KARNATAKA STATE OPEN UNIVERSITY

Mukthagangothri, Mysore – 570 006

M.B.A.

MASTER OF BUSINESS ADMINISTRATION

FOURTH SEMESTER

INTERNATIONAL TRADE LAW

COURSE: MBSC-4.2F **BLOCK: 1 TO 4**

DEPARTMENT OF STUDIES AND RESEARCH IN MANAGEMENT

KARNATAKA STATE OPEN UNIVERSITY

MUKTHAGANGOTHRI, MYSURU- 570 006.

DEPARTMENT OF STUDIES AND RESEARCH IN MANAGEMENT

M.B.A IV SEMESTER

COURSE - 4.2 F

INTERNATIONAL TRADE LAW

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BLOCK-1

UNIT – 1: WORLD TRADE ORGANIZATION AND ECONOMIC THEORIES

Structure

1.0 Objectives

1.1 Introduction

1.2 Definition of International Trade Law

1.3 Free Trade

1.4 The Theories of Economic Trade

1.5 Evolution of GATT

1.6 Made in World

1.7 Summary

1.8 Keywords

1.9 Self Assessment Questions

1.10 References

1.0 OBJECTIVES

1. To define International Trade Law
2. To understand the idea of Free Trade and Theories
3. To appreciate the 'idea of Made in World'
4. To trace the Historical Evolution of GATT, 1947 leading to establishment of WTO

1.1 INTRODUCTION

The World Trade Organization (WTO) and its predecessor, the General Agreement on Tariffs and Trade (GATT), exhibit a number of interesting and attractive features.1 First, the GATT/WTO is widely acknowledged to be one of the most successful international institutions ever created: on this basis alone it is important to understand the reasons for its success. Second, though it is a multilateral institution, the GATT/WTO has adopted a bilateral approach to multilateral bargaining according to which reciprocal negotiations (over tariffs) occur on a voluntary basis through time between pairs of countries or among small numbers of countries, with the results of these bilateral negotiations then multilateralized to the full GATT/WTO membership by a non-discrimination requirement that tariffs abide by the most-favored nation (MFN) principle.

1.2 DEFINITION OF INTERNATIONAL TRADE LAW

Breaking down the phrase into parts, '*inter*' is Latin for between, 'national' is nations, 'trade' is the exchange of goods, services, and technology for profit, and 'law' is the regulation of conduct. International trade law can therefore be defined as the regulation of the conduct of parties involved in the exchange of goods, services and technology between nations.

1.3 FREE TRADE

Free Trade occurs when a government does not attempt to influence, through quotas or duties, what its citizens can buy from another country or what they can produce and sell to another country. The Benefits of Trade allow a country to specialize in the manufacture and export of products that can be produced most efficiently in that country. Countries trade because they are different. They have different technologies or have a different amount of capital and labour, or they trade because they produce different varieties of the same good. In the first case, trade generates gains because it allows countries to specialize in the production of the good they can produce relatively more efficiently or that uses intensively the factor that they are more endowed with.

In the second case, trade generates gains because consumers like variety and trade provides access to different varieties of goods produced all over the world. By increasing the variety of goods consumers can access and buy, trade makes consumers better off. The Pattern of International Trade displays patterns that are easy to understand (Saudi Arabia/oil or China/crawfish). Others are not so easy to understand (Japan and cars).

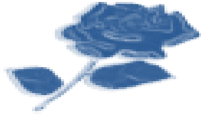
Economic theory has identified several sources of gain from trade:

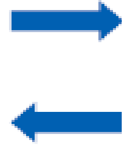
Gain from better utilization of resources	Gains from increased competition	Gains from access to a broader variety of goods & services	Gains from innovation and technology transfer
Gains from specialization and from exploitation of economics of scale (producing on a larger scale)	Foreign competition has an effect on firms pricing decisions. Overall, the opening up to trader reduces mark ups of price over costs (the difference between the cost of production of a good and its selling price)	Consumers benefit from the access to a broader variety of goods and services.They have available not only the varieties of goods produced in their own country, but also those produced abroad.	Trade enhances the incentive to innovate. The larger the size of the market and competition from abroad increase the incentive of a firm to invest in research and development. Trade also favours technology transfer

As we see from the above table, specialisation is the most important source of gains from trade.

Adam Smith in his theory of absolute advantage advocates that, trade allows countries to specialize in the production of the goods that they can produce relatively ‘more’ efficiently and import the goods that they produce relatively ‘less’ efficiently. The exchange of goods in this way benefits both the countries.

Country A **Country B**





As an example let us consider the following trading activities between two countries 'A' and 'B'. Suppose country A is better than country B in producing roses and country B is better than country A in producing computers. This is because country A can produce more roses than country B with the same number of employees per hour, while country B can produce more computers than country A under the same conditions. Then, it will be obvious case that each country will specialize in the product that it can produce most efficiently and then trade their products: country A will export roses and import computers from B, while country B will export computers and import roses from A. Economists believe that even when there is no absolute advantage. A country does not have to be better at producing something than its trading partners to be benefit from trade (absolute advantage). It is sufficient it is relatively more efficient than its trading partners (comparative advantage).

1.4 THE THEORIES OF FREE TRADE

The theory of trade has a central place in economic analysis, and underpins the doctrine of free trade. Free trade doctrines have a long and fascinating history in Europe. In 1846 Britain repealed the Corn Laws, an historic event which marked the start of the era of free international trade, and lasted until the great depression of the 1870s. The Corn Laws were the duties on imports of grain, which had been in force in England since the middle of the fifteenth century.

The reasoning behind the Corn Laws was as follows. Grain, chiefly wheat, is a staple foodstuff, especially important in the diets of labouring people. But its price varies greatly from year to year, depending on the size and quality of harvests. Duties on imports were levied on a sliding scale in order to stabilise the price of wheat. When the domestic price was high because of a poor harvest, duties were lowered to permit imports. When the domestic price was low because of a bumper harvest, import duties were raised.

In the decades leading up to the repeal of the Corn Laws in Britain, the system had fallen into disrepute. In fact the sliding scale of duties was tending to increase rather than reduce fluctuations in the price of wheat. When the domestic price was high, traders tended to withhold supply to raise the price even further. They anticipated that import duties would soon be lowered, which was in fact what tended to happen. Then, when duties fell, traders began to import large quantities of grain. As supply rapidly increased, and prices fell dramatically, import duties were quickly increased. The net effect was to amplify market fluctuations through speculation, making a vulnerable market even more unstable, much to the detriment of consumers.

The Corn Laws had another important effect. They benefited agricultural interests at the expense of the newly emerging manufacturing sectors. High prices of grain, maintained through restricting foreign supply, increased the value of land. Landowners, understandably, came to constitute an important pressure group for the maintenance of the Corn Laws. Against these landed interests were ranged the burgeoning manufacturing classes. In Britain, the opposition to the Corn Laws centred on Manchester, the home of the textile industry. The 'free traders' as they were called, believed that lower grain prices were needed so that the labouring classes in industrial areas would have access to cheap foodstuffs. Led by Cobden, formerly a manufacturer, the free traders argued for the opening-up of British markets to cheap grain imports from overseas. Manufacturers were also anxious that free trade principles should be reciprocated in other countries, so that foreign markets would be opened up to exports of cheap manufactured goods from Britain.

In Britain free trade principles eventually triumphed. In the twentieth century, with the important exception of the period 1918 to 1939, free trade principles also came to dominate the world economy. In this chapter we explore the economic principles which underpinned the doctrine of free trade, a doctrine which is arguably one of the most robust of any in present-day economics. Chapter 2 starts with the mercantilist thinking which pre-dates the free trade era, and passes on to the writings of Adam Smith and David Ricardo, which formed the basis of the case for free trade. These principles were reinterpreted in terms of modern economics by the economist Haberler in the 1930s.

Mercantilism

Mercantilism was the main economic system used during the sixteenth to eighteenth centuries. The main goal was to increase a nation's wealth by imposing government regulation concerning all of the nation's commercial interests. It was believed that national

strength could be maximized by limiting imports via tariffs and maximizing exports. Mercantilism emerged in the period between 1300 and 1500, when Europe was experiencing an acute shortage of gold and silver bullion for use as money in domestic and international transactions. Trade was growing but the money supply could not keep pace. To ensure sufficient bullion to meet the rising needs of commerce, monarchs and their advisers discouraged imports of goods since an excess of imports over exports required the export of gold and silver in payment for imports. By the same token, every effort was made to expand exports of goods, since exports would draw in gold and silver from abroad and thus increase the domestic money supply. Of course, since one country's exports are another's imports, this could never be a recipe for harmonious international relations. All countries could not enjoy the benefits of an export surplus!

The following features characterised the mercantilist system as it operated in Europe in the centuries before the rise of free trade:

● **Extensive *regulation of imports and exports*.** Some imports were prohibited altogether, others were subjected to high rates of import duty. In England the Navigation Acts of 1651 and 1660 aimed to exclude foreign ships from both the import and export trade. Even the export of raw materials (wool, for example) from England was restricted in order to keep input prices low and make the finished product (textiles) more profitable in foreign and domestic markets.

● ***Trade monopolies* flourished.** Governments permitted one merchant (or a group of merchants acting together) to operate in domestic and foreign markets. This meant that merchants could sell goods abroad at high prices because there was no price competition among sellers. Merchant capitalists with monopoly power dominated economic activity in England, France, Spain, Belgium and Holland.

● ***Smuggling* flourished.** Large profits could be made by traders who were willing to import or export prohibited goods. Smuggling of bullion was especially profitable. Most of the gold from South America flowed into Spain. In Spain there were severe penalties, including death, for merchants who smuggled bullion out of the country. Nevertheless, large quantities of Spanish bullion found its way into all parts of Europe.

● **There were significant incentives for European governments to establish *colonial empires.*** England France, Holland, Belgium and Spain established colonies. Colonies enabled the metropolitan country to control trade with weaker countries. The colony was required to

provide cheap raw materials for manufacturers in the metropolitan countries. Colonies also provided protected markets for a home country's manufactured exports.

Even when bullion supplies to Europe increased in the mid-sixteenth century, mercantilist restrictions on international commerce remained. This was because it was widely believed that tariffs were a good way to increase domestic output and employment, and to boost the power of the monarch. Tariffs were a source of revenue for the monarch out of which the army and navy and huge state bureaucracies could be paid. Import restrictions, it was believed, stimulated domestic manufacturing by keeping out foreign competition. To this end there were in place wide-ranging domestic regulations covering manufacturing and commerce. These included patents and monopoly rights, statutes governing apprenticeships, maximum wage rates, and tax exemptions and subsidies.

From the seventeenth century onwards, however, it became increasingly apparent that regulations imposed on domestic output and employment, together with restrictions on international trade, were hindering the growth of enterprise. Writers such as Dudley North (1641– 91) argued that economies would flourish only if restrictive laws which bestowed special privileges were removed. By the beginning of the eighteenth century there was a growing recognition, even in mercantilist writings, that emerging capitalists needed greater freedom to pursue profitable investment opportunities. This was the background against which Adam Smith published the path-breaking book *Wealth of Nations* in 1776, which is universally regarded as the foundation of modern market economics, and is the starting point for the theory of trade.

Absolute advantage and Adam Smith

Adam Smith in his work Wealth of Nations propounded theory of absolute advantage. Smith claimed that a country should specialise in, and export, commodities in which it had an absolute advantage. An absolute advantage existed when the country could produce a commodity with less labour per unit produced than could its trading partner. By the same reasoning, it should import commodities in which it had an absolute disadvantage. An absolute disadvantage existed when the country could produce a commodity only with more labour per unit produced than could its trading partner.

Adam smith criticized the idea of mercantilism and put forward three strong ideas for trade. They are

● ***A nation's wealth depends on its productive capacity.*** Gold and silver do not of themselves constitute a nation's wealth. Gold and silver can be 'wasted' on luxury spending.

But if gold and silver are used to purchase materials and tools, or to employ labour, then productive capacity and future wealth is assured.

● ***Laissez-faire is the best way to increase productive capacity.*** Governments should remove restrictions and privileges to permit the expansion of industry and trade. Once freed from the burden of the state, social harmony and economic progress will triumph.

● ***International trade is mutually beneficial for all trading countries.*** Every country benefits from being able to export those commodities which it produces efficiently, and being able to import those commodities which it produces inefficiently. There are no 'losers' from free trade. All are 'gainers'.

Adam Smith regarded labour s the sole source of value. The quantity of labour embodied in a commodity measured the value of that commodity. The exchange value of each commodity is determined by the amount of labour time (output per unit of labour) necessary for its production.

Smith also recognised that workers differed in aptitudes and abilities. The lazy and unskilled worker would be less productive than the industrious and skilled worker. It is labour, as opposed to the labourer, which is the measuring rod in the labour theory of value. Labour, Smith claimed, was alone 'the ultimate and real standard by which the value of all commodities can at all times and places be estimated and compared' (*Wealth of Nations*, book I).

David Ricardo and Comparative Advantage

According to Adam Smith if country has an absolute advantage over its trading partner in all commodities, then there is no opportunity to trade. But David Ricardo differs from the absolute advantage theory. Ricardo was the first of the classical economists to recognise that it is relative rather than absolute values which are fundamental to the operation of a market economy. This insight was critical to the further development of the theory of trade. The theory of comparative advantage states that when two countries specialize in producing the good in which they have a comparative advantage, both economies gain from trade, even if one country is more efficient in producing both goods. Each country will export the good for which it has a comparative advantage. The Ricardian model shows how there is scope for mutual gains when each country specializes in production towards products for which it has low opportunities costs relative to other products it is based on differences in technologies among countries. In the Ricardian model there is only one factor of production:

labour. Therefore, comparative advantages only arise because of differences in labour productivity, which result from differences in technology.

Factor endowments – Heckscher and Ohlin Model

In reality trade is not just determined by technological differences, but it also reflects differences in factor endowments across countries. Why are there differences in comparative advantage? Why do domestic opportunity costs differ from international opportunity costs? According to Heckscher and Ohlin it was because of differences in relative factor endowments between nations. Countries like the United States and Canada were relatively abundant in fertile land. Other countries, such as the UK, were relatively abundant in labour. The UK could produce cotton textiles relatively cheaply because large amounts of cheap labour were used in the production process. Wheat was cheap in the US relative to cloth because fertile land was abundant in the US relative to labour. Cotton goods were cheap in the UK relative to wheat because labour was relatively abundant in the UK.

● Countries have a *comparative advantage* in commodities which use more of their *relatively abundant factor of production*. A labour-abundant country will export labour intensive goods. A capital-abundant country will export capital-intensive goods.

● Countries have a *comparative disadvantage* in commodities which use more of their *relatively scarce factor of production*. A labour-scarce country will import labour-intensive goods. A capital-scarce country will import capital-intensive goods.

The Heckscher–Ohlin theory tells us that questions about a country's *pattern of trade* – which goods and services it exports and which goods and services it imports – can be answered in terms of factor endowments. It will become clear later in this chapter that the appeal of the Heckscher–Ohlin explanation of comparative advantage does not lie in its power to explain real world trade patterns. As an explanatory model its present-day relevance is very limited. If it ever applied anywhere, it was probably only in the period 1850–75 when reductions in transport costs opened up vast areas of cheap, fertile land, and made available exports of land intensive agricultural products from North and South America and Australia.

If the Heckscher–Ohlin model has serious limitations in an *empirical* sense, why is it still important in international economics? The answer is that it is a trade model which has important *theoretical* qualities. Many of these qualities it shares with the Ricardian approach to comparative cost. But there are key differences. An important difference is that the Heckscher–Ohlin model abandons the classical labour theory of value, and enables several factors of production to be incorporated into the analysis.

1.5 EVOLUTION OF GATT

Following the end of the Second World War, international leaders were anxious to build safeguards and institutions into the international system that would protect the world from the recurrence of such disastrous events. The US took the lead in advancing the view that free trade provided an important mechanism for achieving world peace. US Secretary of State, Cordell Hull, was an eminent and influential exponent of this view: "I have never faltered, and I will never falter, in my belief that enduring peace and the welfare of nations are indissolubly connected with friendliness, fairness, equality and the maximum practicable degree of freedom in international trade."

The Allies, particularly the US and Britain, began discussions about the reconstruction of the world economic order even before the war effort was over. In 1944, at the Bretton Woods conference, the US and Britain signed an agreement that provided the blueprint for the post-war economy. Three pillars were envisaged for the purpose of maintaining international economic cooperation: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (or the World Bank), and the International Trade Organization (ITO). Following the bilateral trade negotiations between the US and Britain, successive multilateral conferences were held between 1946 and 1948. The outcome of this process was the Havana Charter, the draft agreement for the creation of the ITO, which was signed by 53 of the 56 countries participating in the conference.

Despite this promising multilateral commitment, the ITO never came into existence. The agreement required ratification in the US Congress before it could be implemented, and no other country was willing to commit to the rules of an ITO without the US aboard. But US ratification proved to be problematic, despite its leading role in the genesis and evolution of the idea of the ITO. By 1948, the context that had initially led to the idea of the ITO had changed substantially. Domestically in the US, it began to appear extremely unlikely that the Republican Congress of 1948 would ratify the Charter despite the support that the Havana process had enjoyed from the Democratic presidency. International imperatives further demanded that the attention of the Congress be devoted to more immediate and pressing matters. Finally, in 1950, President Truman announced that he would not be submitting the Charter to the Congress for ratification. Given the preponderance of the US in the post-war economy, other countries decided that an ITO without the participation of the US would be meaningless.

Richard Gardner's words about the 'ignominious fate' of the ITO resonate here: 'It did not have a chance to die: it was simply stillborn.' This outcome cannot be understood without a brief examination of the content of the Havana Charter. Within the expanse of its mandate and the details of its organization lay the seeds of its failure. The ITO envisaged by the Havana Charter had a far-reaching mandate, and an elaborate organization to implement it. This expansive mandate was very much a product of the post-war context. The liberalizing ITO was charged with the tasks of solving many of the problems that we see today as belonging inside the borders of states, but which were especially serious concerns in the post-war years. Hence, besides covering the obvious area of commercial policy, the 106 articles of the ITO extended to areas of employment, economic development, restrictive business practices, and commodity agreements. It gave recognition to the importance of ensuring fair labour standards, and also incorporated provisions that allowed governments to address their development and humanitarian concerns.

WTO is different from GATT ?

Sl No	GATT	WTO
1	Legally No more than a multilateral treaty among contracting parties	International Organization with membership
2	Provision for 'granfather Clause', which exempted contracting parties from applying some important GATT articles if they were inconsistent with existing domestic legislation	Abolished 'grandfather clause'
3	Contracting parties were allowed to pick and choose among the agreements.	All agreements are held by Single undertaking
4	Rules on NBT's had been only through the mechanism of the plurilateral codes	Single Undertaking removed voluntary codes
5	Dispute settlement mechanism was weak	Strong Dispute Settlement mechanism

1.6 MADE IN WORLD

Made in World (MiWi)

The World Trade Organization is moving closer to eliminating country-of-origin labels and replacing them with "Made in the World" initiative labels because they say we need to "reduce public opposition to free trade" and "re-engineer global governance." Products instead of having the label of one particular country, will label their products as : Made in world'.

The "Made in the World" initiative has been launched by the WTO to support the exchange of projects, experiences and practical approaches in measuring and analysing trade in value added. WTO while initiating the idea of made in world observes that – "Today, companies divide their operations across the world, from the design of the product and manufacturing of components to assembly and marketing, creating international production chains. More and more products are "Made in the World" rather than "Made in the UK" or "Made in France". The statistical bias created by attributing the full commercial value to the last country of origin can pervert the political debate on the origin of the imbalances and lead to misguided, and hence counter-productive, decisions.

The challenge is to find the right statistical bridges between the different statistical frameworks and national accounting systems to ensure that international interactions resulting from globalization are properly reflected and to facilitate cross border dialogue between national decision makers." WiMi has advanced four reasons to add value to the products produced as Made in the world. They are

Offshore and FDI go UP! - Offshore-Outsourcing and Foreign Direct Investment (FDI) led to an increase in Trade in **"Intermediate Goods"** i.e. parts, components and accessories) which encouraged the specialization of different economies. As a result, economies have been **"Trading Tasks**" (as opposed to **"Final Goods"**) which "add value" along the production line.

Tariffs go DOWN - Asian economies, in particular, have relatively low applied tariffs on imports (especially **on semi-processed goods**).

WEAKNESSES in Current Methods Cross-border trade in Intermediate Goods is R**ECORDED MULTIPLE TIMES**, distorting Bilateral Trade Balances. **WHICH**

COUNTRY DOES WHAT, AND **HOW MUCH**? Are CURRENT **RULES OF origin** reflecting business practices? What does this mean for an economy and its **ABILITY TO CREATE JOBS** and **ADAPT ITS TRADE POLICIES**?

ORIGIN reflecting business practices? What does this mean for an economy and its **ABILITY TO CREATE JOBS** and **ADAPT ITS TRADE POLICIES**?

The Way FORWARD MAKING FURTHER PROGRESS REQUIRES: **ANALYZING TRADE IN VALUE ADDED TERMS.** "INPUT—OUTPUT" ANALYSIS IS CURRENTLY BEING USED TO ACHIEVE THIS.

1.7 SUMMARY

International Trade Law regulates the conduct of parties involved in cross-border transactions in goods, services or technology. Free Trade occurs when a government does not attempt to influence, through quotas or duties, what its citizens can buy from another country or what they can produce and sell to another country. Various theories support the idea of free trade among nations. Notable among these theories is Adam Smith theory. Evolution of GATT provided the platform for international trade which finally resulted in the formation of WTO in 1995.

1.8 KEYWORDS

1. Adam Smith
2. Free Trade
3. GATT
4. Theories of Free Trade
5. WTO

1.9 SELF ASSESSMENT QUESTIONS

1. Define International Trade Law? Explain the theories of Free Trade

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2. Explain the evolution of GATT

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3. Examine the differences between GATT and WTO

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4. Write a note on 'Made in World'.

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1.10 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT -2: WORLD TRADE ORGANIZATION AS AN INTERNATIONAL INSTITUTION

Structure:

2.0 Objectives

2.1 Introduction

2.2 Objectives of WTO and Members

2.3 The WTO is a system of international trade rules: WTO Agreements

2.4 WTO Basic Principles

2.5 Dispute Settlement under WTO

2.6 WTO and Developing Countries

2.7 History of WTO

2.8 Main Features of WTO

2.9 The Institutional Structure of WTO

2.10 Summary

2.11 Keywords

2.12 Self Assessment Questions

2.13 References

2.0 OBJECTIVES

1. To understand the role of WTO in International Trade
2. To trace the historical evolution of WTO
3. To explain the structure and functions of WTO
4. To discuss the core principles of WTO

2.1 INTRODUCTION

The WTO is an inter-governmental organization for progressively liberalizing trade. Trade liberalization is the main approach that WTO Member governments have adopted to promote economic growth and development. The WTO has almost a global Membership. More than 150 governments are Members of the WTO. There are a number of ways of looking at the WTO. It is an organization for governments to **negotiate global trade agreements**. The WTO operates a **system of trade rules** that apply to all its members. The WTO is also a place for Member governments to **settle their trade disputes**.

2.2 OBJECTIVES OF WTO & MEMBERS

In the preamble to the WTO Agreement, the parties to the Agreement recognize the objectives they wish to attain through the multilateral trading system:

- raise living standards;
- ensure full employment;
- ensure a large and steadily growing volume of real income and effective demand; and
- expand the production of and trade in, goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development.

The Agreement also recognizes the need for "positive efforts to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with their economic development".

WTO Members

WTO Member governments are generally grouped as “developed Members” or “developing Members”, according to their level of development. More than two thirds of the WTO Members are developing countries. There is no agreed definition of what is a “developed” or a “developing” Member in the WTO. It is up to each Member to decide if it is to be considered “developing Member” (this is known as the principle of self-selection). This being said, other Members can challenge the decision of a Member to be considered as a

developing Member.

The distinction between “developed” and “developing” Members is important insofar as developing Members enjoy special rights in the WTO. Some developing countries are considered least developed countries (LDCs). The United Nations Economic and Social Council (ECOSOC) maintains a list of the countries that are considered LDCs. Least-developed country Members (LDCs) enjoy additional rights in the WTO. The WTO provides to its Member governments a forum for negotiating global trade rules. When countries have faced trade barriers and wanted them lowered, the negotiations have helped them to open markets for trade.

Negotiations in the WTO are conducted directly and exclusively by the Member governments. The WTO was born out of negotiations and everything it does is the result of negotiations among its Members. The purpose is to reduce trade barriers for the benefit of producers, exporters, importers and consumers, while allowing governments to meet legitimate policy objectives. The bulk of the WTO's current work comes from the 1986-94 negotiations called the Uruguay Round and earlier negotiations under the General Agreement on Tariffs and Trade (GATT).

2.3 THE WTO IS A SYSTEM OF INTERNATIONAL TRADE RULES: THE WTO AGREEMENTS

International trade rules, concluded as a result of WTO negotiations, are contained in the WTO Agreements. They are essentially contracts binding Member governments to keep their trade policies within agreed limits. The WTO Agreements contain the global rules for trade in goods, services and trade-related aspects of intellectual property rights. The WTO Agreements recognise that, in certain circumstances, Members may need to apply trade restrictions to meet certain policy objectives, such as the protection of human health or the environment. In those cases, Members are allowed to depart from the basic principles, but subject to specific conditions. The WTO facilitates the administration of the WTO Agreements. To this end, WTO Member governments meet regularly in the various WTO councils and committees to monitor the implementation of the Agreements.

Monitoring is one of the most intense areas of work in the WTO. WTO councils and committees consider information provided by the Members regarding their trade regulations and measures. They also serve as a forum for discussions on various WTO-related issues. WTO Members also review periodically each Member's trade policies and practices under the Trade Policy Review Mechanism (TPRM). These reviews allow the evaluation of individual

Members' trade policies and practices and their impact on the multilateral trading system (MTS).

2.4 WTO BASIC PRINCIPLES

Non-discrimination: Members shall not discriminate between their trading partners (most-favoured nation principle); or between national and foreign like products, services or nationals (national treatment principle).

More open trade: reducing or eliminating obstacles to trade.

Transparency and predictability: traders and Members need to know what are the trade rules around the world (transparency) and that trade measures will not be raised arbitrarily (predictability).

Special treatment for less developed Members: least developed Members face particular challenges when benefiting from trade liberalization therefore, they have more time to adjust to the rules, greater flexibility and other special rights.

2.5 DISPUTE SETTLEMENT UNDER WTO

The WTO is also a place for Member governments to settle their trade disputes. The WTO's procedure for settling disputes is vital for enforcing the rules. A dispute commonly arises when a Member adopts a trade measure that one or more Members consider to be contrary to the obligations under the WTO Agreements. When Members are unable to agree on a solution, they can request a panel of independent experts to rule on the dispute. The procedure for settling disputes is based on the rules contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

2.6 WTO AND DEVELOPING COUNTRIES

Technical assistance and capacity building are core elements of WTO's work. More than two thirds of WTO Members are developing countries. The WTO helps these Members to fully benefit of the multilateral trading system (MTS) in various ways. The WTO Agreements contain special provisions for developing countries, including longer periods to implement their obligations and measures to increase their trading opportunities. The WTO also organizes hundreds of technical assistance activities to help developing Members to better understand and implement WTO rules, as well as to participate more effectively in its work. Capacity building also involves providing assistance to build the supply-side capacity and infrastructure needed in these countries to expand their trade.

WTO and other international institutions

The WTO cooperates with other international institutions to achieve greater coherence in global economic policymaking. The WTO is only one part of a broader set of international organizations. Coherence is essential for Members to design a harmonious international regulatory framework and in increasing the effectiveness of their policies at the national level. The WTO cooperates with the International Monetary Fund and the World Bank to achieve more coherent and complementary international economic policies. The WTO also maintains institutional relations with other organizations in diverse trade-related matters. Although the extent of such cooperation varies, coordination between the work of the WTO and that of other international organizations continues to evolve so as to assist Members in the operation of their economic policies.

2.7 HISTORY OF WTO

Governments pursue international trade cooperation driven by diverse political economy considerations, including both external and internal, such as the promotion of peace and stability, avoiding protectionism, increasing market size and insurance against unfavourable trade policies in other countries. The period between the World Wars was characterized by instability with respect to trade policy, deteriorating economic conditions and flagging cooperation, which created the conditions for war. Trade policy remained in disorderly limbo until the post-War birth of the modern multilateral trading system (MTS). A lesson from the first half of the 20th century is surely that effective and sustainable international trade cooperation requires a predictable and rule-based institutional framework. This section constitutes a brief historical journey from the birth of the GATT to the establishment of the WTO.

From GATT to WTO: the building of an institution

The history of the WTO begins with the signing of the General Agreement on Tariffs and Trade (GATT) in 1947. From 1948 to 1994, before the WTO was created, the GATT provided the rules for the bulk of world trade and presided over periods that saw some of the highest growth rates in international trade. The initial objective was to create an International Trade Organization (ITO) to handle the trade side of international economic cooperation, joining the two "Bretton Woods" institutions, the World Bank and the International Monetary Fund. The efforts to establish the ITO failed and the GATT served for several years as an organization, taking some of the functions originally intended for the ITO.

The GATT developed rules for the MTS through eight rounds of trade negotiations. In

the early years, the GATT trade rounds focused on reducing tariffs. Following GATT trade rounds covered not only tariffs, but also other trade barriers. During the GATT rounds, substantial liberalization for international trade in goods was achieved and fundamental rules were established on the basis of an open and non-discriminatory trading system. The arrival of new Members, in particular developing countries, during the last years of the GATT, shows that the MTS was recognized as an instrument for economic and trade reform. The eighth round, known as the Uruguay Round, was the most comprehensive round and led to the creation of the WTO and a new set of agreements (the current WTO Agreements).

THE URUGUAY ROUND AND THE CREATION OF THE WTO

The WTO's creation on 1 January 1995, as a result of the Uruguay Round, marked the biggest reform of international trade since after the World War II. The GATT seemed well established, but it was a provisional agreement and organization. Instead, the WTO constitutes an international organization with a more comprehensive mandate and a solid institutional base. The WTO has also expanded both in terms of Membership and substantive coverage.

The WTO Agreements cover not only trade in goods, but also trade in services and trade-related aspects of intellectual property rights. The original GATT still exists as the WTO's general agreement on trade in goods. The common goal of multilateral trade liberalization in the context of a rules-based system resulted in the continuous accession of new countries to the organization, adding to the heterogeneity of the Membership. The ability of the GATT/WTO system to accommodate the different needs of its Members has been an important factor in its success (*).

2.8 MAIN FEATURES OF THE WTO

This section highlights some of the main features of the WTO's trading system. It also explains some of the reasons why governments join the WTO.

The WTO provides to its Member governments, amongst others:

- Predictable and transparent rules for the trade of goods and services
- Enhanced market access opportunities and equal treatment
- It helps to promote peace, by avoiding trade wars and retaliation
- An opportunity to participate in the shaping of global trade rules
- To deal with pressures for protectionism

Predictable and transparent rules for the trade of goods and services

Member governments and more particularly, private economic operators, need to have a

stable and transparent framework of rules for their commercial activities. The WTO provides a predictable system of multilateral trade rules, which are contained in the WTO Agreements. This system is based on a number of basic and fundamental principles that apply to all Members: non-discrimination, more open trade, transparency and predictability, and special treatment for developing countries.

At the same time, the WTO Agreements give policy space to the Members in order to protect legitimate policy objectives, such as the protection of consumers or to prevent the spread of diseases. In those cases, Members are allowed to depart from the basic principles, but subject to certain conditions. The aim is to strike a balance between trade liberalization and the flexibility Members need to pursue their policy objectives.

Enhanced market access opportunities and equal treatment

When a Member lowers a trade barrier or opens up a market at the multilateral level, at the same time, it accesses more freely the markets of other Members. The reduction of trade barriers allows Members to gain from increased market access opportunities in other Members' markets and therefore, to improve welfare by expanding export volumes and revenues.

Furthermore, the most-favoured nation (MFN) principle ensures that every time a WTO Member lowers a trade barrier or opens up a market, it has to do so for the similar goods or services from all Members. That means that all WTO Members - regardless their economic size or level of development - benefit from the best possible treatment given by each WTO Member.

Dealing with domestic pressures for protectionism

As explained in the previous section, trade liberalization generates income distribution effects, so there will be groups who will gain and groups who will lose. The import competing sector is likely to lose from opening up to trade, while the export sector is likely to gain. The outcome of a trade negotiation has to be a balance of interests. Governments can counterbalance the lobbying pressure of the import-competing sector against liberalization by arguing that the overall package goes in the interests of the country as a whole. Furthermore, by "tying the hands" of a government, an international trade agreement may help to make credible policy commitments affecting the private sector that it would not be able to maintain without the agreement.

Avoid trade wars and retaliation

The WTO promotes peace by providing a stable and predictable system of rules and

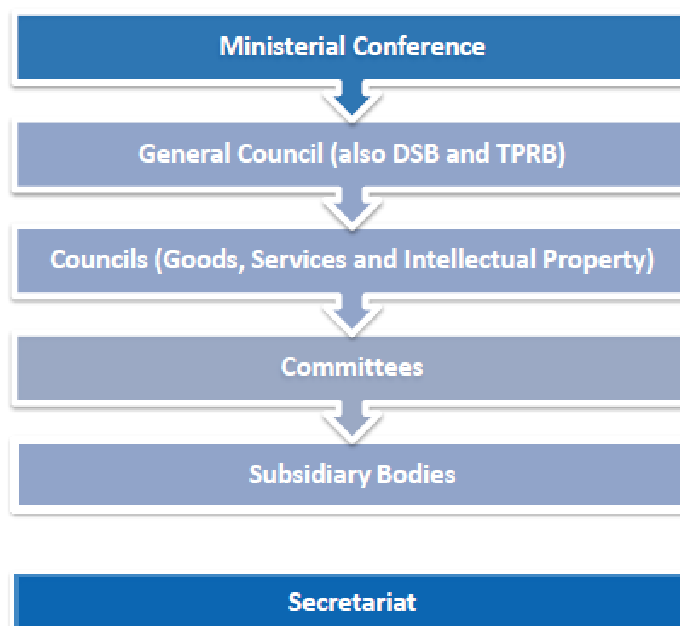
an efficient mechanism for dealing with trade disputes among its Members. If trade flows smoothly and countries enjoy a healthy commercial relationship, conflicts are less likely. Moreover, smoothly flowing trade stimulates economic growth, which in turn reduces the possibility of conflicts.

The trade wars in the 1930s are proof of how protectionism can easily plunge countries into a situation where no one wins and everyone loses. By coordinating multilateral trade rules with other countries, Members are able to avoid tit-for-tat trade restrictions or trade retaliation. The WTO dispute settlement system plays a key role in avoiding trade conflicts and unilateral retaliation. It provides a system where trade conflicts among Members are solved on the basis of rules rather than wars.

Participate in the shaping of global trade rules

The WTO Agreements are the result of negotiations among all Members and therefore, Membership means a balance of rights and obligations. Without a multilateral trading system such as the WTO, smaller countries would have to deal with each of the major economic powers individually. The more powerful countries would be free to impose their trade policies on their small trading partners. Furthermore, multilateral trade negotiations provide Members with an opportunity to increase their bargaining power by forming alliances or coalitions with other countries that have common interests and, in that way, participate more effectively in the shaping of global trade rules.

2.9 THE INSTITUTIONAL STRUCTURE OF THE WTO



Ministerial Conference - Top most decision making body

The Ministerial Conference is integrated by representatives of all WTO Members, and shall meet at least once every two years. It can take decisions on all matters under any of the multilateral trade agreements, in accordance with the decision-making procedures contained in the WTO Agreement Establishing the WTO. As of December 2011, eight Ministerial Conferences have been held under the auspices of the WTO. The following chart contains basic information on each Ministerial Conference.

General Council - Second tier in WTO structure

The General Council is also formed by representatives of all WTO Members, usually Ambassadors or Permanent Representatives, based in Geneva. It acts on behalf of the Ministerial Conference on all WTO affairs, when the Conference is not in sessions. The General Council meets regularly to carry out all the functions of the WTO. It has a Chairperson (a Member's representative, normally an Ambassador), who is elected by all the Members, every year, to organise the work of the General Council. The General Council also meets as the **Dispute Settlement Body** (DSB) and as the **Trade Policy Review Body** (TPRB).

AS THE DISPUTE SETTLEMENT BODY (DSB)

As introduced above, the WTO acts as a forum for settling trade disputes among its Members in accordance to the procedures elaborated in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The settlement of disputes in the WTO is administered by the Dispute Settlement Body (DSB). The DSB, among others, establishes panels of independent experts to resolve the disputes, adopts the rulings of the panels, and oversees the implementation of those rulings.

AS THE TRADE POLICY REVIEW BODY (TPRB)

WTO Members meet regularly to review each Member's national trade policies under the Trade Policy Review Mechanism (TPRM). The TPRM is administered by the Trade Policy Review Body (TPRB). The surveillance of national trade policies through the TPRB provides a means of encouraging transparency both domestically and at the multilateral level.

Councils for Goods, Services and Intellectual Property

The three Councils operate under the guidance of the General Council and are also open to all WTO Members.

- Council for Trade in Goods: it oversees all the issues related to the WTO Agreements on trade in goods. It supervises the work of Committees responsible for specific subjects (e.g.

agriculture, market access, customs valuations, rules of origin, sanitary and phytosanitary measures, etc).

 Council for Trade in Services: it oversees all issues related to the General Agreement on Trade in Services (GATS). It has also subsidiary bodies.

 Council for Trade - Related Aspects of Intellectual Property Rights (TRIPS): oversees all issues related to the TRIPS Agreement.

Subsidiary Bodies

Several other subsidiary bodies, which focus on horizontal issues, report to the General Council directly. They cover issues such as trade and environment, trade and development, regional trading arrangements and accessions of new Members. They are open to all WTO Members. The bodies that are of a permanent nature are normally called "Committees" or "Working Groups", while those established on a temporary basis are called "Working Parties".

WTO Secretariat

The Secretariat is headed by a Director-General, appointed by the Ministerial Conference. Since decisions are taken by Members only, the Secretariat has no decision-making powers.

The Secretariat is located in Geneva and has around 700 staff who are nationals from WTO Members and cannot seek or accept instructions from any government or any other authority external to the WTO in the discharge of their duties. Its main duties include supplying technical support for the various councils and committees, providing technical assistance for developing countries, and proving information to the public. The Secretariat also provides legal assistance in the dispute settlement process and advises governments wishing to become Members of the WTO.

The WTO continues GATT's tradition of making decisions not by voting but by consensus (*). Where consensus is not possible, the WTO agreement allows for voting - a vote being won with a majority of the votes cast, unless otherwise provided in the WTO Agreement. At meetings of the Ministerial Conference and the General Council, each WTO Member shall have one vote. Decisions in the WTO are taken through its councils and committees, whose Membership consist of all WTO Members. As explained above, the top-most decision making body is the Ministerial Conference.

2.10 SUMMARY

The WTO is a system of international trade rules. The core principles of WTO include

non-discrimination, open and free trade and transparency. WTO evolved out of GATT system which was prevalent since 1948. WTO provides effective dispute settlement mechanisms among nations. WTO has assumed the status of an international institutions and operates through the agreements negotiated between member countries.

2.11 KEYWORDS

1. GATT
2. Non-discrimination
3. Transparency
4. WTO

2.12 SELF ASSESSMENT QUESTIONS

1. Explain the historical evolution of WTO

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2. Discuss the main features of WTO agreement

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3. Explain the basic principles of WTO

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4. Write a note on Ministerial Conference

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5. Discuss the institutional structure of WTO

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2.13 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn

6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT -3: GATT AND TRADE IN GOODS

Structure:

3.0 Objectives

3.1 Introduction

3.2 The MFN Principle with regard to Trade in Goods

3.3 Exceptions to MFN Principle

3.4 The National Treatment Principle with regard to Trade in Goods

3.5 Exceptions to National Treatment Principle

3.6 Difference between the National Treatment Principle and MFN Principle

3.7 Summary

3.8 Keywords

3.9 Self Assessment Questions

3.10 References

3.0 OBJECTIVES

1. To understand the provisions of GATT in relation to trade in goods
2. To explain the basic principles of GATT- MFN & NT
3. To study the exceptions to MFN and National Treatment Principles

3.1 INTRODUCTION

GATT embodies non-discrimination principles such as MFN and national treatment in the context of international trade in goods. Multilateral rules and principles were agreed back in 1947 to govern trade in goods between GATT Contracting Parties. After the conclusion of the Uruguay Round and the entry into force of the Marrakesh Agreement Establishing the WTO (1 January 1995), the basic principle of non-discrimination formulated in the GATT 1947 remained fundamentally unchanged. Since 1995, this principle has been embodied in the updated GATT (called "GATT 1994"), which is now the WTO Agreement governing trade in goods

This unit explains the non-discrimination principle in the context of trade in goods , incorporated in Article I (MFN) and in Article III (national treatment) of the GATT 1994.

3.2 THE MFN PRINCIPLE WITH REGARD TO TRADE IN GOODS

Members of the WTO can be seen as Members of a club. One of the fundamental rules of the club is that each Member will grant all other Members the best possible treatment it grants to any trading partner, whether or not a Member of the club. Hence, each Member is guaranteed to receive the best possible treatment from each of its fellow-Members (subject to some important exceptions). The MFN obligation is therefore a cornerstone of the GATT 1994 and one of the pillars of the WTO trading system (EC - Tariff Preferences, Appellate Body Report).

Example: The MFN Principle Assume that in Rauritania – a WTO Member - the MFN tariff applicable to tomatoes from all WTO Members is 10%. Medatia – another WTO Member - is a big tomato producer interested in increasing its exports of tomatoes to Rauritania. Imagine that, during a WTO negotiating round, Medatia initiates tariff negotiations on tomatoes with Rauritania. After long and difficult bilateral meetings, Rauritania agrees to give Medatia a duty free access (0% tariff) for tomatoes. However, according to the MFN principle, Rauritania should extend the 0% tariff on tomatoes to all WTO Members. This is because all WTO Members should enjoy the most favourable treatment for tomatoes granted by Rauritania. Therefore, for trade in goods, the MFN principle requires each Member to extend to all other WTO Members treatment no less

favourable than the treatment it accords to imports from any other country - Member or not of the WTO.

ARTICLE I:1 OF THE GATT 1994 (MFN PRINCIPLE)

Article I:1 of the GATT 1994 contains the specific rules on MFN treatment for goods:

Article I:1 of the GATT 1994: General MFN Treatment -

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.

Besides Article I:1, the MFN principle is also reflected in other GATT 1994 provisions, such as Article IX:1 (marks of origin) and Article XIII (non-discriminatory administration of quantitative restrictions (QRs)).

RATIONALE BEHIND THE MFN PRINCIPLE

The MFN principle works to:

- Maximize efficiency.
- Minimize transaction costs (related rules for the issuance of certificates of origin, direct
- shipment requirements and other relevant administrative producers can impose significant costs on both enterprises and governments, but, in accordance with MFN countries apply the same rules to imports from all countries).
- Promote further reciprocal liberalization (this benefits particularly small developing countries, which benefit from the most favoured treatment provided to other Members).
- Minimize costs of trade negotiations (negotiating one multilateral agreement instead of several bilateral agreements).

THE MFN PRINCIPLE: THREE-TIER TEST

The analysis of inconsistency of a measure with the MFN principle is a three-tier test.

- One needs to check these three elements to find an inconsistency:
- Any advantage, favour, privilege or immunity covered by Article I:1 of the GATT 1994;
- Like products; and,

- The advantage at issue is not granted immediately and unconditionally to the like products concerned.

Any Advantage, Favour, Privilege or Immunity covered by Article I:1

Article I:1 covers a broad range of measures in relation to exportation and importation as well as internal measures. Such measures include the following:

- Customs duties;
- any kind of charges imposed on importation or exportation;
- any kind of charges imposed in connection with importation or exportation;
- any charges imposed on the international transfer of payments for imports and exports;
- the method of levying such duties and charges;
- all rules and formalities in connection with importation and exportation;
- internal taxes or other internal charges (covered in Article III.2);
- all laws, regulations and requirements affecting internal sale, offering fore sale, purchase,
- transportation, distribution or use of any product (covered in Article III.4).

Both Panels and the Appellate Body have interpreted Article I:1 as covering a wide range of measures . In Canada – Autos , the Appellate Body stated that the wording of Article I:1 refers not to some advantages granted with respect to the subjects that fall within the scope of Article I:1, but to " any advantage "; not to some products, but to " any product '; and not to like products from some other Members, but to like products originating in or destined for " all other" Members.

Like Products

As explained by the Appellate Body in EC – Bananas III, the essence of the MFN obligation is that "like products" should be treated equally, irrespective of their origin (EC – Bananas III, Appellate Body Report, para. 190). This means that products which are not "like products" may be treated differently. The term "like products" is not defined in the GATT 1994, although it is used in other provisions both in the GATT 1994 and in other WTO Agreements. For example, the concept of "like products" appears in Articles II, III, VI, IX, XI, XIII, XVI and XIX of the GATT 1994. As it will be explained further on, the concept of "like products" may have different meanings depending on its context in the various provisions of the WTO Agreements.

GATT/WTO case law has set up four criteria that should be considered in determining whether the imported and domestic products are "like products". All these criteria (except for "the customs classification of the product" - see box below) were taken

from the Report of the Working Party on Border Tax Adjustments adopted by the GATT Contracting Parties in 1970. As we will see, such criteria have been developed mainly by WTO adjudicating bodies in the context of Article III (National Treatment). In EC - Asbestos , the Appellate Body emphasized that these four criteria do not constitute a "closed list" and that they are simply tools to assist in the task of sorting and examining the relevant evidence (EC - Asbestos , Appellate Body Report).

EXCEPTIONS TO THE PROVISIONS CONTAINED IN THE WTO AGREEMENTS –INCLUDING THE MFN PRINCIPLE

There are a number of provisions that allow WTO Members to derogate from most or some provisions contained in the WTO Agreements, including the MFN principle. They include:

- General exceptions (Article XX of the GATT 1994);
- Security exceptions (Article XXI of the GATT 1994);
- Balance of payment exceptions and temporary application of quantitative restrictions in
- discriminatory manner (Articles XII , XVIII.B, and XIV of the GATT 1994);
- Waivers (Article IX:3 of the Agreement Establishing the WTO); and,
- A number of provisions on special and differential treatment , which can be found throughout the WTO Agreements.

3.3 EXCEPTIONS TO THE MFN PRINCIPLE

The specific exceptions to the MFN principle are listed below. The most important exceptions are the first two related to Regional Integration and the " Enabling Clause".

Regional Integration (Article XXIV of the GATT 1994)

Article XXIV of the GATT 1994 allows a WTO Member to grant more favourable treatment to its trading partners within a customs union or a free trade area without extending such treatment to all WTO Members, subject to certain conditions.

Enabling Clause

The Enabling Clause also allows WTO Members to depart from the MFN principle. This Clause "enables" developed country Members to derogate from the MFN principle in order to grant preferential tariff treatment to imports from developing country Members under certain conditions. The Enabling Clause also "enables" developing country Members to depart from the MFN principle to negotiate regional agreements among them.

Historical Preferences (Article I:2–I:4of the GATT 1994)

Very few "historical preferences" exist today. The few preferences which derogate from the MFN principle and which can be maintained are remnants of the particular

situations which existed back in the GATT 1947. For this reason they are called "historical" preferences. It should be emphasized that these preferences were significant when the GATT 1947 was negotiated, but their importance has faded over the years.

Frontier Traffic (Article XXIV:3 of the GATT 1994)

Advantages accorded by Members to "adjacent countries" in order to facilitate frontier transactions constitute one authorized derogation to the MFN principle. It should nevertheless be emphasized that this derogation refers to the facilitation of transactions in the vicinity of the frontier and cannot cover a trade agreement governing the entire territories of two neighbouring countries. As with the historical preferences, the economic impact of this derogation is very limited.

3.4 THE NATIONAL TREATMENT PRINCIPLE WITH REGARD TO TRADE IN GOODS

The National Treatment Principle prohibits a Member from favouring its domestic products over the imported products of other WTO Members.

Article III of the GATT 1994: National Treatment on Internal Taxation and Regulation

General Principle

Members 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.

Internal Taxation

The products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or in directly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no Member shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in para. 1(Art.III).

Internal Regulation

The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, transportation, and requirements affecting their internal sale, offering for sale, purchase, transportation 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.

RATIONALE BEHIND ARTICLE III

The national treatment principle embodied in Article III of the GATT 1994 works to:

- ❖ Avoid protectionist measures.
- ❖ Maintain equality of competitive conditions.
- ❖ Protect tariff bindings

Scope of Art.III

As with the MFN principle, the scope of the national treatment principle also covers both de jure and de facto discrimination. A measure is de jure discriminatory when discriminatory treatment between imported and domestic like products is clear from the wording of the legal instrument. When the discrimination is not clear on the text or face of the legal instrument, it can still be de facto , or in practice, discriminatory. In the case of the national treatment principle, de facto discrimination occurs when a legal

Instrument in effect or in fact favours domestic products over imported like products. As explained when referred to the MFN principle, to establish de facto discrimination, all the facts relating to the application of the measure must be reviewed. Cases where de facto discrimination was found are Japan – Alcoholic Beverages II , Korea - Alcoholic Beverages and Chile – Alcoholic Beverages . These cases involved internal measures which, although not making an explicit reference to the origins of products, had the effect of affording protection to domestic products vis-à-vis "like" or "directly competitive or substitutable" imported products.

3.5 EXCEPTIONS TO THE NATIONAL TREATMENT PRINCIPLE

Specific exceptions only related to the national treatment principle can be summarized as follows:

Government Procurement (Article III:8A of the GATT 1994)

Advantages or preferences can be accorded to domestic products over imported ones if government agencies purchase such products for government purposes and not for commercial resale or use in the production of goods for commercial sale. The Plurilateral Agreement on Government Procurement contains specific rules pertaining to the opening of the procurement process by government entities to international competition. The rights and

obligations it contains, because of its lurilateral nature, only bind the Members that have ratified it (to know more about the Plurilateral Agreement on Government Procurement.

Subsidies to Domestic Producers (Article III: 8B OF THE GATT 1994)

Governments can provide subsidies (including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of Article III) exclusively to domestic producers. GATT Contracting Parties and WTO Members considered that the practice of granting production subsidies was not necessarily illegal. In the Tokyo and Uruguay Rounds the GATT CONTRACTING PARTIES introduced progressively additional disciplines on the use of subsidies. Subsidies and their use are now regulated by the Agreement on Subsidies and Countervailing Measure and by the Agreement on Agriculture (subsidies limited to agricultural products). Note also that Members have the right to take certain "corrective measures" – one of them being countervailing measures - against imported subsidized products which cause injury to a Member's domestic industry producing "like products". Such duties are collected at the border in addition to, and independently of, tariffs.

Internal Maximum Price Control Measures (Article III:9 of the GATT 1994)

Members recognize that internal maximum price control measures, even though conforming to the other provisions of this Article can have effects prejudicial to the interests of the Members supplying imported products. Accordingly, Members applying such measures shall take account of the interests of exporting Members with a view to avoiding to the fullest practicable extent such prejudicial effects.

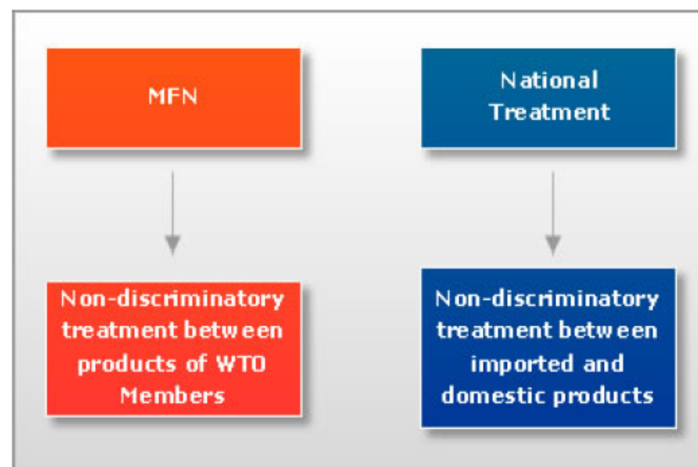
Cinematograph Films (Articles III:10 and IV of the GATT 1994)

As an exception to the National Treatment principle, negotiators of the GATT retained the possibility of giving preferences to products emanating from the national movie industry (exposed cinematograph films). National preferences are governed by the provisions of Article IV , and take the form of internal quantitative regulations in "screen quotas". This provision must now be read together with specific commitments taken by Members in the audiovisual sector in the GATS Agreement.

3.6 DIFFERENCE BETWEEN THE NATIONAL TREATMENT PRINCIPLE AND MFN PRINCIPLE

Difference Between the National Treatment Principle and the MFN Principle

According to the national treatment principle, each Member shall treat imports no less favourably than it treats like domestically produced goods. **Whilst the MFN principle seeks to ensure that a WTO Member does not discriminate between like products originating in, or destined for, other WTO Members, the national treatment principle addresses the non-discriminatory treatment to be applied to imported and domestic like products.**



3.7 SUMMARY

International trade in goods is governed by the principles of GATT. Two most important principles are (1) Most Favoured Nation (MFN) and (2) National Treatment Principles. Members are required to these principles while trading in goods. Both the principles have certain exceptions as oulined in the GATT agreement. Exceptions can be claimed by Members by satisfying the requirements of the agreement.

3.8 KEYWORDS

1. GATT
2. MFN
3. National Treatment
4. Trade in Goods

3.9 SELF ASSESSMENT QUESTIONS

1. Discuss the GATT provisions in relation to non-discrimination principle

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2. Explain MFN principle under GATT. What are the exceptions?

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3. Discuss the National Treatment principle. Outline the exceptions to the principle

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4. Write a note on GATT 1994

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3.10 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT – 4: TRADE REMEDIES AND THE WTO

Structure

4.0 Objectives

4.1 Introduction

4.2 What are Trade Remedies?

4.3 Anti-Dumping Duties

4.4 Subsidies and Countervailing Measures

4.5 What is a Countervailing Duty?

4.6 Safety Measures

4.7 Summary

4.8 Keywords

4.9 Self Assessment Questions

4.10 References

4.0 OBJECTIVES

1. To Understand Trade Remedies under WTO
2. To understand Anti-dumping measures
3. To explain the SCM Agreement

4.1 INTRODUCTION

WTO Members aspire for free trade. However, free trade is not always fair trade. Distortions in international trade – dumped exports - subsidized exports Anti dumping duty can be imposed by affected state to counteract unfair Trade practice of exporters from specified Countries causing injury to domestic Industry of Importing country. Countervailing duty measures available as trade remedies to counteract subsidized exports.

4.2 WHAT ARE TRADE REMEDIES?

Trade remedies aims at preventing unfair trade practices among WTO members.

- ❖ They would be Permissible import restraints that otherwise would be contrary to WTO principles essentially, exceptions to the bedrock rules of binding tariffs and MFN (most favored nation) treatment
- ❖ Designed to allow relief from imports deemed "unfair," or adjustment from a surge in imports often called the "safety valve" to allow further trade liberalization
- ❖ WTO identifies three primary types:
- ❖ Safeguards (temporary relief from import surges)
- ❖ Countervailing duties (counteracting subsidies)
- ❖ Anti-dumping (counteracting unfairly low prices)

In early years, little attention paid to trade remedies, in the original GATT: Article VI covered anti-dumping measures; Article XVI covered subsidy practices and Article XIX dealt with safeguards focus of GATT was reducing tariffs.

Over time, focus on trade remedy measures - Kennedy Round (1969) produced first rules on antidumping duties; but only agreed to by a limited number of countries ,Tokyo Round (1979) expanded Anti-Dumping Code; produced Subsidies and Countervailing Duties Agreement, but did not really address substance of subsidy practices, Uruguay Round produced first agreement on application of safeguard measures; addressed substance of subsidies.

Starting with anti-dumping and countervailing measures, these are aimed at imports of a particular product from a particular exporting country, which imports have been found to be

dumped (anti-dumping) or subsidized (countervailing measures), and to be causing or threatening to cause material injury to the domestic industry in the importing Member that produces the like product. Where dumping or subsidization, injury, and causation are found, the importing Member can apply to those imports an additional duty up to the amount of dumping or subsidization that has been found. Given their country-specific focus, application of such measures would run counter to the MFN principle if there were no specific provisions allowing them.

It should be borne in mind that dumping is an action by private firms and as such is not regulated by the WTO. Rather, what is regulated is anti-dumping action by WTO Member governments. Anti-dumping measures are disciplined by GATT Article VI and the Anti-dumping Agreement. Dumping takes place when a product of one firm is introduced into the commerce of another country at less than the normal value of the product. Investigations have to be conducted to determine the margin of dumping and thus the maximum allowable level of the anti-dumping duty.

Subsidies of course are government measures, and the WTO thus regulates, via the Agreement on Subsidies vand Countervailing Measures ("SCM Agreement") (underpinned by GATT Articles VI and XVI), both the provision of subsidies by Member governments, and those governments' use of countervailing measures in respect of subsidized imports into their own territories. Subsidies on goods in general are governed by the SCM Agreement, while the Agreement on Agriculture contains detailed rules on subsidies to agricultural products. Nonetheless, agricultural subsidies remain covered by and countervail able under the SCM Agreement.

The final types of measures allowing for derogations from basic GATT/WTO principles for economic reasons, that is, economic problems engendered by the very trade that the multilateral trading system encourages, are trade remedies, of which there are three types: anti-dumping measures , countervailing measures, and safeguard measures. While these measures have certain common characteristics, they also have important differences, as reflected in the Agreements setting forth the rules on their use.

In essence, all of these measures take the form of border measures (special duties in addition to the ordinary customs duties, or in some cases undertakings, or in the case of safeguards, duties, quantitative restrictions and possibly other forms). Trade remedies can only be applied on the basis of a fact-based investigation establishing that the requisite conditions for application of the particular measure in question are met. In particular, these

conditions are that the imports in question have certain characteristics and that they have caused certain kinds of economic damage.

Starting with anti-dumping and countervailing measures, these are aimed at imports of a particular product from a particular exporting country, which imports have been found to be dumped (anti-dumping) or subsidized (countervailing measures), and to be causing or threatening to cause material injury to the domestic industry in the importing Member that produces the like product. Where dumping or subsidization, injury, and causation are found, the importing Member can apply to those imports an additional duty up to the amount of dumping or subsidization that has been found. Given their country-specific focus, application of such measures would run counter to the MFN principle if there were no specific provisions allowing them.

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4.3 ANTI-DUMPING DUTY

GATT and WTO rules do not prohibit "dumping" as such. Rather, they set forth the rules that Members must respect when taking action against dumped imports. For such action to be permissible, Members must determine the existence and amount of dumping, and must establish that dumped imports are causing material injury or threat to , or material retardation of the establishment of, the importing Member's domestic industry producing the product that is "like" the dumped imported product. "Dumping" is defined in both Article VI of the GATT 1994, and in the AD Agreement, as the sale of an imported product in the importing market at less than its "normal value ". As indicated above, most commonly this is where the price of the imported good is less than the price at which the exporter sells that good in its own home market. In this sense, dumping is a situation of international price discrimination.
Dumping is NOT the sale of an imported product for less than the price charged for the same product produced domestically. This is price undercutting, which is a factor to be examined in the context of injury analysis, but which is not relevant to whether or not there is dumping. In the simplest of cases, the existence of dumping is identified by comparing prices in two

markets. In this case, dumping would exist where: Price of imported good < (less than) Home market price in exporting market.

Article VI of GATT allows countries to take action against dumping. The AD (Anti-Dumping Agreement) Agreement clarifies and expands on Article VI, and the two operate together.

Under these provisions, countries are allowed to act in a way that would normally break the GATT principles of binding a tariff and not discriminating among trading partners. Typically, anti-dumping action means charging an extra import duty on a particular product imported from a particular exporter in order to bring the price of the imported product up to its "normal value" by offsetting the margin of dumping. As we will see below, anti-dumping measures also may take the form of price undertakings.

Under Article VI of GATT 1994, and the AD Agreement, WTO Members can impose anti-dumping measures if they determine:

(a) that dumping is occurring;

(b) that the domestic industry producing the like product in the importing country is suffering material injury or threat thereof , or that the establishment of a domestic industry is being materially retarded ; and

(c)that there is a causal link between the two.

In addition to substantive rules governing the determinations of dumping, injury, and causal link, the AD Agreement sets forth detailed procedural rules for the initiation and conduct of investigations, the imposition of measures, and the duration and review of measures.

EXCEPTIONS

The AD Agreement recognizes that in certain circumstances, the price from the exporter to the importer, or to a third party, may not be reliable. One such circumstance is where there is no export price. This could occur, for example, where the product is sold on consignment (i.e., the selling price is not fixed until the product is actually sold to a purchaser in the importing country), or transferred to a related entity for further processing before sale in the importing country. Another situation where the price charged by the exporter may not be a reliable indicator of the export price to be used in the dumping calculation is where the exporter sells the product to a related importer. This happens very often where large companies, such as Sony, Samsung, General Electric, etc. are involved in investigations. Another circumstance that can lead to price unreliability is a "compensatory arrangement"

between the exporter and the importer or a third party, such as where the exporter gives discounts, refunds or rebates, after the export transaction has taken place. In such cases, the AD Agreement provides for an alternative method of determining. The export price to be used in the dumping calculation, namely a "constructed export price". Such a price is to be calculated on the basis of the price at which the imported products are first resold to an independent buyer in the importing country. If the imported product is not resold to an independent buyer, or is not resold as imported, the authorities may determine a reasonable basis on which to construct the export price.

The AD Agreement contains detailed procedural requirements on a number of issues, which are applicable at different stages of the proceeding. These are contained in among others, Articles 5 (Initiation and Subsequent Investigation), 6 (Evidence), 7 (Provisional Measures), 8 (Price Undertakings), 9 (Imposition and Collection of Anti-dumping Duties), 10 (Retroactivity), 11 (Duration and Review of Anti-dumping Duties and Price Undertakings), 12 (Public Notice and Explanation of Determinations), 13 (Judicial Review), 14 (Anti-dumping Action on Behalf of a Third Country), 15 (Developing Country Members), 16 (Committee on Anti-dumping Practices), 17 (Consultation and Dispute Settlement), 18 (Final Provisions), and Annexes I (Procedures for the On-The-Spot Investigations Pursuant to Paragraph 7 of Article 6) and II (Best Information Available in Terms of Paragraph 8 of Article 6).

4.4 SUBSIDIES AND COUNTERVAILING MEASURES

The Agreement on Subsidies and Countervailing Measures (SCM Agreement) disciplines the use of subsidies by Members and regulates the actions Members can take to counter the effects of other Members' subsidies. The SCM Agreement does not prohibit Members from granting most forms of subsidies. It contains rules to determine which programmes, measures, etc. are subsidies, as well as rules governing the use of and disciplines on subsidies, and disciplines on the use of countervailing measures.

The SCM Agreement thus contains two "tracks". The first is the multilateral track, which sets forth the disciplines on governments' use of subsidies, and provides for WTO dispute settlement to enforce those disciplines. Thus, under the multilateral track, a Member concerned over the use of an allegedly prohibited subsidy by another Member, or over the adverse effects allegedly caused by another Member's non-prohibited subsidy, has the right to raise a challenge under the WTO's dispute settlement system.

The second track is the unilateral or national track, which is the use of countervailing measures by an importing Member where subsidized imports are causing injury to the domestic industry in the importing Member. (Countervailing measures are similar in form and in terms of procedural requirements to anti-dumping measures, the main difference being that CV measures apply to subsidized, rather than dumped, imports.)

For a measure, programme, incentive etc. to be a "subsidy" in the sense of the SCM Agreement, it must correspond to the legal definition in that Agreement, namely it must involve a financial contribution by a government or any public body within the territory of a Member, which confers a benefit to the recipient. Furthermore, for a subsidy thus defined to be covered by the SCM Agreement and hence subject to its disciplines, the subsidy also must be "specific".

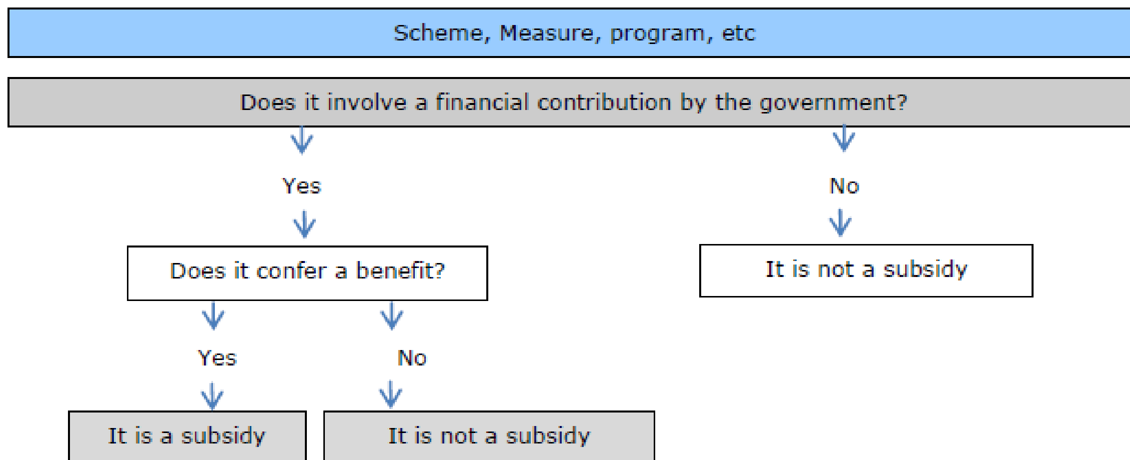
The SCM Agreement classifies specific subsidies into two groups: (1) **prohibited subsidies and (2) actionable subsidies**. There are only two kinds of prohibited subsidies: export subsidies and local content (or import substitution) subsidies.

The SCM Agreement applies not only to industrial products, but to agricultural products as well. Thus subsidies disciplines and countervailing measures can be invoked in respect of agricultural products. That said, the Agreement on Agriculture modulates some of the multilateral disciplines of the SCM Agreement in respect of those products. The Agreement on Subsidies and Countervailing Measures, as its name indicates, addresses two separate but closely related topics: multilateral disciplines regulating the provision of subsidies, and the unilateral or national use of countervailing measures by a Member to offset injury in its territory caused by subsidized imports.

Multilateral subsidies disciplines are the rules governing whether or not a subsidy may be provided by a Member, and regulating the adverse trade effects that a subsidy may cause. These disciplines are enforced through invocation of the WTO dispute settlement mechanism. Countervailing duties are a unilateral instrument, which may be applied by a Member to imports of a product into its territory, on the basis of an investigation in which the imports in question are found to be subsidized, and to be causing injury to the domestic industry of the importing Member.

The SCM Agreement defines the term "subsidy". The definition contains three basic elements: (i) a financial contribution (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit. All three of these elements must be

present for a subsidy to exist. However, that not all "subsidies" are covered by the SCM Agreement. Rather, only those that are "specific" are covered



FINANCIAL CONTRIBUTION

Pursuant to Article 1.1 (a)(1) of the SCM Agreement, only measures in the form of a "financial contribution" may be subsidies. This provision sets forth a closed (exclusive) list of the types of measures that constitute financial contributions, namely:

- Direct transfer of funds (example, a grant, a loan, etc.);
- Potential direct transfer of funds or liabilities (example, a loan guarantee);
- Government revenue otherwise due that is foregone or not collected (example, fiscal incentives such as tax credits);
- Government provision of goods or services other than general infrastructure, or government purchase of goods;
- Government payment into a funding mechanism. In addition, certain income or price support also is listed as potentially constituting a subsidy, if it confers a benefit.

BY A GOVERNMENT OR PUBLIC BODY

For a financial contribution to be deemed a subsidy for the purposes of the SCM Agreement, the financial contribution must be made by government or a public body. A government can be at the national or sub-national level, and can be any sort of governmental entity. A public body is an entity other than a government, but which has or fulfils some sort of public policy role. A financial contribution made by a private body may still fall under the definition in Article 1.1 of the SCM Agreement if that contribution was made pursuant to entrustment or direction by the government.

CONFERRING A BENEFIT

Pursuant to the SCM Agreement, a financial contribution by a government does not involve a subsidy unless it confers a "benefit". In many cases, as in the case of a cash grant, the existence of a benefit will be clear. A grant, being a gift, confers a benefit in its full amount, as the recipient does not have to pay anything for it. In some cases, however, the issue of benefit will be more complex. For example, when does a government loan, a government equity infusion, or the provision or purchase by a government of a good confer a benefit? Although the SCM Agreement does not provide complete guidance on these issues, the Appellate Body has ruled that the existence of a benefit is to be determined by comparison with the market-place. The question to be answered is therefore whether the financial contribution is "provided on terms which are more advantageous than those that would have been available to the recipient on the market." If the answer is positive, then the financial contribution confers a benefit. So, for example, a government-provided loan confers a benefit where its terms are more favourable to the recipient than those the recipient could have obtained from a commercial lender. Similarly, government provision of goods confers a benefit where the price charged for the goods by the government is less than the prevailing market price for those goods, in the country where the goods are provided.

CATEGORIES OF SUBSIDIES UNDER THE SCM AGREEMENT

Since 2000, with the expiry of the provisions related to non-actionable subsidies (see Tip below), the SCM Agreement regulates two basic categories of subsidies: those that are prohibited, and those that are actionable (i.e., not prohibited but potentially subject to challenge on the basis of adverse effects, or to countervailing measures). All specific subsidies fall into one of these categories.

The SCM Agreement adopts what is sometimes called a "traffic light" approach in categorizing different types of subsidies:

1. Prohibited. "Red light" or "red" subsidies: Prohibited on the basis of their (irrebutably) presumed adverse effects on trade. There are two types of prohibited subsidies:

Subsidies contingent, in law or in fact, upon export performance, ("export subsidies"). Subsidies contingent upon the use of domestic over imported goods ("import substitution" or "local content" subsidies)

Prohibited subsidies are subject to special and additional dispute settlement rules (i.e., in addition to those in the Dispute Settlement Understanding). One such special rule is that if

a challenged subsidy is found to be prohibited, the remedy is that the subsidy must be withdrawn immediately.

2. Actionable. -"Yellow light" or "amber" subsidies: Actionable, i.e., subject to challenge, on the basis of evidence that they have caused specified adverse effects, in particular cases. (That is, there is no presumption of adverse effects in respect of actionable subsidies.

There are three types of adverse effects on the basis of which a Member can bring a dispute against another Member's subsidies:

Serious prejudice

This can take a number of specified forms, including: displacement or impedance of imports of a "like product" into the market of the subsidizing Member; displacement or impedance of exports of a "like product" into a third country market; significant price undercutting, price suppression or depression, or lost sales; in the case of a primary product, an increase over historical levels in the world market share of the subsidized product.

Injury

Injury to the domestic industry producing the like product in the importing country, caused by subsidized imports.

Nullification or impairment of benefits

Where the effect of the subsidy in the territory of the subsidizing Member is to prevent trading partners from enjoying the benefits of multilateral market access concessions that they have received from the subsidizing Member. Members considering that they are subject to serious prejudice, injury or nullification or impairment of benefits can refer the matter to the Dispute Settlement Body. In the area of actionable subsidies, the SCM Agreement contains certain special and additional dispute settlement rules. One such rule is that if a challenged subsidy is found to be causing specified adverse effects, the subsidizing Member must withdraw the subsidy or remove the adverse effects.

Non-actionable, or "green": Lapsed 31 December 199

4.5 WHAT IS A COUNTERVAILING DUTY?

Article VI of the GATT 1994 and footnote 36 to the SCM Agreement define a countervailing duty in the following way: A special duty levied for the purpose of offsetting any subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

FORMS OF COUNTERVAILING MEASURES:

As is the case for anti-dumping, the SCM Agreement provides for three kinds of countervailing measures:

- provisional countervailing duties;
- definitive countervailing duties; and
- voluntary undertakings.

PROVISIONAL COUNTERVAILING DUTIES:

Pursuant to the SCM Agreement, provisional countervailing duties may be imposed before the conclusion of an investigation, provided that there has been a preliminary affirmative finding of subsidization, injury and causation. In no case, however, can such provisional duties be applied until at least sixty days have elapsed from the date of initiation of the investigation. Furthermore, provisional countervailing duties must be limited to as a short a period as possible, and under no circumstances can they be applied for longer than four months.

DEFINITIVE COUNTERVAILING DUTIES:

Definitive duties can only be imposed on the basis of a final determination in an investigation. In particular, before it can apply a definitive duty, the importing Member must have initiated and conducted an investigation in full conformity with the applicable provisions of the SCM Agreement, and in the investigation it must have arrived at affirmative final determinations of subsidization, injury and causation.

VOLUNTARY UNDERTAKINGS:

Voluntary undertakings represent an alternative to definitive duties. In particular, a countervailing duty investigation can be suspended without the imposition of countervailing duties if the Member and/or exporter being investigated gives the investigating Member a satisfactory voluntary undertaking under which: the government of the exporting Member agrees to eliminate or limit the subsidy or to take other measures concerning its effects; and/or the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated.

The imposition of any countervailing measure must fulfill the substantive and procedural requirements set forth in the SCM Agreement. Many of these requirements are similar to those contained in the Anti-Dumping Agreement. This module therefore refers to the module on the Anti- Dumping Agreement where there is overlap, and explains the differences where relevant.

Countervailing measures are subject to five-year sunsetting provisions, but can be extended on the basis of a review .They also can be subject to review to determine whether they remain necessary to prevent or remedy injury, and whether their level could be modified. The SCM Agreement recognizes that subsidies may play an important role in economic development programmes of developing countries. The Agreement therefore contains less strict rules and disciplines on the subsidies of developing Members than those that apply to develop Members. Finally, the SCM Agreement requires Members to submit a variety of notifications to the SCM Committee. Except where a notifying Member has specifically requested otherwise, all notifications are issued as unrestricted documents and are fully accessible to the public.

4.6 SAFEGUARD MEASURES

A WTO member may take a "safeguard" action in the sense of Article XIX of GATT 1994 and the SG Agreement (i.e., temporarily suspend multilateral concessions) to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the industry. Safeguard measures were always available under the GATT (Article XIX). However, prior to the entry into force of the SG Agreement, Article XIX safeguards were relatively little used, with many governments preferring to protect their industries through "grey area" measures, because there were no clear multilateral rules on those measures. In particular, there was no requirement to pay compensation to affected trading partners, as was the rule for Article XIX measures. (Grey area measures included "voluntary" export restraint arrangements, minimum pricing arrangement s and other sorts of measures. These were frequently employed on products subject to chronic trade frictions, such as cars, steel and semiconductors).

The WTO Safeguards Agreement broke new ground in prohibiting "grey area" measures and setting time limits ("sunset clause") on all safeguard actions

GATT ARTICLE XIX AND THE AGREEMENT ON SAFEGUARDS

Article XIX, GATT 1994:

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 Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member 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 Member 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.

The SG Agreement contains additional elaboration of the principles set forth in Article XIX:

Agreement on Safeguards

Article 2 (Conditions)

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

2. Safeguard measures shall be applied to a product being imported irrespective of its source.

Article 3 (Investigation)

1.A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member, pursuant to procedures previously established and made public.

The core principle, stated fairly simply in the SG Agreement and Article XIX of GATT 1994, is that Members have the right to apply safeguard measures, which, as we know from Article XIX, consist of the temporary suspension of negotiated multilateral concessions. In practice, this means that Members have the right to derogate from the basic disciplines of the GATT system, in particular in respect of tariff bindings and quantitative restrictions (contained in GATT Art. II and GATT Art. XI, respectively, under the conditions identified. The principle of parallelism must be respected. That is, a measure cannot be applied to only some imports based on an investigation and conclusions taking into account all imports (except for the limited exemption for developing Members with small shares of imports).

Safeguard measures can take a wide range of forms. The most common forms are tariff increases above bound rates, quotas, and tariff -rate quotas. Other forms also are possible. The level of a safeguard measure should not be more restrictive than necessary to prevent or remedy the serious injury and facilitate adjustment. Specific rules pertain to the level and allocation of quotas. For safeguard measures of all forms, the authorities of the importing Member should include in their published reports and notifications regarding the measure, the justification for the form and level of measure to be applied.

Safeguard measures longer than one year's duration must be progressively liberalized over their period of application. If a measure is extended, it must not be more restrictive than at the end of the initial period of application, and should continue to be liberalized over the extension period. Safeguard measures are subject to numerical limits on duration. The initial period of application cannot exceed four years. Any extension(s) cannot exceed, in total, an additional four years (six years in the case of developing Members applying measures). Other than for measures of very short duration, no safeguard measure can be reapplied to a given product before a period equal to the duration of an earlier measure on that product has elapsed.

While in principle a Member applying a safeguard measure must provide trade compensation to affected exporting Members or face trade retaliation by them, the right to retaliate in many cases cannot be exercised for the first three years of application of a safeguard measure. All Members must notify their domestic legislation, regulations and/or procedures for safeguard investigations and measures. If they have no such legislation, etc., they must make a nil notification. Members taking safeguard actions must notify: initiating an investigation; making a finding of serious injury or threat caused by increased imports; taking a decision to apply a safeguard measure; the results of mid-term reviews of measures; the results of consultations with affected exporting Members; and any proposed compensation or retaliation.

4.7 SUMMARY

The term "trade remedies" refers to anti-dumping duties, countervailing duties and safeguards. There are specific World Trade Organisation (WTO) agreements on Tariffs and Trade (GATT) system which preceded it, that the ability of member states to have recourse to trade remedies when needed is tied to achieving one of the fundamental aims of the multilateral trade system, that is a high degree of reciprocal tariff liberalisation.

4.8 KEYWORDS

1. Ant-Dumping
2. Countervailing Duties
3. GATT
4. Safeguards

4.9 SELF ASSESSMENT QUESTIONS

1. What are Trade Remedies? Explain

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2. Explain the measures to overcome dumping situations

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3. Discuss the procedure for imposing countervailing duty

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4. Critically examine safeguard measures as Trade Remedies.

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5. Write a note on subsidies.

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4.10 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT -5: TRADE AGREEMENTS

Structure:

5.0 Objectives
5.1 Introduction
5.2 Economic Basis for Regional Trade Agreements
5.3 Free Trade Area (FTA)
5.4 Customs Union
5.5 Common market
5.6 Economic Union
5.7 India and Regional Trading Agreements
5.8 Summary
5.9 Keywords
5.10 Self Assessment Questions
5.11 References

5.0 OBJECTIVES

1. To understand the significance of Regional Trade Agreements
2. To explain the economic basis for regional trade agreements
3. To know the importance of Customs Union and FTAs
4. To outline the RTAs of India

5.1 INTRODUCTION

A trading agreement is an arrangement between countries to reduce tariff barriers. Custom duties on imports have been a big barrier to international trade, reducing trade and the gains that could be made from trade. Reducing these leads to an increase in trade and business. There are multilateral, bilateral and regional trade agreements. There are customs unions and free trade areas. Regional trading agreements (RTA) can be of broadly two categories: customs unions and free trade areas. Countries in a customs unions have a zero tariffs internally and a unified tariff against the rest of the world. A free trade area(FTA) is one in which countries maintain their own tariffs against non-member countries while having zero tariffs with members of the FTA. In other words, they do not have a unified tariff against the rest of the world.

The European Economic Community (EEC) is an example of a customs union. A good can enter the EEC in any country and once tariff is paid at the port of entry, the good is free to move through the EEC. Another example of a customs union is MERCOSUR, formed in 1995, which includes Argentina, Brazil, Paraguay and Uruguay. In contrast NAFTA, the North American Free Trade Area, is a free trade area. It was formed in 1994. Member countries -- the US, Canada and Mexico maintain different tariff rates with the rest of the world. This means that when a good enters NAFTA through Mexico it pays a different import duty than when it enters through the US. Only goods which are produced in North America can move freely in the free trade area. The others are subjected to Rules of Origin. A shirt made in India with labels and buttons stitched on in Mexico does not pass as a Made in North America shirt and cannot move freely from Mexico to the US. This is done to prevent third country exporters from taking advantage of lower duties in Mexico to enter the US market.

5.2 ECONOMIC BASIS FOR REGIONAL TRADING AGREEMENTS

Economic theory shows free trade on a worldwide basis as the first best outcome, in as much as it allows specialization and exchange to take place globally, thus leading to greater world output and welfare. Preferential Trade Agreements (PTAs) among a subset of countries are therefore a second best solution. They create trade among their members as

trade barriers fall, and they divert trade from efficient non-member producers to members because of their privileged market access. It should be noted that PTAs can take a variety of forms. These range from low-level integration by means of FTAs or CUs to higher levels of integration, such as a common market, economic (and monetary) union, or even economic and political union. A PTA also refers to two or more countries forming a union with lower tariffs (and other trade barriers) for goods and services from member countries.

FTAs eliminate tariffs on goods from members entirely, and CUs (customs Union) are FTAs (Free Trade greements) with a common external tariff.

More specifically, economic integration proceeds by agreements to:

• abolish tariffs and import quotas among members (FTAs and sectoral FTAs).

• establish common external tariffs and quotas (CUs).

• allow free movement of goods, services and workers (Common Market).

• harmonize competition, structural, fiscal, monetary and social policies (Economic Union).

• unify economic policies and establish supra-national institutions (Economic and Political Union).

Thus three progressively higher levels of integration can be distinguished. The first level entails modest integration by means of an agreement to apply symmetric preferential treatment of imports and assign supporting functions and instruments to jointly operated institutions.

Examples would be NAFTA's commitment to eliminate tariffs among its members, its dispute settlement provisions, and the various working groups and committees that serve to facilitate trade and investment among the three partners. In the case of a CU, the agreement would additionally involve a common external tariff applicable to non-members, which, in turn, requires an understanding on how to apportion among the partners the tariff revenue collected.

The second level of economic integration would be the harmonization of instruments over which the parties retain control, and through which, due to different national approaches, obstacles to a common market exist. This could be the case in the area of migration of workers, competition policy, and production standards. One example of such harmonization is the European Single Act. Among other provisions this act applied the "principle of mutual recognition" to product standards. More co-operation and supranational institutions, such as a joint tribunal on competition policy, are also characteristic of this second level. The third and highest level of economic integration adds coordination of national policies and the creation

of further supranational bodies which entail not only economic but increasingly political integration. Examples here are the creation of a common currency and central bank, and even a supranational parliament as in the case of the EU.

5.3 FREE TRADE AREA (FTA)

This is the preferred option for countries embarking on economic integration and for those unwilling or unable to engage in higher levels of integration. An FTA can be limited to particular sectors, thus retaining a high level of control at the national level and preventing exposure to competition for the other sectors. The authority to decide how third countries are to be treated remains unaffected (independent trade policy) in an FTA.

However, rules of origin (ROO) have to be agreed upon among members so as to determine which products can be transferred duty-free. In the case of NAFTA a product has to have been substantially transformed so that a change in tariff classification has occurred, or it must have 50% (62.5% for cars) member-country content to qualify for duty-free treatment. There are extensive and complex provisions on how such content is arrived at and what documentation is necessary at the border. If there were no such ROO third country, products could be landed in the lower duty jurisdiction and then transferred duty-free to the higher tariff member thereby circumvent its tariff. As a result, in an FTA border controls are necessary for commerce among members, and arguments over interpretation of ROO can lead to delays and disputes. These restrictive effects of ROO have led one eminent economist to observe: "It is reported that Canadian producers have on occasion chosen to pay the relevant duties rather than incur costs of proving origin."

5.4 CUSTOMS UNION

When two or more countries agree to remove (essentially) all restrictions on mutual trade and set up a common system of tariffs and import quotas vis-à-vis non-members, the result is referred to as a CU. The adoption of a common external tariff (CET) and joint quotas necessitates closer co-operation with respect to the sharing of customs revenues collected on non-member imports. Rules of origin are no longer necessary: when a common external tariff exists, imports into the CU–area face the same tariff in each CU-member country; hence there is no incentive for trans-shipment of imports between members. The CET effectively creates "destination-neutrality" for imports into the CU.

Both FTAs and CUs imply that the member countries remain nation states, yet when viewed in the historical context there are some subtle differences between the agreements. The German Zollverein and the European Community for Coal and Steel are examples of

successful CUs. The Zollverein preceded the formation of Germany in 1870 and thus holds fewer lessons for today. The European Community for Coal and Steel, a sectoral CU created in 1951, was not expected to be a precursor to eventual European political union. Nevertheless, it was recognized at the time that free trade and the consequent rationalization and specialization of production in coal and steel products would require a supranational body to regulate pricing practices and commercial policies. This historical precedent therefore suggests that a successful CU implies a common competition policy. Subsequently the European Common Market naturally adopted and extended this competition policy. A common competition policy would replace the need for, and the application of , trade remedy laws among the CU-members. Predatory pricing (dumping) would be dealt with by the common competition watchdog, and Article 19 of the GATT/WTO could be relied upon to obtain temporary relief from import surges that threaten an industry's survival.

That said, the key feature of a CU remains the CET. Derivative issues are a matter of negotiation and will determine how successful the CU is.

5.5 COMMON MARKET

A common market (CM) can be considered the first stage of deep economic integration. Free mobility of the key participants in the process of production is its characteristic. In addition to goods and services, capital and people move freely inside a common market. The benefits expected consist of further gains in efficiency through a more appropriate allocation of resources: capital moves to where skills are and people move to where opportunities beckon. In addition to the common external tariff that defines a CU and to ensure the viability of a common market, uniform regulations have to be worked out among the members regarding the movement of people and capital. This is a major task that requires, at least over time, agreement on qualifications and certifications of workers from different member countries.

For a common market to become effective, therefore, co-operation in decision-making is required in yet more areas. Non-tariff barriers have to be dismantled, structural adjustment policies have to be jointly reassessed, distribution policies will face harmonization pressures, and fiscal and monetary policies, as a dynamic consequence or by design, will show greater convergence. This convergence results from the increased economic interdependence among the members and necessitates that greater consideration be given to the effects of national policies on the welfare of CM partners.

5.6 ECONOMIC UNION

The next step in deep economic integration, economic union adds to the common market harmonized fiscal, monetary and labor market policies. Tax and monetary policies affect where a business locates, and because labor market policies affect migration patterns and production costs, these will have to be streamlined among members. There will be no room for different national transportation, regional or industrial policies, as these distort competition among firms from different member countries. To achieve such a union, it is necessary to form supranational institutions that legislate the rules of commerce for the entire area, leaving the administration to national bodies, but with recourse to supranational administrative tribunals to ensure uniform application of these rules. In an economic union supranational commercial law replaces national law.

For example, the European Union's (EU) regional adjustment policy provides infrastructure funds to regions within the EU that have 75% or less of the average EU-income level, with a budget of 0.45% of the EU's GDP. This illustrates the degree of co-operation necessitated by an economic union. An economic union is made more effective, furthermore, by a common currency. When there is no uncertainty about exchange rates among members, location decisions and trade patterns will follow efficiency considerations, and borrowing costs will not be affected by an exchange risk Premium on a particular member country's currency.

5.7 INDIA AND REGIONAL TRADING AGREEMENTS

The importance of increasing regional trade within Asia cannot be emphasised enough. At a time when regional trading agreements, such as the EU and NAFTA have led to higher trade and investment, Asia lags behind. Trade within Asia is a miniscule proportion of world trade, even though the Association of South East Asian Nations (ASEAN) countries (Singapore, Phillipines, Thailand, Indonesia, Malaysia, Cambodia, Laos, Vietnam, Myanmar and Brunei) , along with China, Japan,Korea and India are among the fastest growing exporters in the world today. China is expected to enter into an agreement with the ASEAN countries to promote trade by cutting tariffs on a large number of commodities with the region. This will lead to greater economic integration, in a region in which members have, until now, seen themselves largely as competitors, than as potential partners.

Trade agreements in India are any contractual measures with other state or states regarding their trade relationships. Trade agreements can be bilateral or multilateral—that is, the agreement is between two states or it can be between more than two states or countries.

For the majority of countries global trade is synchronized by unilateral barriers of several types, including tariffs, non tariff barriers, and outright preventions.

Trade agreements are one of the approaches to diminish these barriers, thus opening all parties to the remuneration of increased trade. In most contemporary economies the possible alliances of interested groups are numerous, and the variety of possible unilateral barriers is enormous. Further, several trade barricades are created for other, non economic grounds, such as national security or the aspiration to preserve or protect local culture from foreign manipulations.

Therefore, it is not startling that successful trade agreements in India are very convoluted. Various general features of trade agreements are (1) reciprocity, (2) a most-favoured-nation (MFN) clause, and (3) national treatment of non tariff barriers. India views Regional Trading Arrangements (RTA's) as constructive blocks towards the overall purpose of trade liberalization. Consequently, it is participating in a number of RTA's which include Free Trade Agreements (FTA's); Preferential Trade Agreements (PTA's); Comprehensive Economic Cooperation Agreements (CECA's); etc. These agreements are pierced into either bilaterally or in a regional grouping. Some of the key trade agreements are as follows:-

Agreement on South Asia Free Trade Area (SAFTA)

The Agreement on South Asian Free Trade Area (SAFTA) was signed by all the member States of the South Asian Association for Regional Cooperation (SAARC) during the twelfth 'SAARC Summit' held in Islamabad on 4-6th January, 2004. As a result, SAFTA came into force from 1st January, 2006. SAARC was recognized in Dhaka on December 7-8, 1985 with the intentions of:- promoting the profit of people of South Asia; hastening economic growth and social progress; promoting active collaboration in the economic, social, cultural, technical and scientific fields; increasing cooperation in international forums on matters of common interest; and cooperating with international and regional organizations with similar goals and principles.

Its members include Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. The objectives of SAFTA are to endorse and augment mutual trade and economic cooperation among the 'Contracting States' by inter-alia:-

• Eradicating barriers to trade in, and assisting the cross-border progress of goods between the territories of the Contracting States;

• Encouraging conditions of fair competition in the free trade area, and ensuring equitable benefits to all Contracting States, taking into account their respective levels and pattern of

economic development;

• Creating successful methods for the execution and application of this Agreement, for its joint administration and for the resolution of disputes; and

• Creating a framework for additional regional cooperation to develop and enhance the common benefits of this Agreement.

India-Mercosur Preferential Trade Agreement (PTA)

A Framework Agreement was signed between India and MERCOSUR on 17 th June 2003 . The aim of this Framework Agreement is to generate conditions and methods for negotiations in the first stage, by granting reciprocal tariff inclinations and in the second stage, to negotiate a free trade area between the two parties in conventionality with the rules of the World Trade Organization. As a follow up to the Framework Agreement, a Preferential Trade Agreement (PTA) was signed in New Delhi on January 25, 2004.

The aim of this Preferential Trade Agreement is to enlarge and reinforce the existing relations between MERCOSUR and India and endorse the extension of trade by granting reciprocal fixed tariff preferences with the ultimate objective of creating a free trade area between the parties. MERCOSUR is a trading bloc in Latin America formed in 1991 and comprising Brazil, Argentina, Uruguay and Paraguay. It was formed with the objective of making possible the free movement of goods, services, capital and people among the four member countries.

The India trade agreements as included in the above international or worldwide agreements allow more expansion of trading business in India as well as across the globe. There are many similar worldwide agreements including the trade agreements in India and following up the legal consortiums of trade.

Asia-Pacific Trade Agreement (APTA)

The Asia-Pacific Trade Agreement (APTA), formerly known as the Bangkok Agreement, the trade was signed on 31st of July 1975 as a proposal of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). The United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) is the provincial expansion arm of the United Nations for the Asia-Pacific region. It emphasize on issues that are most successfully addressed through regional cooperation.

BIMSTEC (Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation)

BIMSTEC (Bangladesh India Myanmar Sri Lanka and Thailand Technical and Economic Cooperation), a sub-regional economic collaboration consortium was formed in Bangkok in June 1997. Myanmar connected to the alliance later in December 1997. Bhutan and Nepal too united with the alliance in February 2004. Its membership involves 5 members of SAARC (India, Bangladesh, Bhutan, Nepal & Sri Lanka) and 2 members of ASEAN (Thailand, Myanmar). Thus, it is pictured as a 'bridging link' between the two major regional groupings i.e. ASEAN and SAARC. Its chairmanship of BIMSTEC revolves amongst the member countries in alphabetical array. The immediate priority of the grouping is combining of its activities and making it striking for economic cooperation.

At its first summit held in Bangkok on July 31, 2004, the acronym BIMSTEC was renamed as "Bay of Bengal Initiative for Multi Sectoral Technical and Economic Cooperation."

In the beginning, cooperation was planned into 6 sectors. But, throughout the 11th Senior Official Meeting in New Delhi in August 2006, it was decided that the areas of cooperation should be prolonged to 13 sectors and each sector will be lead by members in a deliberate manner. The India trade agreements as discussed above follow a very concretive approach making the trade rules and regulations on their place along with the fulfillments of the requirement of the trade

5.8 SUMMARY

A trade agreement is a wide ranging tax, tariff and trade treaty that often includes investment guarantees. The most common trade agreements are of the preferential and free trade types are concluded in order to reduce (or eliminate) tariffs, quotas and other trade restrictions on items traded between the signatories.A Preferential trade area is a trading bloc which gives preferential access to certain products from the participating countries. A PTA can be established through a trade pact. It is the first stage of economic integration . The line between a PTA and a Free trade area (FTA) may be blurred, as almost any PTA has a main goal of becoming a FTA in accordance with the General Agreement on Tariffs and Trade.

5.9 KEYWORDS

1. ASEAN
2. Customs Union
3. FTA
4. PTA

5. SAARC

5.10 SELF ASSESSMENT QUESTIONS

1. What is Free Trade Area? Explain

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2. Distinguish between customs union and economic union

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3. Explain the rule of WTO on PTA

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4. Explain the economic basis for Regional Trade Agreements

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5. Write a Note on NAFTA

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6. Explain India's Regional Trading Agreements

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5.11 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

BLOCK - II

UNIT – 6: TECHNICAL BARRIERS TO TRADE

Structure:

6.0 Objectives

6.1 Introduction

6.2 Agreement on TBT

6.3 Agreement on Application of Sanitary and Phytosanitary Measures

6.4 General Principles of SPS Agreement

6.5 Trade and Environment

6.6 Precautionary Principle, Environment Protection & WTO

6.7 Summary

6.8 Keywords

6.9 Self Assessment Questions

6.10 References

6.0 OBJECTIVES

1. To define Technical Barriers to Trade
2. To Study TBT agreement and its Implications
3. To Explain SPS Agreement & its General Principles
4. To study the application of Precautionary Principle

6.1 INTRODUCTION

Technical barriers to trade are regarded as non-tariff barriers to international trade. Agreement on Technical Barriers to Trade provided in Annex-I of WTO multilateral agreements deal with technical barriers to trade. The Agreement seeks to improve the situation which was envisaged in Tokyo Round during the GATT period. Technical Barriers are considered as import standards or regulations that reflect country's concern and valuation for safety, health, food quality and environment.

The WTO Agreement on Technical Barriers to Trade (TBT Agreement) tries to ensure that regulations, standards, testing and certification procedures facilitate trade and do not give rise to unwarranted protection for domestic producers. The 1994-Agreement was part of the outcome of the Uruguay Round and extends and clarifies the 1979-Agreement that was reached in the Tokyo Round of multilateral trade negotiations. It requires that technical regulations and standards, as well as testing and certification procedures, be transparent, justified by legitimate objectives, such as national security, prevention of deceptive practices, human health and safety, animal and plant life and health, or environmental protection, and do not create unnecessary obstacles to trade.

Countries have the right to pursue domestic policy objectives through technical regulations and conformity assessment procedures; however, when designing these measures, they are required to use relevant international standards, if these exist and would be effective and appropriate. The TBT Agreement covers all technical measures (regulations, standards, testing and certification procedures) relating to any product or process and production method, except sanitary and phytosanitary measures, which fall under the auspices of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), and technical specifications related to government procurement, which are covered by the plurilateral Agreement on Government Procurement. Examples of measures that might fall under the TBT but not the SPS Agreement include technical regulations and procedures concerning composition and packaging, marking and labelling, process and production methods, and final product characteristics. Measures based on product requirements are supposed to be

specified in terms of performance rather than design or descriptive characteristics. Technical regulations and product standards may vary from country to country. Having many different regulations and standards makes life difficult for producers and exporters. If regulations are set arbitrarily, they could be used as an excuse for protectionism.

The Agreement on Technical Barriers to Trade tries to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles, while also providing members with the right to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or the environment.

6.2 AGREEMENT ON TBT

Agreement on Technical Barriers to Trade (TBT) consists of 15 articles and 3 annexes. The general principles outlined in the agreement are as follows;

(1) The regulations should not be more trade-restrictive than necessary to fulfill legitimate objectives. These include national security requirements, prevention of deceptive practices and protection of (a) human health or safety (b) animal or plant life or health or (c) environment

(2) The principle of non-discrimination among Members should be followed i.e the product of the territory of any member will not be accorded les favourable treatment than that accorded to the like product of the territory of any other member (Art.2)

(3) The principle of National Treatment shall be followed

(4) Technical regulations will be generally be prescribed in terms of the performance o the product, rather than design or descriptive characteristics

(5) If international regulations for a specific product exist or if these are to be imminently available, Members will adopt them, except if such a step will be ineffective or inappropriate for the fulfilment of the objectives.

(6) Members should try to accept the technical regulations of other Members as equivalent to their own regulations, even if these are different from their own. Of course, they should satisfy themselves that these regulations adequately fulfil the objectives of their own regulations.

Assessment of Conformity

Members are required to prepare their administrative procedures for assessing whether a product conforms to the technical regulations. These procedures should conform to the principles of non-discrimination and national treatment. Besides, if such procedures differ from the guidelines issued by an international standardising body, public notice and notice to

other Members have to be given well ahead of the application of the procedures so that they have an opportunity to offer comments. In case of urgency, measures may be adopted without this process, but immediately thereafter, Members have to be notified and their comments have to be taken into account.

Notifications under the TBT Agreement

WTO member countries are required to designate a single government authority responsible for the implementation of the TBT transparency provisions and to specify publications that are used to announce that work on draft technical regulations and conformity assessment procedures is proceeding. They also have to establish enquiry points that are able to answer requests for information from other member countries. Further transparency provisions under the TBT Agreement concern notifications by WTO members of bilateral or multilateral agreements that they have reached on issues related to technical regulations, standards, and conformity assessment procedures and of standardising bodies that have accepted the Code of Good Practice. This Code provides transparency and other disciplines for the preparation, adoption and application of standards by central and local governmental, non-governmental and regional standardising bodies, and thereby helps to avoid duplication of standardisation work.

Moreover, countries have to notify other members through the WTO Secretariat of the proposed introduction of or changes to technical regulations or conformity assessment procedures for which no international standard, guide or recommendation exists or that differ from such international benchmarks and that may have a significant effect on trade of other member countries. Notifications are supposed to specify the products covered by the proposed technical regulation or conformity assessment procedure and contain a brief description of the objective and rationale of the measure. Notifications are to take place at an early appropriate stage, *i.e.* normally 60 days before the measures are finalised, in order to make it possible to introduce amendments and take comments from other member countries into account. In case of urgent problems of safety, health, environment protection or national security, the comment period can be shortened.

TBT-related disputes

In cases where bilateral or multilateral discussions have not made it possible to resolve a trade-related disagreement about technical measures between countries, member countries can ask for resolution of the issue according to the WTO dispute settlement rules. If formal consultations at the initial stage of the process do not lead to a mutually agreeable

solution, the establishment of a dispute panel can be requested. This panel rules on the compliance of a measure with the provisions of international trade law, including the TBT Agreement. If necessary, the panel's ruling could subsequently be reviewed by the WTO Appellate Body.

Of the more than 240 requests for consultations that had been formally raised during 1995-2001, 27 concerned alleged violations of the TBT Agreement. During 1995-98, there were four to seven new consultations requests per year, while subsequently the number of new cases fell to one to three . Seventeen cases, *i.e.* more than three-fifths of all TBT-related cases, concerned agro-food products. However, in all of these cases violations of other parts of international trade law were also alleged and panels and the Appellate Body may in such instances base their decisions on rules other than those under the TBT Agreement. For example, the consultation requests of 10 of the agro-food cases also alleged violations of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and concerned indeed often mainly SPS issues.

TBT-related disputes that have been resolved after establishment of panels

In 1995, Canada, Chile and Peru requested consultations and subsequently the establishment of panels concerning the EC's **trade description of scallops**. According to an order by France's government, certain varieties of *pectinidae* (scallops) could after 1 January 1996 no longer be sold using the traditional description of "Coquilles St. Jacques" or "Noix de St. Jacques" on the French market, but had to use the trade description "pétoncle", which – according to the complainants – consumers associate with a product of lower quality. The complainants alleged violation of GATT Articles I and III, as well as Article 2 of the TBT Agreement, which requires that imports be treated no less favourably than 'like products' of national origin. The dispute was settled in July 1996 on a mutually satisfactory basis by the implementation of a new order by the French government. Scallops are henceforth to be marketed in France under the name "Coquilles Saint Jacques" or "Noix de St. Jacques", followed by the scientific name of the species. Moreover, the country of origin must be indicated on the label.

In 1997, New Zealand requested consultations and subsequently the establishment of a panel concerning the EC's **measures affecting butter products**. New Zealand claimed that, in addition to GATT Articles II, III, X and XI and the Agreement on Import Licensing Procedures, the EC was violating Article 2 of the TBT Agreement through its decision to qualify butter manufactured by two particular buttermaking processes (Spreadable and

AMMIX) as not being "manufactured directly from milk or cream" and, hence, to exclude such butter from eligibility for New Zealand's country-specific tariff quota established by the EC's WTO schedule. A mutually satisfactory solution was found in November 1999, when the EU's Council of Ministers passed a new regulation, clarifying that butter manufactured by using concentrated milkfat and/or the fractionation of such milkfat, such as in the Spreadable and AMMIX butter-making processes, should still be considered as being manufactured directly from milk or cream and, therefore, meet the EC's requirement for butter applying in connection with the country-specific tariff quota for New Zealand.

In 2000/01, the United States requested consultations and subsequently the establishment of a panel concerning Belgium's **administration of measures establishing customs duties on rice**. The US alleged that Belgian customs authorities had disregarded the transaction values associated with certain shipments of rice imported from the United States between 1 July 1997 and 31 December 1998, for purposes of establishing the relevant customs values and duties. Although the Belgian authorities approved the proffered transaction values prior to entry of the rice in question, Belgian customs authorities in November 2000 rejected the use of the same transaction values when assessing duties. The rejection of the proffered transaction value appeared to have been based *inter alia* on the application of an unpublished interpretative memorandum addressing the value to be assigned to specific, limited product characteristics. Belgium customs authorities applying this interpretative memorandum, which confined the category of product characteristics and the value to be assigned to such characteristics in establishing the customs value of the imports in question, were seen to have acted inconsistently with Belgium's obligations set forth in paragraphs 2, 4 and 5 of Article 2 of the Agreement on Technical Barriers to Trade. In addition, violations of GATT Articles I, II, VII, VIII, X and XI, the Customs Valuation Agreement, and the Agreement on Agriculture were alleged. A mutually satisfactory solution was found when the Belgian authorities, acting under EC law, redetermined the duties in dispute on the basis of new evidence.

6.3 AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

The SPS Agreement is essentially about *health* and *international trade*. International trade and travel have expanded significantly in the past 50 years. This has increased the movement of products that may pose health risks. The SPS Agreement recognises the need

for WTO members to protect themselves from the risks posed by the entry of pests and diseases, but also seeks to minimise any negative effects of SPS measures on trade.

The *health* aspect of the SPS Agreement basically means that WTO members can protect human, animal or plant life or health by applying measures to manage the risks associated with imports. The measures usually take the form of quarantine or food safety requirements.

Under the SPS agreement, a WTO member may employ trade restrictive measures for the purpose of protection of human life or health and of plant or animal health or life. These measures are known as sanitary and phytosanitory measures. The term sanitary refers to conditions of hygiene and health whereas the term phytosanitary refers to plant health.

The SPS Agreement has 14 Articles, containing the rights and obligations that WTO members have agreed to. The SPS Agreement also has three annexes giving definitions of various terms, and elaborating on certain obligations in the body of the SPS Agreement.

The key principles which govern the application of disciplines of SPS agreement are:

1. Harmonization
2. Equivalence
3. Appropriate level of protection
4. Risk Assessment
5. Regional conditions and
6. Transparency

Sanitary and Phytosanitary (SPS) measures are those which are applied to in order to

(1) to protect human life or health or animal life or health from risks arising from additives, contaminants, toxins or disease causing organisms in foods, beverages or feedstuffs

(2) Protect animal life or health or plat life or health from risks arising from the entry, establishment or spread of pests, diseases, disease carrying organisms or disease causing organisms;

(3) Protect human life or health from risks arising from diseases carried by animals, plants or their products or entry, establishment or spread of pests

(4) Prevent or limit other damages from the entry, establishment or spread of pests

Application of SPS measures

SPS measures may be applied by the member in the form of laws, rules, procedural requirements or regulations. Some of the illustrations are

(a) End-product criteria
(b) Process and Production Methods (PPMs)
(c) Testing, inspection, certification and approval procedures
(d) Quarantine treatment, including requirements for transport of animals or plants or requirements for material necessary for their survival during transport
(e) Statistical methods, sampling procedures and methods of risk assessment
(f) Packaging and labeling requirements directly related to food safety

The application of SPS measures are subject to certain limitations. They are

(1) A measure must be applied only to the extent necessary to protect human life or health, animal life or health or plant life or health.
(2) Measures must be based on scientific principles and must not be maintained without sufficient scientific evidence
(3) A measure must not be disguised and should not be used to hinder international trade
(4) There must not be nay discrimination between members with similar or identical conditions. This is a modified form of MFN. Here the principle allows discrimination among countries where different conditions prevail
(5) Measures must not be more trade restrictive than required to achieve an appropriate level of protection, taking into account technical and economic feasibility.

Conformity with International Standards

SPS measures applied by the member countries are expected to conform to international standards, guidelines and recommendations, if they exist. A member can opt for higher level of protection than the international standards if it has conducted an examination and evaluation of available scientific information and determined that international standards are sufficient to achieve an appropriate level of protection. Measures must be based on the assessment of risks, taking into account the risk assessment techniques developed by international organizations. If scientific information is sufficient, provisional measures may be applied by the member. But in such cases, the member must try to obtain additional information and must review the situation within reasonable period of time.

Implementation of SPS Agreement

Responsibility for implementing the SPS Agreement usually lies with the government departments and national repositories that have the expertise and information relevant to plant and animal health, as well as food safety matters. The implementing bodies typically include animal health and food safety authorities. A domestic regulatory framework covering the

work, responsibilities and powers of these bodies is needed, together with systems to enforce compliance. This encourages confidence in assessments and confidence in certificates issued in connection with SPS measures.

6.4 GENERAL PRINCIPLES OF SPS AGREEMENT

The central principles of harmonisation, equivalence, appropriate level of protection (ALOP), risk assessment, regional conditions and transparency are covered by specific Articles of the SPS Agreement.

Harmonisation (Art.3)

WTO members are entitled to determine their own SPS measures provided they are in accordance with the terms of the SPS Agreement. However, under the principle of harmonisation WTO members are encouraged to base their SPS measures on international standards, guidelines and recommendations, where they exist. The SPS Committee promotes and monitors international harmonisation. There are three international standard-setting bodies specifically mentioned in the SPS Agreement. They are

1. the International Plant Protection Convention (IPPC) dealing with plant health
2. the World Organisation for Animal Health (OIE) dealing with animal health
3. the Codex Alimentarius Commission (Codex) dealing with food safety.

WTO Members are encouraged to participate actively in the above bodies, which provide other forums for delivering technical assistance.

Equivalence (Art.4)

The SPS Agreement requires importing WTO members to accept the SPS measures of exporting WTO members as equivalent if the exporting country objectively demonstrates to the importing country that its measures achieve the importing country's ALOP. Typically, recognition of equivalence is achieved through bilateral consultations and the sharing of technical information.

Appropriate level of protection (Art.5)

According to the SPS Agreement the appropriate level of protection (ALOP) is the level of protection deemed appropriate by the WTO member to protect human, animal or plant life or health within its territory.

It is important to clearly distinguish between the ALOP established by a WTO member and the SPS measures. The ALOP is a broad objective. The SPS measures are established to attain that objective. The determination of the ALOP logically precedes the establishment of an SPS measure. Each WTO member has the right to determine its own

ALOP. However, in determining their ALOP, WTO members should take into account the objective of minimising negative trade effects. In addition, WTO members are required to apply the concept of ALOP consistently; i.e. they must 'avoid arbitrary or unjustifiable distinctions' that 'result in discrimination or a disguised restriction on international trade'.

Risk assessment (Art.5)

The SPS Agreement requires WTO members to base their SPS measures on a risk assessment, as appropriate to the circumstances. In conducting such risk assessments WTO members are required to take into account risk assessment techniques developed by relevant international organisations. The reason WTO members conduct a risk assessment is to determine the SPS measures to apply to an import in order to achieve their ALOP. However, the SPS measures which a WTO member adopts must not be more trade restrictive than required to achieve their ALOP, taking into account technical and economic feasibility.

In practical terms, a risk assessment is essentially the process of gathering scientific evidence and relevant economic factors on the risks involved in allowing a particular import to enter a country. An importing member is likely to seek information on matters such as the pests or diseases that might be associated with the commodity for which permission to import has been sought, and if they are present in the exporting country. The types of questions that might be asked include: Does the pest or disease occur in your country? Have the pests or diseases been controlled? Are they restricted to particular parts of the country? How effective are the procedures applied to ensure that products for export are free from pests, diseases and other contaminants?

Regional conditions (Art.6)

The SPS characteristics of a geographic region — be it all of a country, part of a Country, or all or parts of several countries — are referred to in the SPS Agreement as regional conditions. They can affect the risk posed to human, animal or plant life or health. Accordingly, the SPS Agreement requires WTO members to adapt their SPS Measures to the regional conditions from which the product originated and to which the product is destined. In particular, WTO members are required to recognise the concepts of pest/disease-free areas and areas of low pest/disease prevalence. Exporting WTO members claiming pest/disease-free areas or areas of low pest/disease prevalence must demonstrate to the importing WTO member that such areas are, and are likely to remain, pest/disease-free areas or areas of low pest/disease prevalence.

Transparency (Art.7)

The principle of transparency in the SPS Agreement requires WTO members to provide information on their SPS measures and to notify changes in their SPS measures. WTO members are also required to publish their SPS regulations. The notification requirements are met through a national notification authority. Each WTO member must also nominate a national enquiry point to deal with SPS related queries from other WTO members. A single agency may perform both notification and enquiry functions.

SPS committee

The SPS Agreement is administered by the Committee on Sanitary and Phytosanitary Measures (the 'SPS Committee'), in which all WTO members can participate. The SPS Committee is a forum for consultations where WTO members regularly come together to discuss SPS measures and their effects on trade, to oversee implementation of the SPS Agreement, and to seek to avoid potential disputes.

6.5 TRADE AND ENVIRONMENT

The linkages between trade, environment and development are very significant. The debating surrounding environment protection and WTO rules has created hue and cry all over the world. Whether free trade is harming the environment and WTO rules are insufficient to protect the environment? There are three commonly opposing positions relating to trade related environmental measures.

1. Objective of economic success through Free Trade: Economic development is necessary and free trade is an essential part of the strategy for growth. Differing environmental standards between countries are legitimate source of comparative advantage and should not be the basis for restricting imports from other countries. Environmentally motivated product bans and other restrictions on trade hinder economic activity and are often, used to protect domestic industry.
2. Objective of Environmental Protection through Tough Standards: All economic activities have environmental impacts and where these impacts are too high, it is legitimate to prohibit those activities. Nation states have a right to improve the well being of their citizens through higher environmental standards and this will require regulations of products and processes.
3. Bothe growth and Environment Protection are Important : Environmental protection is central to sustained economic growth. Indeed, many of the major economic opportunities of the future are to be found in environmental protected industries.

Environmental protection supports and may even create growth and is to be encouraged, provided it does not overly restrict growth of free trade.

Even though there are no specific measures for the protection of environment in free trade, WTO provides a framework in two agreement: (1) Agreement on Technical Barriers to trade which prescribes standards, technical regulations and conformity assessment procedures. (2) Agreement on Sanitary and Phytosanitary measures regulates measures aimed at protecting human, animal and plant life or health from risks of plant and animal-borne pests.

Committee on Trade and Environment (CTE)

The WTO also supports sustainable development and the environment through its specialized committees and bodies. One unique institutional venue is the Committee on Trade and Environment (CTE). As a forum for dialogue on trade and the environment, the Committee is an incubator for ideas on how to move the discussion forward. Already, this is bearing fruit. Some issues first raised in the CTE have become fully-fledged negotiations — for instance, on fisheries subsidies and on the relationship between the WTO and multilateral environmental agreements (MEAs). Other WTO bodies are also important. For example, the committee administering the Technical Barriers to Trade Agreement (which deals with regulations, standards, testing and certification procedures) is where governments share information on actions they are taking and discuss how some environmental regulations may affect trade.

The Doha Development Agenda and the environment

The Doha Round of negotiations gives members a chance to achieve an even more efficient allocation of resources on a global scale through the continued reduction of obstacles to trade. The Round is also an opportunity to pursue win-win-win results for trade, development and the environment. For example, the Doha Round is the first time environmental issues have featured explicitly in the context of a multilateral trade negotiation and the overarching objective is to enhance the mutual supportiveness of trade and environment. Members are working to liberalize trade in goods and services that can benefit the environment. They are also discussing ways to maintain a harmonious co-existence between WTO rules and the specific trade obligations in various agreements that have been negotiated multilaterally to protect the environment. Other parts of the Doha negotiations are also relevant to the environment, for example aspects of the agriculture negotiations and also

disciplines on fisheries subsidies. The Doha Development Agenda also has a section specifying the priority items in the CTE's regular work.

6.6 PRECAUTIONARY PRINCIPLE, ENVIRONMENTAL PROTECTION AND WTO

Under environment protection laws the principle of precaution (Precautionary Principle) is invoked frequently when there is a doubt as to risks even though there is no sufficient scientific basis. Principle 19 of Rio Declaration states that "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

The "precautionary principle" is a notion which supports taking protective action before there is complete scientific proof of a risk; that is, action should not be delayed simply because full scientific information is lacking. The "precautionary principle" or precautionary approach has been incorporated into several international environmental agreements, and some opine that it is now recognized as a general principle of international environmental law.

Use of Precautionary Principle in WTO Law

WTO regime is facing challenges in finding appropriate balance between trade liberalization objectives and environmental protection measures. Concerns over the environmental protection under WTO trade rules was first raised by the two famous *Tuna Dolphin*[1] reports decided by panels under the GATT 1947 system. Despite the fact that they were not adopted and therefore had no formal effect, the reports were released to the public to be met by sustained and severe criticism from environmental groups and commentators. This 'wake-up call' for environmentalists came too late to have much influence on the Uruguay Round negotiations and the WTO Agreement reflects very little explicit recognition of the need to give weight to environmental values or interests beyond that already contained in the GATT 1947.

Preamble of the WTO highlights sustainable development as one of its objectives which is linked to environmental protection. The SPS agreement has several provisions which are directly linked to environmental protection. In the fields of food safety, plant and animal health protection, the need for taking precautionary actions in the face of scientific

uncertainty has long been widely accepted. There may be instances when a sudden outbreak of an animal disease, for example, is suspected of being linked to imports, and trade restrictions must be immediately imposed while further information about the source of the outbreak and its extent are gathered. The discipline of risk assessment, one of the basic obligations of the SPS Agreement, was developed to guide action in the face of incomplete knowledge about risks to health. It focuses on probabilities of hazards occurring, and the probable consequences, because complete knowledge is very rare. Furthermore, it is virtually impossible to scientifically prove the "safety" of a food or product, rather scientists seek evidence of any harm. In the following section the discussion will focus on three landmark cases illustrating the WTO approach and its normative implications for the application of the precautionary principle.

Case – I :The *Asbestos* case

In this case the dispute was between France and Canada regarding banning of import of materials containing asbestos. The *Asbestos* case concerned a French measure which prohibited the sale or use of asbestos and asbestos-containing materials. The measure was intended to eliminate disease caused by exposure to those materials. It did, however, permit the use of non-asbestos materials which served the same purpose of fire resistance and which also posed a risk to human health, but less serious.

Canada brought a complaint on the grounds, *inter alia*, that the French measure violated Article III:4 by discriminating between like products.[2] It argued that all fire-retarding materials should be treated as 'like' for this purpose. The established criteria for evaluating likeness are the property, nature and quality of the products, their end-uses, consumers' tastes and habits, and tariff classification.[3] The Panel, however, focused on the competitive relationship between the products and, because they all performed the same sort of function, it found that discrimination between them constituted a violation of Article III:4. The Panel concentrated on the similarities between the products in terms of their properties, nature and quality. Most importantly it declined to consider risk to human health or consumer tastes and habits. The Appellate Body, on the other hand, took a more measured approach which encompassed a wider range of considerations. It is interesting to note that it did not suggest a change in the criteria. The problem was that the Panel had only given weight to market

access, application and substitutability, and had subsumed the test of end-use into this analysis.

The Appellate Body accepted the idea that there must be a competitive relationship but not that it should be the overriding consideration. It insisted that all the evidence should be weighed in the light of all the criteria. This approach identified two points that are of particular relevance to the question of whether the precautionary principle could be applied when determining whether products were like. First, it found that difference in physical properties could include the capacity to pose a threat to human health. Second, it found that consumer tastes and habits could be determinative, and risk to human health might well be a factor in the way in which consumers approached a product.

Although the Panel in the *Asbestos* case found that the French measure had violated Article III:4 but was excused by virtue of Article XX(b), and the Appellate Body had already found that the measure had not been shown to violate Article III:4, the Appellate Body considered it necessary to analyse the application of Article XX in the circumstances of the case. Article XX(b) permits measures which are "necessary to protect human, animal or plant life or health". The first point that has to be decided is whether the measure is aimed at a policy protected by the paragraph. In the case of asbestos, it was accepted that there was a risk of a "very serious nature" and the French measure was clearly designed to protect human health.

Case – II – The Shrimp Case

The *Shrimp* case concerned a US import ban on shrimp caught in nets without devices to allow turtles to escape. This was a straightforward quantitative restriction which violated Article XI. The only question was whether it could be saved under Article XX(g) as a measure relating to the conservation of exhaustible natural resources and, if so, whether it could also satisfy the condition in the chapeau of Article XX that it must not constitute arbitrary or unjustifiable discrimination or a disguised trade restriction. The Panel found that the US measure constituted unjustifiable discrimination under the chapeau largely because to allow unilateral conditions to impede market access would undermine the multilateral trading system. The Appellate Body reversed this finding and, in so doing, raised a number of questions about the relationship between the WTO trade regime and environmental law, including the precautionary principle.

The first question was whether the term "exhaustible natural resources" was intended only to refer to non-renewable resources such as minerals, or whether it could include animal

species. In previous case law, the phrase has been interpreted liberally to include non-endangered species and clean air. In the *Shrimp* case, the turtles in question were recognised as being endangered. There are many good arguments for an interpretation which excludes renewable resources, not least of which is the argument that to make the phrase cover all resources, whether renewable or non-renewable, renders the word "exhaustible" superfluous. There is also some evidence from the drafting history of Article XX that it had been intended to refer to non-renewable resources such as minerals. However, the Appellate Body chose to take a modern view, one which recognised the validity of environmental concerns. It did so by adopting a particular interpretative technique which allows the meaning of terms in a treaty to evolve rather than relying on the meaning of the member States at the time of drafting. This was buttressed by a reference in the preamble of the WTO Agreement to sustainable development which provided evidence that the drafters of the WTO Agreement intended the term "exhaustible" to be interpreted in the light of contemporary concerns about conservation. Even more importantly, the idea that the term exhaustible could be interpreted in an evolutionary fashion meant that the Appellate Body was entitled to refer to state practice outside the WTO. Although the precautionary principle was not specifically mentioned, this approach to treaty interpretation has obvious normative implications for its application. Indeed, it is arguable that the reasoning in *Shrimp* has the effect of applying the precautionary principle since it allowed the accommodation of modern concerns about potential threats to species and uncertainty about the implications of their extinction to humans and the environment in general.

The second aspect of Article XX(g) which is relevant to the precautionary principle is the condition that the measure must relate to conservation. Early jurisprudence took the view that this should be interpreted narrowly, and unilateral measures designed to promote conservation were not accepted because they were indirect. The Appellate Body has now reasserted the normal meaning of the words and requires only that there is a "substantial relationship" which is not "merely incidentally or inadvertently aimed" at conservation. In *Shrimp*, they described it as a "close and genuine relationship between ends and means". This test focuses more on the problem of avoiding disguised protectionism than insisting on the least trade-restrictive effect as is the case when applying the condition of "necessary" in Article XX(b). It also says nothing about the level of protection chosen or the risk identified which constitutes the objective of the measure. One would reasonably expect some objective evidence that conservation is the intention behind the measure, but beyond that, the condition

of “relating to” is not restrictive. In the particular case of *Shrimp*, the Appellate Body accepted that the US measure was designed to influence other States to change their environmental policies but since it was specifically aimed at its stated objective and allowed the importation of shrimp under reasonable circumstances, it satisfied the proportionality test.

Case III – The Hormones Case

The dispute in *Hormones* arose because of an import ban imposed by the EC on the importation of meat and meat products from animals treated with growth-promoting hormones. The case has been extensively commented on because it is the only case in which the precautionary principle has been explicitly discussed, but it is of limited use to our understanding of the wider application of the precautionary principle in WTO law. The dispute was decided under the SPS Agreement which is designed to elaborate upon the meaning of Article XX (b) of the GATT. The SPS provides for the right to take measures to protect human, animal or plant life or health, but only in so far as they are necessary, based on scientific principles, and are not maintained if there is insufficient evidence. Member States are encouraged to adopt international standards by the fact that national standards that conform with international standards are deemed to be necessary for the protection of human, animal or plant life or health. However, Article 3.3 permits Member States to introduce measures which give a higher level of protection than would be provided by international standards if there is scientific justification for doing so, or if the higher level of protection can be justified according to the conditions contained in Article 5.1-8. Article 5.1 requires that national measures be based on a risk assessment taking account of risk assessment techniques developed by relevant international organisations, and Article 5.2 requires the risk assessment to take into account, *inter alia*, available scientific evidence. The emphasis is on objective evidence justifying such cases. However, Article 5.7 provides that in cases where there is insufficient scientific evidence, it is possible for Member States to introduce provisional measures provided that they are based on what relevant information is available and that the Member State seeks to obtain the necessary additional information to be able to make a more objective assessment. This re-assessment must occur within a reasonable period of time.

The EC argued that it was entitled to set its own level of protection by reference to the precautionary principle and that it was a constituent part of the risk assessment required in order setting a higher standard of protection than internationally agreed. The Panel, however, found that the precautionary principle only applied to provisional measures and, whether it was a principle of international customary law or not, it could not override the wording of Article

5.1 and 2 which required measures pursuing a higher level of protection to be based on risk assessment and scientific and other objective evidence. The Appellate Body agreed with this analysis. It pointed out that the precautionary principle had not been written into the SPS Agreement as an exception. It was however reflected in the wording of Article 5.7 permitting provisional measures in cases where there was insufficient scientific evidence to enable a more objective risk assessment. It added that the precautionary principle was also reflected in the preamble and in Article 3.3 permitting Member States to impose a higher level of protection than contained in international standards. Thus a Member State could base its decision to seek a higher level of protection on the need to be cautious. But measures designed to provide a higher level of protection than normal still had to satisfy the requirements of Article 5.1-2. The precautionary principle could not be used to change the clear meaning of the provisions concerning the need for risk assessment and scientific and other objective evidence. Since the EC explicitly excluded reliance on the right to introduce provisional measures under Article 5.7, it was bound by the obligation to provide an objective risk assessment based on available scientific evidence.

This case is interesting because of its explicit discussion of the precautionary principle but ironically it is the least useful of the three cases analysed here because it finds only that there is a *lex specialis* applicable in cases where a more general version of the precautionary principle might have applied. Arguably, a more fruitful subject for analysis would have been the relationship between the right to choose a higher level of protection than normal under Article 3.3 and the risk assessment to be carried out under Article 5.1.

6.7 SUMMARY

Technical Barriers are considered as import standards or regulations that reflect country’s concern and valuation for safety, health, food quality and environment.Under the SPS agreement, a WTO member may employ trade restrictive measures for the purpose of protection of human life or health and of plant or animal health or life.The “precautionary principle” is a notion which supports taking protective action before there is complete scientific proof of a risk; that is, action should not be delayed simply because full scientific information is lacking.

6.8 KEYWORDS

1. Environment
2. Phytosanitary

3. Precautionary Principle
4. Technical Barriers

6.9 SELF ASSESSMENT QUESTIONS

1. What is TBT? Explain the general provisions of Agreement on TBT

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2. Discuss the Key principles under SPS Agreemen

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3. What is Precautionary Principle? Explain its application in environment protection.

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4. Write a Note on Trade and Environment

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5. Write a note on (a) Asbestos Case (b) Shrimp case (3) Harmones case

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6.10 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT –7: GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

Structure:

7.0 Objectives

7.1 Introduction

7.2 GATS Agreement

7.3 The Architecture of the GATS

7.4 Council for Trade in Services

7.5 Financial Services

7.6 Telecommunication Services

7.7 India and GATS

7.8 GATS - Service Classification

7.9 Summary

7.10 Keywords

7.11 Self Assessment Questions

7.12 References

7.0 OBJECTIVES

1) To understand the meaning of Trade in Services
2) To outline the provisions of GATS Agreement
3) To highlight Financial and Telecommunication services disciplines
4) To understand the implications of GATS on India

7.1 INTRODUCTION

The GATS was formulated as a sort of a framework agreement for the entire landscape of the services trade. *Recognizing* the growing importance of trade in services for the growth and development of the world economy, the area of trade in services are prescribed in the GATS. It is an agreement outside GAAT 1994, but is a constituent part of the WTO agreements and is inscribed Annex IC in the WTO agreement.

7.2 GATS AGREEMENT

The GATS agreement consists of VI parts, 29 articles and 8 annexes.

Under Art.2 of the GATS agreement, Trade in services is defined as the supply of a service:

(a) From the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

(c) By a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

7.3 THE ARCHITECTURE OF THE GATS

The structure of the GATS broadly comprises the following four main elements:

- a set of general provisions, principles and rules that largely applies across the board to all measures affecting trade in services.
- a set of 'specific commitments' that applies only to service sectors and sub-sectors that are enlisted in the GATS schedule of a Member country of the WTO.
- an understanding that periodical negotiations will be undertaken with the aim of progressive liberalisation of trade in services.
- a set of attachments and annexes that takes into account sectoral specificities and ministerial decisions pertaining to the implementation of the Agreement.

General Obligations and Disciplines

Art.II to Art.XV of GATS agreement impose number of general obligations on Members similar to that in the GATT. GATS require MFN treatment for all countries. GATS advocates transparent decision making with respect to trade in services. Each Member shall publish promptly, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of the agreement.

International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published. Each Member shall inform Council for trade for any change in existing rules or administrative guidelines or laws at least once in a year. GATS allows countries to enter into regional integration agreements liberalizing trade in services as long as they have substantial sect oral coverage and eliminate substantially all discrimination between parties. A Member which is a party to any regional integration agreements may not seek compensation for trade benefits that may not seek compensation for trade benefits that may accrue to any other member from such agreements. GATS shall not present any of its Members from being a party to an agreement establishing full integration of the labour markets between or among parties to such an agreement.

GATS stipulate domestic regulation of services to be based on objective criteria such as competence to provide the service, should not be more restrictive than necessary to ensure the quality of a service. Members may prescribe educational qualifications or experience for Foreign Service providers. Countries should ensure that their monopoly service providers do not abuse their position in a manner inconsistent with the Member's commitments. To eliminate anti-competitive business practices, members are encouraged to enter into consultations. There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination.

Except under the circumstances of serious balance of payments, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments. In the event of serious balance payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. GATS exempts' laws, regulations or requirements governing the procurements by government agencies of services purchased for governmental purposes and not with a view to commercial resale.

Specific Commitments

Specific commitments are those commitments undertaken by the individual Members in specific sectors of services. In each of the selected sectors, a Member will have taken commitment in three areas (a) market access (b) national treatment (c) other commitments. The market access requirement prohibits limitations on the number of service suppliers; limitations on the total value of service transactions or the total number of service operations, limitations on the number of natural persons employed in a particular sector, restrictions on the type of legal entity through which a service may be supplied, limits on the participation of foreign capital in a service sector.

National treatment means that the same laws and regulations must apply, to services, provided by foreign suppliers as domestic service suppliers. Members may negotiate commitments with respect to measures affecting trade in service including those regarding qualifications, standards or licensing matters. The above disciplines are covered in the GATS agreement from Art.XVI to XVIII.

Progressive Liberalisation

The third important element of the GATS is a set of provisions dealing with 'Progressive Liberalisation'. Article XIX.1 mandates entering into successive rounds of negotiations, beginning no later than five years from the date of entry into force of the WTO Agreement and periodically thereafter. Such negotiations should be aimed at achieving a progressively higher level of liberalisation. However, Article XIX.2 clearly states that the process of liberalisation 'shall' take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. GATS also incorporates certain flexibilities for developing country Members, which allow them to open fewer sectors, liberalise fewer types of transactions, and increase their MA commitments in compatibility with their development situation. It is further stipulated that for each round, negotiating guidelines and procedures shall be established for which an assessment of trade in services is to be carried out by the Council for Trade in Services. It is required that the negotiating guidelines 'shall' establish modalities for the treatment of autonomous liberalisation undertaken by the Members since previous negotiations, as well as for the special treatment for least-developed countries. A GAT further specifies three approaches of negotiations, which may be adopted towards achieving the goal of progressive liberalisation. These are: bilateral, plurilateral and multilateral.

Annexes and Attachments

The fourth important element of the GATS is a series of annexes and attachments added at the end of the legal text. The annexes comprise regulatory principles agreed upon in specific sectors and decisions on specific issues. These include annexes on MFN exemptions, movement of natural persons, air transport services, financial services, maritime transport services and basic telecommunications. The attachments on the other hand, consist of a series of Ministerial declarations pertaining to the implementation of the GATS. These include decisions on: Institutional Arrangements; Dispute Settlement Procedures; Services Trade and the Environment; Movement of Natural Persons; and Professional Services, among others. The purpose of these annexes and attachments is to outline procedural and implementation issues in these areas and to establish a timeframe for future discussions on specific issues.

Pros and Cons of the GATS Flexibilities

The coverage of the GATS is in principle much broader than that of the GATT. In this sense, the GATS is a more general Agreement than the GATT. However, this breadth of coverage in the GATS has been secured at a cost, namely, the ease by which a particular service sector can be excluded from the purview of the major GATS disciplines.19 Under the GATT, all products are covered by general provisions and exclusion of products from such coverage occurs only in special circumstances. Under the GATS, however, many of the most important provisions (e.g. National Treatment, Market Access, Domestic Regulation, etc.) apply only to the service sectors that are specified in the schedule of a Member country. For these provisions, the service sectors are negotiated in, rather than out, which is regarded as a much less liberalising procedure compared to the GATT. Moreover, unlike the GATT, even the MFN principle can be implemented under the GATS on a conditional rather than an unconditional basis. All these flexibilities make the GATS a more liberal agreement than the GATT. The 'bottom-up' approach adopted by the GATS leaves sufficient room for the Member countries to undertake trade liberalisation in services at their own terms and pace. At least legally there is no compulsion on a Member country to open up a particular sector or a particular mode of supply if there are domestic sensitivities and concerns surrounding the potential impact of such an opening-up. In this regard, the GATS attempts to strike a balance between commercial interests on the one hand and regulatory concerns and public policy objectives of the Member countries on the other.

Notwithstanding the scope of retaining sufficient policy space provided by the flexibilities embedded in the GATS, there are certain major drawbacks associated with these

flexibilities from the point of view of progressive liberalisation of the services trade - one of the prime objectives of the GATS. For instance, given the scope of revoking MFN exemptions together with the positive listing of sectors and the practice of scheduling commitments by mode of supply for each sector, specific sectoral interests and modal preferences are likely to dominate the negotiating process. Hence, the outcome is likely to be biased towards certain sectors and modes of supply.

7.4 COUNCIL FOR TRADE IN SERVICES

The Council for Trade in Services operates under the guidance of the General Council and is responsible for overseeing the functioning of the General Agreement on Trade in Services (GATS). It's open to all WTO members, and can create subsidiary bodies as required.

7.5 FINANCIAL SERVICES

In any country, the financial services sector is typically made up of banks, trust and loan companies, credit unions, life and health insurance companies, property and casualty insurance companies, securities traders and exchanges, investment fund companies, pension funds, finance and leasing companies, insurance agents and brokers, and a myriad of auxiliary service providers, such as independent financial advisors, actuaries, and intermediaries. The General Agreement on Trade in Services (GATS) Annex on Financial Services defines a 'financial service' as 'any service of a financial nature offered by a financial service supplier of a Member'. Financial services include two broad categories of services: insurance and insurance-related services and banking and other financial services. These two categories are further broken down into the following:

(a) Insurance and insurance-related services
Insurance and insurance-related services cover life and non-life insurance, reinsurance, insurance intermediation such as brokerage and agency services, and services auxiliary to insurance such as consultancy and actuarial services.

(b) Banking and other financial services
This category includes all banking and other financial services, such as the acceptance of deposits and other repayable funds from the public, lending of all types (e.g. consumer credit, mortgage credit, factoring and financing of commercial transaction), financial leasing, all payment and money transmission services (e.g. credit, charge and debit cards, travellers' cheques and bankers' drafts), guarantees and commitments, securities trading,

underwriting, money broking, asset management, settlement and clearing services, provision and transfer of financial information, and advisory, intermediation and other auxiliary financial services.

7.6 TELECOMMUNICATION SERVICES

Telecommunications services are a global market worth over US$ 1.5 trillion in revenue. Mobile services account for roughly 40 per cent of this, while mobile subscribers worldwide currently outnumber the use of fixed telephone lines by more than two to one. Over the past decade, the market has witnessed far-reaching changes, with the introduction of competition into a sector that was once principally a monopoly.

GATS require countries which undertake commitments on public telecommunications networks to provide foreign suppliers with access to those networks by allowing them to attach terminals and equipment which interferes with the network and to use operating protocols of their choice. A country may restrict access to the telecommunications networks only to protect their integrity or to ensure availability of services to the public. Although GATS only requires equal treatment between domestic and foreign players, foreign players dominate the telecommunication sector because of the superior financial power.

7.7 INDIA AND GATS

The General Agreement on Trade in Services (GATS) is the first multilateral agreement, under the auspices of Uruguay Round, to provide legally enforceable rights to trade in a wide range of services along with their progressive liberalization. Though very little liberalization was actually achieved, the negotiations on trade in services established the institutional structure for negotiating liberalization in the future. Many of the developing countries have not been very receptive to the conception of GATS mainly due to non-existence of such rules in the past and also because many of the service sectors had always enjoyed heavy protection. The GATS provides developing countries with an opportunity to integrate into the global economy through adopting more liberal policies with regard to trade in services. Both the developing as well as the developed countries would gain through liberalization of various service-sectors. In fact, inefficiencies in the service-sectors of a developing economy impact negatively on the export competitiveness of its agriculture and manufacturing sectors, through forward linkages, thus becoming one of the contributory factors leading to unfavorable balance of current account.

Many developing countries including India and Brazil were initially opposed to the idea of inclusion of services in the Uruguay round of negotiations. Their apprehensions were based on number of considerations.

1. They feared that they have not acquired adequate knowledge on various services and have not understood impact of liberalization on them.
2. Services like banking, transport and insurance are still in developing stage, hence they have to be protected. Banking, service and transport services provided by the Governments as welfare measures to achieve the social objective.
3. Service sector is dominated by transnational companies.
4. Developing countries wanted labour to be included in the services
5. Since many developing countries suffer from adverse balance of payments in a large number of services, the liberalization of trade in services would further, aggregate their balance of payments deficits.

Developing countries were very apprehensive about the proposal to liberalization trade in services. But the differences between US and EC, on this issue left the service sector largely unaffected. India's negotiating position on services has undergone a paradigm shift since the Uruguay Round (UR). From being a leading opponent of the GATS in the early stages, India has now emerged as one of the forerunners of the services trade liberalisation under the GATS. This more recent negotiating stance of India on services is partly attributable to the growing importance of the services sector in its economy. With a vast pool of educated and skilled workers in its workforce, the country also has a huge offensive interest in the export of services. Hence India is aggressively participating in the ongoing GATS 2000 negotiations predominantly with the aim of securing its offensive interests in the different modes of the services trade. Although India's 'Initial Offer', submitted in January 2004, was rather conservative, India came out with an ambitious 'Revised Offer' in August 2005.

7.8 GATS - SERVICE CLASSIFICATION

BOX 1

Services Sectoral Classification List (W/120)

Broad Sectors and Sub-sectors

1. **Business Services**
   - A. Professional services
   - B. Computer and related services
   - C. Research and development services
   - D. Real estate services
   - E. Rental/Leasing services without operators
   - F. Other business services
2. **Communication Services**
   - A. Postal services
   - B. Courier services
   - C. Telecommunication services
   - D. Audiovisual services
   - E. Other
3. **Construction and Related Engineering Services**
   - A. General construction work for buildings
   - B. General construction work for civil engineering
   - C. Installation and assembly work
   - D. Building completion and finishing work
   - E. Other
4. **Distribution Services**
   - A. Commission agents' services
   - B. Wholesale trade services
   - C. Retailing services
   - D. Franchising
   - E. Other
5. **Educational Services**
   - A. Primary education services
   - B. Secondary education services
   - C. Higher education services
   - D. Adult education
   - E. Other education services
6. **Environmental Services**
   - A. Sewage services
   - B. Refuse disposal services
   - C. Sanitation and similar services
   - D. Other
7. **Financial Services**
   - A. All insurance and insurance-related services
   - B. Banking and other financial services (excl. insurance)
   - C. Other
8. **Health-related and Social Services (other than those listed under 1.A.h-j.)**
   - A. Hospital services
   - B. Other human health services
   - C. Social services
   - D. Other
9. **Tourism and Travel-related Services**
   - A. Hotels and restaurants (incl. catering)
   - B. Travel agencies and tour operators services
   - C. Tourist guides services
   - D. Other
10. **Recreational, Cultural and Sporting Services (other than audio-visual services)**
    - A. Entertainment services (including theatre, live bands and circus services)
    - B. News agency services
    - C. Libraries, archives, museums and other cultural services
    - D. Sporting and other recreational services
    - E. Other
11. **Transport Services**
    - A. Maritime transport services
    - B. Internal waterways transport
    - C. Air transport services
    - D. Space transport
    - E. Rail transport services
    - F. Road transport services
    - G. Pipeline transport
    - H. Services auxiliary to all modes of transport
    - I. Other transport services
12. **Other Services not Included Elsewhere**

Source: WTO Document MTN.GNS/W/120.

7.9 SUMMARY

GATS agreement lays down the procedures and disciplines for trade in services under WTO Regime. Developing countries showed their reluctance to GATS in its initial stages of formulation.India's negotiating position on services has undergone a paradigm shift since the Uruguay Round (UR). From being a leading opponent of the GATS in the early stages, India has now emerged as one of the forerunners of the services trade liberalisation under the GATS.

7.10 KEYWORDS

1. GATS
2. Financial Services
3. Telecommunication Services
4. Uruguay Round

7.11 SELF ASSESSMENT QUESTIONS

1. Describe the architecture of GATS

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2. Examine the implications of GATS on India's service sector

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3. Discuss the issues of developing countries in accepting GATS

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4. Write a note on Council for Trade in Services

5. Write a note on (a) Financial Services (b) Telecommunication services

7.12 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn

7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT – 8: TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY (TRIPS)

Structure

8.0 Objectives

8.1 Introduction

8.2 Salient Features of TRIPS Agreement

8.3 Copyright

8.4 Trademarks

8.5 Geographical Indications

8.6 Industrial Designs

8.7 Patents

8.8 Lay-out Design of Integrated Circuits

8.9 Protection of Undisclosed Information

8.10 Control of Anti-competitive practices in Contractual Licenses

8.11 India and TRIPS

8.12 Compulsory Licensing under TRIPS

8.13 Summary

8.14 Keywords

8.15 Self Assessment Questions

8.16 References

8.0 OBJECTIVES

1) To discuss IPRs covered under TRIPS Agreement
2) To understand the compulsory licensing under TRIPS
3) To explain India's response to TRIPS Agreement
4) To analyze case laws in the light of TRIPS obligations

8.1 INTRODUCTION

The TRIPS Agreement, which came into effect on 1 January 1995, is the most comprehensive multilateral agreement on intellectual property. Along with Goods and services, intellectual property is also made part of the international trade. The areas of intellectual property that it covers are: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data.

8.2 SALIENT FEATURES OF TRIPS AGREEMENT

The three main features of the Agreement are:

- **Standards**. In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries. The relevant provisions are to be found in Articles 2.1 and 9.1 of the TRIPS Agreement, which relate, respectively, to the Paris Convention and to the Berne Convention. Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or

were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris-plus agreement.

- **Enforcement**. The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all IPR enforcement procedures. In addition, it contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.
- **Dispute settlement**. The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.

In addition the Agreement provides for certain basic principles, such as national and most-favoured-nation treatment, and some general rules to ensure that procedural difficulties in acquiring or maintaining IPRs do not nullify the substantive benefits that should flow from the Agreement. The obligations under the Agreement will apply equally to all Member countries, but developing countries will have a longer period to phase them in. Special transition arrangements operate in the situation where a developing country does not presently provide product patent protection in the area of pharmaceuticals. The TRIPS Agreement is a minimum standards agreement, which allows Members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.

Certain general provisions

As in the main pre-existing intellectual property conventions, the basic obligation on each Member country is to accord the treatment in regard to the protection of intellectual property provided for under the Agreement to the persons of other Members. Article 1.3 defines who these persons are. These persons are referred to as “nationals” but include persons, natural or legal, who have a close attachment to other Members without necessarily being nationals. The criteria for determining which persons must thus benefit from the treatment provided for under the Agreement are those laid down for this purpose in the main pre-existing intellectual property conventions of WIPO, applied of course with respect to all WTO Members whether or not they are party to those conventions. These conventions are the

Paris Convention, the Berne Convention, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty).

Articles 3, 4 and 5 include the fundamental rules on national and most-favoured-nation treatment of foreign nationals, which are common to all categories of intellectual property covered by the Agreement. These obligations cover not only the substantive standards of protection but also matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in the Agreement. While the national treatment clause forbids discrimination between a Member's own nationals and the nationals of other Members, the most-favoured-nation treatment clause forbids discrimination between the nationals of other Members. In respect of the national treatment obligation, the exceptions allowed under the pre-existing intellectual property conventions of WIPO are also allowed under TRIPS. Where these exceptions allow material reciprocity, a consequential exception to MFN treatment is also permitted (e.g. comparison of terms for copyright protection in excess of the minimum term required by the TRIPS Agreement as provided under Article 7(8) of the Berne Convention as incorporated into the TRIPS Agreement). Certain other limited exceptions to the MFN obligation are also provided for.

The general goals of the TRIPS Agreement are contained in the Preamble of the Agreement, which reproduces the basic Uruguay Round negotiating objectives established in the TRIPS area by the 1986 Punta del Este Declaration and the 1988/89 Mid-Term Review. These objectives include the reduction of distortions and impediments to international trade, promotion of effective and adequate protection of intellectual property rights, and ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. These objectives should be read in conjunction with Article 7, entitled “Objectives”, according to which the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Article 8, entitled “Principles”, recognizes the rights of Members to adopt measures for public health and other public interest reasons and to prevent the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement. **Substantive standards of protection**

8.3 COPYRIGHT

During the Uruguay Round negotiations, it was recognized that the Berne Convention already, for the most part, provided adequate basic standards of copyright protection. Thus it was agreed that the point of departure should be the existing level of protection under the latest Act, the Paris Act of 1971, of that Convention. The point of departure is expressed in Article 9.1 under which Members are obliged to comply with the substantive provisions of the Paris Act of 1971 of the Berne Convention, i.e. Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members do not have rights or obligations under the TRIPS Agreement in respect of the rights conferred under Article 6*bis* of that Convention, i.e. the moral rights (the right to claim authorship and to object to any derogatory action in relation to a work, which would be prejudicial to the author's honour or reputation), or of the rights derived therefrom. The provisions of the Berne Convention referred to deal with questions such as subject-matter to be protected, minimum term of protection, and rights to be conferred and permissible limitations to those rights. The Appendix allows developing countries, under certain conditions, to make some limitations to the right of translation and the right of reproduction. In addition to requiring compliance with the basic standards of the Berne Convention, the TRIPS Agreement clarifies and adds certain specific points.

Article 9.2 confirms that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 10.1 provides that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). This provision confirms that computer programs must be protected under copyright and that those provisions of the Berne Convention that apply to literary works shall be applied also to them. It confirms further, that the form in which a program is, whether in source or object code, does not affect the protection. The obligation to protect computer programs as literary works means e.g. that only those limitations that are applicable to literary works may be applied to computer programs. It also confirms that the general term of protection of 50 years applies to computer programs. Possible shorter terms applicable to photographic works and works of applied art may not be applied.

Article 10.2 clarifies that databases and other compilations of data or other material shall be protected as such under copyright even where the databases include data that as such are not protected under copyright. Databases are eligible for copyright protection provided

that they by reason of the selection or arrangement of their contents constitute intellectual creations. The provision also confirms that databases have to be protected regardless of which form they are in, whether machine readable or other form. Furthermore, the provision clarifies that such protection shall not extend to the data or material itself, and that it shall be without prejudice to any copyright subsisting in the data or material itself.

Article 11 provides that authors shall have in respect of at least computer programs and, in certain circumstances, of cinematographic works the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. With respect to cinematographic works, the exclusive rental right is subject to the so-called impairment test: a Member is excerpted from the obligation unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, the obligation does not apply to rentals where the program itself is not the essential object of the rental.

According to the general rule contained in Article 7(1) of the Berne Convention as incorporated into the TRIPS Agreement, the term of protection shall be the life of the author and 50 years after his death. Paragraphs 2 through 4 of that Article specifically allow shorter terms in certain cases. These provisions are supplemented by Article 12 of the TRIPS Agreement, which provides that whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

Article 13 requires Members to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. This is a horizontal provision that applies to all limitations and exceptions permitted under the provisions of the Berne Convention and the Appendix thereto as incorporated into the TRIPS Agreement. The application of these limitations is permitted also under the TRIPS Agreement, but the provision makes it clear that they must be applied in a manner that does not prejudice the legitimate interests of the right holder.

Related rights

The provisions on protection of performers, producers of phonograms and broadcasting organizations are included in Article 14. According to Article 14.1, performers shall have the possibility of preventing the unauthorized fixation of their performance on a phonogram (e.g. the recording of a live musical performance). The fixation right covers only aural, not audiovisual fixations. Performers must also be in position to prevent the reproduction of such fixations. They shall also have the possibility of preventing the unauthorized broadcasting by wireless means and the communication to the public of their live performance. In accordance with Article 14.2, Members have to grant producers of phonograms an exclusive reproduction right. In addition to this, they have to grant, in accordance with Article 14.4, an exclusive rental right at least to producers of phonograms. The provisions on rental rights apply also to any other right holders in phonograms as determined in national law. This right has the same scope as the rental right in respect of computer programs. Therefore it is not subject to the impairment test as in respect of cinematographic works. However, it is limited by a so-called grand-fathering clause, according to which a Member, which on 15 April 1994, i.e. the date of the signature of the Marrakesh Agreement, had in force a system of equitable remuneration of right holders in respect of the rental of phonograms, may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

Broadcasting organizations shall have, in accordance with Article 14.3, the right to prohibit the unauthorized fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of their television broadcasts. However, it is not necessary to grant such rights to broadcasting organizations, if owners of copyright in the subject-matter of broadcasts are provided with the possibility of preventing these acts, subject to the provisions of the Berne Convention. The term of protection is at least 50 years for performers and producers of phonograms, and 20 years for broadcasting organizations (Article 14.5).

Article 14.6 provides that any Member may, in relation to the protection of performers, producers of phonograms and broadcasting organizations, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.

8.4 TRADEMARKS

The basic rule contained in Article 15 is that any sign, or any combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings, must be eligible for registration as a trademark, provided that it is visually perceptible. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, must be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Member countries are allowed to require, as an additional condition for eligibility for registration as a trademark, that distinctiveness has been acquired through use. Members are free to determine whether to allow the registration of signs that are not visually perceptible (e.g. sound or smell marks). Members may make registrability depend on use. However, actual use of a trademark shall not be permitted as a condition for filing an application for registration, and at least three years must have passed after that filing date before failure to realize an intent to use is allowed as the ground for refusing the application (Article 14.3). The Agreement requires service marks to be protected in the same way as marks distinguishing goods (see e.g. Articles 15.1, 16.2 and 62.3).

The owner of a registered trademark must be granted the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion must be presumed (Article 16.1).

The TRIPS Agreement contains certain provisions on well-known marks, which supplement the protection required by Article 6*bis* of the Paris Convention, as incorporated by reference into the TRIPS Agreement, which obliges Members to refuse or to cancel the registration, and to prohibit the use of a mark conflicting with a mark which is well known. First, the provisions of that Article must be applied also to services. Second, it is required that knowledge in the relevant sector of the public acquired not only as a result of the use of the mark but also by other means, including as a result of its promotion, be taken into account. Furthermore, the protection of registered well-known marks must extend to goods or services which are not similar to those in respect of which the trademark has been registered, provided that its use would indicate a connection between those goods or services and the owner of the

registered trademark, and the interests of the owner are likely to be damaged by such use (Articles 16.2 and 3).

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties (Article 17).

Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely (Article 18).

Cancellation of a mark on the grounds of non-use cannot take place before three years of uninterrupted non-use has elapsed unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark, such as import restrictions or other government restrictions, shall be recognized as valid reasons of non-use. Use of a trademark by another person, when subject to the control of its owner, must be recognized as use of the trademark for the purpose of maintaining the registration (Article 19). It is further required that use of the trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form, or use in a manner detrimental to its capability to distinguish the goods or services (Article 20).

8.5 GEOGRAPHICAL INDICATIONS

Geographical indications are defined, for the purposes of the Agreement, as indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin (Article 22.1). Thus, this definition specifies that the quality, reputation or other characteristics of a good can each be a sufficient basis for eligibility as a geographical indication, where they are essentially attributable to the geographical origin of the good. In respect of all geographical indications, interested parties must have legal means to prevent use of indications which mislead the public as to the geographical origin of the good, and use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (Article 22.2).

The registration of a trademark which uses a geographical indication in a way that misleads the public as to the true place of origin must be refused or invalidated *ex officio* if the legislation so permits or at the request of an interested party (Article 22.3). Article 23 provides that interested parties must have the legal means to prevent the use of a geographical

indication identifying wines for wines not originating in the place indicated by the geographical indication. This applies even where the public is not being misled, there is no unfair competition and the true origin of the good is indicated or the geographical indication is accompanied be expressions such as “kind”, “type”, “style”, “imitation” or the like. Similar protection must be given to geographical indications identifying spirits when used on spirits. Protection against registration of a trademark must be provided accordingly.

Article 24 contains a number of exceptions to the protection of geographical indications. These exceptions are of particular relevance in respect of the additional protection for geographical indications for wines and spirits. For example, Members are not obliged to bring a geographical indication under protection, where it has become a generic term for describing the product in question (paragraph 6). Measures to implement these provisions shall not prejudice prior trademark rights that have been acquired in good faith (paragraph 5). Under certain circumstances, continued use of a geographical indication for wines or spirits may be allowed on a scale and nature as before (paragraph 4). Members availing themselves of the use of these exceptions must be willing to enter into negotiations about their continued application to individual geographical indications (paragraph 1). The exceptions cannot be used to diminish the protection of geographical indications that existed prior to the entry into force of the TRIPS Agreement (paragraph 3). The TRIPS Council shall keep under review the application of the provisions on the protection of geographical indications (paragraph 2).

8.6 INDUSTRIAL DESIGNS

Article 25.1 of the TRIPS Agreement obliges Members to provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

Article 25.2 contains a special provision aimed at taking into account the short life cycle and sheer number of new designs in the textile sector: requirements for securing protection of such designs, in particular in regard to any cost, examination or publication, must not unreasonably impair the opportunity to seek and obtain such protection. Members are free to meet this obligation through industrial design law or through copyright law.

Article 26.1 requires Members to grant the owner of a protected industrial design the right to prevent third parties not having the owner's consent from making, selling or

importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

Article 26.2 allows Members to provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

The duration of protection available shall amount to at least 10 years (Article 26.3). The wording "amount to" allows the term to be divided into, for example, two periods of five years.

8.7 PATENTS

The TRIPS Agreement requires Member countries to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination, subject to the normal tests of novelty, inventiveness and industrial applicability. It is also required that patents be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced (Article 27.1). There are three permissible exceptions to the basic rule on patentability. One is for inventions contrary to *ordre public* or morality; this explicitly includes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment. The use of this exception is subject to the condition that the commercial exploitation of the invention must also be prevented and this prevention must be necessary for the protection of *ordre public* or morality (Article 27.2).

The second exception is that Members may exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals (Article 27.3(a)). The third is that Members may exclude plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, any country excluding plant varieties from patent protection must provide an effective *sui generis* system of protection. Moreover, the whole provision is subject to review four years after entry into force of the Agreement (Article 27.3(b)).

The exclusive rights that must be conferred by a product patent are the ones of making, using, offering for sale, selling, and importing for these purposes. Process patent protection must give rights not only over use of the process but also over products obtained

directly by the process. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts (Article 28).

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties (Article 30).

The term of protection available shall not end before the expiration of a period of 20 years counted from the filing date (Article 33).

Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application (Article 29.1). If the subject-matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process, where certain conditions indicating likelihood that the protected process was used are met (Article 34).

Compulsory licensing and government use without the authorization of the right holder are allowed, but are made subject to conditions aimed at protecting the legitimate interests of the right holder. The conditions are mainly contained in Article 31. These include the obligation, as a general rule, to grant such licences only if an unsuccessful attempt has been made to acquire a voluntary licence on reasonable terms and conditions within a reasonable period of time; the requirement to pay adequate remuneration in the circumstances of each case, taking into account the economic value of the licence; and a requirement that decisions be subject to judicial or other independent review by a distinct higher authority. Certain of these conditions are relaxed where compulsory licences are employed to remedy practices that have been established as anticompetitive by a legal process. These conditions should be read together with the related provisions of Article 27.1, which require that patent rights shall be enjoyable without discrimination as to the field of technology, and whether products are imported or locally produced.

8.8 LAYOUT-DESIGNS OF INTEGRATED CIRCUITS

Article 35 of the TRIPS Agreement requires Member countries to protect the layout-designs of integrated circuits in accordance with the provisions of the IPIC Treaty (the Treaty

on Intellectual Property in Respect of Integrated Circuits), negotiated under the auspices of WIPO in 1989. These provisions deal with, *inter alia*, the definitions of “integrated circuit” and “layout-design (topography)”, requirements for protection, exclusive rights, and limitations, as well as exploitation, registration and disclosure. An “integrated circuit” means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function. A “layout-design (topography)” is defined as the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture. The obligation to protect layout-designs applies to such layout-designs that are original in the sense that they are the result of their creators' own intellectual effort and are not commonplace among creators of layout-designs and manufacturers of integrated circuits at the time of their creation. The exclusive rights include the right of reproduction and the right of importation, sale and other distribution for commercial purposes. Certain limitations to these rights are provided for.

In addition to requiring Member countries to protect the layout-designs of integrated circuits in accordance with the provisions of the IPIC Treaty, the TRIPS Agreement clarifies and/or builds on four points. These points relate to the term of protection (ten years instead of eight, Article 38), the applicability of the protection to articles containing infringing integrated circuits (last sub clause of Article 36) and the treatment of innocent infringers (Article 37.1). The conditions in Article 31 of the TRIPS Agreement apply *mutatis mutandis* to compulsory or non-voluntary licensing of a layout-design or to its use by or for the government without the authorization of the right holder, instead of the provisions of the IPIC Treaty on compulsory licensing (Article 37.2).

8.9 PROTECTION OF UNDISCLOSED INFORMATION

The TRIPS Agreement requires undisclosed information -- trade secrets or know-how -to benefit from protection. According to Article 39.2, the protection must apply to information that is secret that has commercial value because it is secret and that has been subject to reasonable steps to keep it secret. The Agreement does not require undisclosed information to be treated as a form of property, but it does require that a person lawfully in control of such information must have the possibility of preventing it from being disclosed to, acquired by, or used by others without his or her consent in a manner contrary to honest

commercial practices. “Manner contrary to honest commercial practices” includes breach of contract, breach of confidence and inducement to breach, as well as the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

The Agreement also contains provisions on undisclosed test data and other data whose submission is required by governments as a condition of approving the marketing of pharmaceutical or agricultural chemical products which use new chemical entities. In such a situation the Member government concerned must protect the data against unfair commercial use. In addition, Members must protect such data against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use.

8.10 CONTROL OF ANTI-COMPETITIVE PRACTICES IN CONTRACTUAL LICENCES

Article 40 of the TRIPS Agreement recognizes that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology (paragraph 1). Member countries may adopt, consistently with the other provisions of the Agreement, appropriate measures to prevent or control practices in the licensing of intellectual property rights which are abusive and anti-competitive (paragraph 2). The Agreement provides for a mechanism whereby a country seeking to take action against such practices involving the companies of another Member country can enter into consultations with that other Member and exchange publicly available non-confidential information of relevance to the matter in question and of other information available to that Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member (paragraph 3). Similarly, a country whose companies are subject to such action in another Member can enter into consultations with that Member (paragraph 4).

8.11 INDIA AND TRIPS

As a signatory to the Uruguay round of GATT, and the founder member of the WTO, India was obliged to meet all provisions of the Trade Related Aspects of Intellectual Property Rights (TRIPs). A transition period was accorded to developing countries depending on their state of development. India has completed the complete term of this transition period i.e. 10

years, to set up an IPR system in compliance with TRIPS. The main elements of change in the Indian patent system are:

- Enforcement of product patent protection in all branches of technology, including drugs.
- 20 years of protection instead of 14 or 7 in the case of the Indian patent Act.
- No discrimination between imported and domestic products.
- Accommodate compulsory licensing (though no country south of the equator has yet used this clause).

Indian Patent Act of 1970 before amendment	**TRIPs obligations**
Only process not product patents in food, medicines, chemicals	Process and product patents in almost all fields of technology
Term of patents 14 years; 5-7 in chemicals, drugs	Term of patents 20 years
Compulsory licensing and license of right	Limited compulsory licensing, no license of right
Several areas excluded from patents (method of agriculture, any process for medicinal surgical or other treatment of humans, or similar treatment of animals and plants to render them free of disease or increase economic value of products)	Almost all fields of technology patentable. Only area conclusively excluded from patentability is plant varieties; debate regarding some areas in agriculture and biotechnology
Government allowed to use patented invention to prevent scarcity	Very limited scope for governments to use patented inventions

Indian Patent Act has been amended to make it TRIPS complaint.

Impact on Major Sectors:

The Major sectors and industries that would be affected with the TRIPs agreement would be Agriculture, Pharmaceutical and Biotechnology Industries. The greatest impact is expected to be on the **Pharmaceutical industry** as it's a knowledge based and research oriented industry. Here are some **challenges and opportunities** that can be noted specifically arising out of this agreement. India today has become one of the major exporters of cheap

drugs not only to developed countries but also to other developing countries, the advantage India has is lower prices due to low labour costs and comparatively lower expenditure on Research and development. With the significant change in the IPR regime, there are concerns regarding the export earnings diminishing. Another concern is that compliance with the TRIPs is expected to create a monopoly of the patented drugs and lead to a crisis in the public health issues. On the other hand, some feel that it is equally plausible that the Indian national system of innovative has evolved sufficiently to take advantage of the strengthening of the IPR system. This view is particularly supported by the clear success of India, in market based, high-tech domains, such as generics and software.

However the protagonists claim that "The fear that prices of medicines will spiral are unfounded....We must realize the fact that 97% of all drugs manufactured in India are off-patent, and so will remain unaffected." On the other hand, protection of innovation through patents is also justified on the front that patent protection will stimulate investment into R&D that will benefit Indian consumers and will reward India with increased foreign investment.

The worst impact of TRIPS that the pharmaceutical industry expects is the end of the reverse engineering; the industry now has to emphasize and concentrate on basic research. It is also feared that number of units in the industry may close down and only few hundred may survive this onslaught of imposition of conditions by the TRIPS. This may result in unemployment on large scale.

To put it in a nut-shell, the prescription by TRIPS for product patent implies the following for the industry:

- The industry has to now emphasis on basic research. The days of core competence of the industry in reverse engineering seems to move towards natural death. The firms in the industry now have to offer newer drugs to the customers to break the competitive forces.
- Huge investments are required by the pharmaceutical industries on Research and development infrastructure.
- Every industry has to develop a strategic outlook and have a internal policy for innovation if it is looking for sustainability in the long run.
- IPR system requires further strengthening for encouraging real outputs in innovation and creativity.

Overall, the industry feels that the TRIPS in its present form, is bent in favor of developed nations and its MNC's and that there is nothing trade related about TRIPS and that

the right to trade is being exploited by developed countries. Besides these, the imports are expected to increase leading to a serious question on self-reliance of these industries and overall it may have a dampening impact on the growth of this industry.

However, there is a light at the end of every tunnel, and there is an opportunity hidden in the agreement. The first opportunity is using the off patent drugs to capture markets across the globe. The strong process re-engineering skills and lower cost of development is another competitive advantage. As predicted by the different analysts, the out sourcing by MNCs would mean serious strategic alliances, contract manufacturing and bringing in of foreign exchange. The industry would use its technical and man power skills for research and innovation. However the industry would still be able to market older drugs which are not included in the patents list.

Impact on biotech: Most of the research orients towards the impact of TRIPs on pharmaceutical industry and agriculture. However, little research that has been conducted has concluded that the impact of TRIPs will be restricted to an elimination of the production of patented products. It will not have a deleterious or a positive impact on their levels of inventive activity. Even more importantly, TRIPs is not likely to create any incentive to increase technological knowledge or create innovations other than that provided by the national system of innovation. TRIPs is not going to have a significant impact on biotech in India or on the other preoccupations of Indian pharmaceutical firms. Hence, the major effect of TRIPS would seem to be to force Indian firms to put their re-engineered products on the market only when they get off patent[4].

Impact on Agriculture: The TRIPS Agreement of the WTO includes three items related to agriculture: Geographical indications (Art 22-24); Patent protection of agricultural chemical products (Arts. 70.8 and 70.9); Plant Variety Protection (Art 27.3(b)). Out of which the plant variety protection is of great importance for the current scenario.

TRIPS is a clearly anti-developing country agreement contend the critics. Its provisions seriously threaten self reliance in agriculture and the livelihoods of farmers, by seeking to establish a monopoly because it embodies the philosophy of the industrialized nations where it was developed and where the primary goal is to protect their interests.

Therefore, when a question is raised as to what would be the impact of compliance to agreement TRIPs on developing economies like India, a reply pops up that would be a clear compromise with national security. Food security, as we are all aware, is a critically important part of national security. A nation that does not produce its own seed and its own

food cannot be a secure nation. The agriculture remains a crucial as well as a controversial subject in WTO negotiations. No clear negotiations have worked out so far, as the developing countries are trying to push their interests in these negotiations to which the developed countries have serious objections to implementing them as it would have adverse impact on their agricultural sector.

It is generally observed that a strong patent regime has often been found detrimental to the process of industrial development in particular and scientific advancement in general. TRIPS may prove to be a breeding ground for cost inefficient process technologies. The possible solutions suggested by experts in the field to this problem are:

- Simplify and streamline India's compulsory licensing procedure.
- Retain the pre-grant opposition procedure in its original form. This permits opposition to potentially frivolous patent applications, protecting consumers against high prices on non-innovative pharmaceutical products under consideration for patent protection.
- Remove provisions for the granting of new-use or second-use patents,
- Immediately implement the clause which allows compulsory licensing and importation if the domestic production facility is in-sufficient.

It is thus advised by the group of experts, that the Indian government should, instead of fulfilling its obligation in haste, shall make such amendments in the act which adequately safeguard and protect the interests of the domestic industries and market, taking advantage of the concessions given in the TRIPs agreement.

8.12 COMPULSORY LICENSING UNDER TRIPS

Compulsory licensing is defined generally as the granting of a license by a government to use a patent without the patent-holder's permission. Article 31 of the TRIPS agreement states that where WTO member states provide in their patent legislation for compulsory licences the following provisions must be made:

- each case must be decided on its own merits;
- the applicant for the compulsory licence must have made efforts to take a licence from the patentee on reasonable commercial terms;
- the scope and duration of the compulsory licence must be limited to the purpose for which it was granted, such that it may be terminated or amended if the circumstances which led to the grant of the compulsory licence change or cease to exist; in the business unit that enjoys the compulsory licence);

- the patentee must be paid adequate remuneration for use under the compulsory licence;
- the decision to grant a compulsory licence and the determination of what is adequate remuneration shall be subject to judicial review;
- where a compulsory licence is granted in order to enable a second patent to be exploited, the invention claimed in the second patent must involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent and the patentee of the first patent must be entitled (on reasonable terms) to a cross-licence in respect of the second patent.

Indian Patent Act had been extensively amended in regard to the grant of compulsory licence to conform to the requirements of the TRIPS. Though TRIPS does not expressly use the word ‘compulsory licence’, it uses a similar terminology ‘other use’. Section 31 of TRIPS state that:

Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

(a) authorization of such use shall be considered on its individual merits;

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of national emergency or other circumstances of extreme urgency or in cases of public noncommercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

(c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public noncommercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;

(d) such use shall be non-exclusive;

(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

(l) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:

(i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;

(ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and

(iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

NOVARTIS AG VS UNION OF INDIA

The main argument of the writ petitioner was that section 3(d) of the Indian Patent Act was unconstitutional as it violated not only Article 14 of the Constitution of India. Petitioner also argued on the ground that it was not in compliance to "TRIPS" . S.3 of the patent Act deals with 'What are not Inventions'.

Before the amendment, Section 3(d) read as follows:

"The mere discovery of any new property or new use of a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant" is not an invention. Amendment to Section 3(d) under Ordinance 7/2004: The mere discovery of any new property or mere new use of a known substance or of the mere use of a known process; machine or apparatus unless such known process results in a new product or employs at least one new reactant.

Section 3(d) as amended by the Patents (Amendment) Act, 2005 which came into effect from 01.01.2005 read as: The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

Explanation: For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.

Following issues were framed by the Hon'ble Madras High Court:

(a) Assuming that the amended section is in clear breach of Article 27 of "TRIPS" and thereby suffers the wise of irrationality and arbitrariness violating Article 14 of the Constitution of India, could the courts in India have jurisdiction to test the validity of the amended section in the back drop of such alleged violation of "TRIPS"? OR

Even if the amended section cannot be struck down by this Court for the reasons stated above, cannot this Court grant a declaratory relief that the amended section is not in compliance of Article 27 of "TRIPS"?.

(b) If it is held that courts in India have jurisdiction to go into the above referred to issue, then, is the amended section compatible or non-compatible to Article 27 of "TRIPS"?

(c) Dehors issues (a) and (b) referred to above, could the amended section be held to be violative of Article 14 of the Constitution of India on the ground of vagueness, arbitrariness and conferring un-guided powers on the Statutory Authority?

On the issue of whether Indian courts have jurisdiction to decide the issue under consideration distinguishing the case of Equal Opportunities Commission and Anr. v. Secretary of State for Employment, it agreed with the respondents that "TRIPS" do not become Law in India on its own force without any domestic Law legislated by the Indian Government. It further observed that International Covenant, International Treaty, International Agreement and such documents are essentially in the nature of a contract. Agreeing with the respondents that the right forum to raise the issue was WTO Dispute Settlement Body (DSB), it held that when participating nations, having regard to the terms of the agreement and the complex problems that may arise out of the agreement between nation to nation, decide that every participating nation shall have a Common Dispute Settlement Mechanism, it has to be followed. Every International Agreement possesses the basic nature of an ordinary contract and courts should respect the choice of jurisdiction fixed under such ordinary contract. It thus held that the Court had no jurisdiction to decide the validity of the amended section, being in violation of Article 27 of "TRIPS", it also refused to delve into the question whether any individual was conferred with an enforceable right under "TRIPS" or not.

It also rejected the argument of the petitioner that there was excess discretionary power vested with the authorities which was violative of Article 14 of Indian Constitution.

INDIA – US & INDIA – EC WTO DISPUTE (DISPUTE DS50 and DISPUTE DS79)

India — Patent Protection for Pharmaceutical and Agricultural Chemical Products

DS50 was on a complaint by the United States and DS79 was on complaint by the European Community. Violations of the TRIPS Agreement Articles 27, 65 and 70 were claimed.

Issues were the following :

India's "mailbox rule" – under which patent applications for pharmaceutical and agricultural chemical products could be filed; and (ii) the mechanism for granting exclusive marketing rights to such products.

Patent protection for pharmaceutical and agricultural chemical products, as provided under TRIPS Art. 27.

Findings

TRIPS Art. 70.8: The Appellate Body upheld the Panel's finding that India's filing system based on "administrative practice" for patent applications for pharmaceutical and agricultural chemical products was inconsistent with Art. 70.8. The Appellate Body found that the system did not provide the "means" by which applications for patents for such inventions could be securely filed within the meaning of Art. 70.8(a), because, in theory, a patent application filed under the administrative instructions could be rejected by the court under the contradictory mandatory provisions of the existing Indian laws: the Patents Act of 1970.

TRIPS Art. 70.9: The Appellate Body agreed with the Panel that there was no mechanism in place in India for the grant of exclusive marketing rights for the products covered by Art. 70.8(a) and thus Art. 70.9 were violated. India complied with the recommendations of the DSB within the implementation period by amending its Patent Act.

HOFFMANN-LA ROCHE LTD. and ANR v CIPLA LIMITED

Plaintiff were patent holders of the drug molecule, medically termed as a Human Epidermal Growth Factor Type-1/Epidermal Growth Factor Receptor (HER/EGFR) inhibitor, popularly known as Erlotinib. This drug is administered in the form of a tablet. The tablet formulation of Erlotinib is sold by the plaintiff under the trademark and name of Tarceva, which is registered in the name of the plaintiff. It is averred that the drug Erlotinib and its formulation Tarceva has been approved by the U.S. Food and Drug Administration in the year 2004 and thereafter by the European Union in the year 2005.

The first Plaintiff is actively engaged in the manufacture, marketing and sale of the innovative drug Tarceva in various countries including India and it introduced Tarceva in India sometime in April 2006.

The Defendant, CIPLA, is the second biggest pharmaceutical company in India. In December 2007 and January 2008, various news reports appeared in the print as well as the electronic media about the defendants plans to launch a generic version of Erlotinib in India and also for exporting it to various countries. The Plaintiffs claim their knowledge of the Defendants plans to infringe their rights in the patent, from such reports. They have filed the present action seeking permanent injunction and damages. It was averred by the Plaintiffs that Erlotinib was developed after long, sustained and substantial research, and after incurring enormous expenditure for the tests, mandatorily conducted to establish its efficacy and safety. It was submitted that this innovation was duly protected under the provisions of law and no person except those authorized to exercise the legal rights associated with the patented drug can be allowed or permitted to copy/simulate and/or recreate it in any manner or in any other

name. They alleged that the Defendant was following an illegal course to offer a generic version of the patented drug; firstly, in an unlawful manner by infringing the legal rights of the plaintiffs, and secondly, in a manner that may pose a serious hazard to the lives of the patients. They submitted that they would suffer serious and irretrievable prejudice in case the Defendant was not restrained as prayed for. They further claimed that the actions of the Defendant may cause a serious and grave hazard to the lives of the cancer patients.

Along with other defences, Cipla contended that the plaintiffs patent claim lack an inventive step. They alleged that the patent was liable to be revoked as Erlotinib, being a Quinazolin derivative, only sought to improve from the existing prior art. It would be obvious for a person skilled in the art that quinazolin compounds are known to inhibit growth and proliferation of mammalian cells and have been used in cancer treatment. Various quinazolin derivatives are available in the market for treatment of different types of cancer. The patented compound of the Plaintiffs was a quinazolin derivative used for the treatment of cancer therefore, a derivative of a known compound and hence not patentable under Section 3 (d) of the Act. It was next contended that the patent did not reveal any obvious inventive step. In support, the Defendant averred about existence of at least three European patents, which date back to 1993 that disclose quinazolin derivatives. One such patent discloses the exact chemical structure contained in the Plaintiffs patent except for one substitution, which was obvious to any person skilled in the art. Apart from this, the defendant alleged that the plaintiff has miserably failed in proving that there was any improved efficacy of the said drug and that no tables or comparative data were provided in support of such claim. Drawing from the summary of the invention in the patent specifications of the plaintiff, the Defendant submitted that the Plaintiffs had admitted that the Erlotinib was a quinazolin derivate. It was alleged that in the absence of proven enhancement in efficacy in terms of Section 3(d) no patent can even be considered, let alone granted. The defendant alleged that Erlotinib was just a derivative from Gefitinib of Astra Zeneca for which patent was refused in India, on the ground that the said product was already in prior use and was in the public domain. Under such circumstances, the Defendant submitted, the patent office ought not to have granted a patent for Erlotinib. It alleged that the Plaintiffs attempt to protect Erlotinib (which was nothing but a derivative of Gefitinib), established that the plaintiff was indulging in evergreening. Evergreening, it was submitted is contrary to public policy, against the statutory language employed in Section 3(d) of the Act and in the context of the pharmaceutical industry against national interests. The defendant placed reliance in this

regard on the ruling of the Madras High Court in Novartis v. Union of India, 2007 (4) MLJ 1153, where the Court extensively relied on legislative debates in this regard.

The learned single judge after noticing the Novartis judgment observed that even if non-obviousness of an invention in the pharmaceutical or chemical industry were established, the applicant should also prove that if the invention claimed is the derivative of a known substance, it does not fall within the excepted category, in the Explanation to Section 3(d) as it comprehend a discovery of significant enhancement in known efficacy of such known substance.

On the issue of interlocutory injunctions it held that : (i) In patent infringement actions, the courts should follow the approach indicated in American Cyanamid, by applying all factors; (ii) The courts should follow a rule of caution, and not always presume that patents are valid, especially if the defendant challenges it; (iii) The standard applicable for a defendant challenging the patent is whether it is a genuine one, as opposed to a vexatious defense. Only in the case of the former will the court hold that the defendant has an arguable case.

After going through the facts, it came to the conclusion that plaintiff was not entitled to claim an ad interim injunction. In the judgment the learned judge did observe that though India entered into the TRIPS regime, and amended her laws to fulfill her international obligations, yet the court has to proceed and apply the laws of this country, which oblige it to weigh all relevant factors.

In this background the Court cannot be unmindful of the right of the general public to access life saving drugs which are available and for which such access would be denied if the injunction were granted. The degree of harm in such eventuality is absolute; the chances of improvement of life expectancy; even chances of recovery in some cases would be snuffed out altogether, if injunction were granted. Such injuries to third parties are un-compensatable. Roche’s appeal before Division Bench of the High Court was also unsuccessful.

Till now the effects of the TRIPS compliance of the developed countries have been primarily theoretical. The developing countries need to use the TRIPS flexibilities to tackle any difficult situation. India has significantly changed the Patent Act to bring it in conformity with the TRIPS agreement, but a lurking fear remains that such overhaul of the patents Act may make the prices of drugs outside the reach of the general public. But it has to be kept in mind that there are various provisions already engrafted in the Patents Act like the detailed provisions of compulsory licencing which can check misuse of patents. It is also to be noticed

that Indian courts till now have not felt bound by the TRIPS in particular cases and have held that domestic laws will take precedence over TRIPS in case of any conflict.

8.13 SUMMARY

The TRIPS Agreement, which came into effect on 1 January 1995, is the most comprehensive multilateral agreement on intellectual property. TRIPS prescribes minimum standards of protection to IPRs in international trade. TRIPS empowers members to use compulsory licensing in certain cases. To meet the obligations under TRIPS, India has made several changes in its intellectual property regulatory regime. It has amended its Patent Law, new Trademark Law is in Place and enacted Geographical Indications Act.

8.14 KEYWORDS

1. Compulsory Licensing
2. IPRs
3. TRIPS

8.15 SELF ASSESSMENT QUESTIONS

1. Examine the TRIPS provisions for the protection of IPRs in International Trade

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2. Discuss the amendments made to Indian Patent Act to meet TRIPS obligations

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3. Explain the provisions relating to public health under TRIPS

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4. What is compulsory licensing? Explain

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5. Write a Note on NOVARTIS case

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8.16 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009

3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT -9: AGREEMENT ON AGRICULTURE

Structure:

9.0 Objectives

9.1 Introduction

9.2 Agreement on Agriculture

9.3 Exemptions from Reduction Commitment

9.4 Limitation on actions against Subsidy

9.5 Impact of Agreement on Agriculture in India

9.6 Doha Rounds on AOA

9.7 India’s Ministerial Position at Doha Rounds and on AOA

9.8 Summary

9.9 Keywords

9.10 Questions for Self-Study

9.11 References

9.0 OBJECTIVES

- To able understand the mpact of Agreement on Agriculture in India
- To analyse the Agreement on Agriculture of WTO
- To know the Doha Development Agenda

9.1 INTRODUCTION

Agriculture was under a softer discipline than industry in GATT 1947 in respect of market access, export subsidy and domestic support to the producers. The agreement on Agriculture has become an integral part of WTO agreements and contains new disciplines in this sector.

9.2 AGREEMENT ON AGRICULTURE

Agreement on Agriculture consists of 13 parts, 21 articles with 5 annexure. The agreement is a complex one and to understand the implications of its provisions, frequent cross-references must be made between the various annexes and the relevant articles of the agreement. In order to know what commitments have been made by the Members in this sector, one has to consult the schedules of various Members published by the WTO.

Agreement on Agriculture was made to achieve greater liberalization of trade in agriculture and also with the following objectives:

(1) To provide a platform for initiating a process of reform of trade in agriculture
(2) To establish a fair and market oriented trading system
(3) To provide for substantial progressive reductions in agriculture support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets
(4) To achieve specific binding commitment in market access, domestic support, export etc
(5) To provide for special and differential treatment for developing countries through negotiations

Agreement on Agriculture (AOA) comprises three major components, namely,

1. Market Access
2. Domestic Support
3. Export Subsidy

These above components require cuts in protections against imports or promotion of exports.

Members Commitments (Art.3)

Commitments of Members are in the fields of (i) market access – tariff and import restrictions (ii) domestic support to producers and (iii) export competition – export subsidy etc. All these commitments are recorded in the respective schedules of Member. Generally these commitments will remain valid for the implementation period. The implementation period for commitment for developing countries was 10 years.

However at the outset, the agreement notes that the reform program should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment; having regard to the agreement that special and differential treatment (SDT) for developing countries is an integral element of the negotiations, and taking into account the possible negative effects of the implementation of the reform program on least-developed and net food-importing developing countries. In addition, there are provisions of Special Products and Sensitive Products, which are to be exempted from stringent discipline of the above provisions of the AOA Provision of Special Products designates a certain number of products of the developing countries that would be exempt from tariff reduction requirements and other disciplines in order to protect and promote food production, livelihood security and rural development. The key issues here are associated with the mechanism to decide on country-wise crops. In the case of developed countries also, certain products, based on political, social and cultural considerations are designated as Sensitive Products, which will be treated less stringently.

Main provisions of the Agreement on Agriculture as derived from Uruguay round:

Negotiated Reduction	Implementation period	
	Developed countries (1995-2000) Per cent	Developing countries (1995-2004) Per cent
Market access		
Average tariff cut for al agriculture products	-36	-24
Minimum tariff cut per product	-15	-10
Domestic Support		
Total cut in aggregate measure of support	-20	-13
Export subsidy		
Value cut	-36	-24
Volume cut	-21	-14

Market Access

The market access requires that tariffs fixed by individual countries be cut progressively to allow free trade. The restrictions on market access have been in the form of tariff and non-tariff measures. The latter includes quantitative restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state trading enterprises, voluntary export restraints, and similar border measures i.e they have to remove these measures and replace them with equivalent tariff. Several Members have calculated very high levels of equivalent tariff in replacement for non-tariff measures.

The normal customs duties increased by these equivalent tariffs have been recorded as base tariff levels in the schedules of the Members. The tariff has to be reduced in accordance with the modalities mentioned above over the implementation period. The final reduced level of tariff at the end of the implementation period has been recorded by a Member in its schedule. This reduction will take place uniformly over the implementation period; hence the tariff level will go on decreasing successively from year to year during this period.

Import control measures maintained by developing countries under the balance of payment (BOP) provisions are not required to be converted to equivalent tariffs. But once a developing country Member, which has not made a tariffication commitment, ceases to have the protection of BOP provisions, it cannot impose these import control measures in agriculture except through recourse to the Agreement on Safeguard.

Special Safeguard Measure

When domestic industry and production suffers because of imports, a Member is allowed to adopt safeguard measures. In agriculture sector along with general safe guard measures, a Member can also use Special Safeguard measures. A Member which has converted their non-tariff measures to equivalent tariff can take special safeguard measures in agriculture which will be in the form of additional duty imposed on the import of a product. There are two alternative pre-conditions for taking such measures:

(1) The quantity of import in a particular year exceeds a quantity trigger level. The quantity trigger level is the sum of two components – the import component a d the change in domestic consumption.

(2) The price of the imported product is below the trigger price which is to be announced by the Member. The trigger price which is to be announced by the Member.

Domestic Product

Domestic support measures of governments are in the nature of subsidy provided to the domestic producers. According to the Agreement on Agriculture, the domestic support measures will be reduced over the implementation period. The domestic support measure is quantified through what has been called the Aggregate Measure of Support (AMS). The domestic support measures for different products and also those that are of a general nature, and thus not related to specific products, are all added together to get the Total AMS. These support measures may be in the form market price support or direct payment by government.

The AOA broadly subdivides domestic support programs into three boxes with colours, green, blue and amber and two other categories namely *Development measures* and *de minimis*. Under current WTO rules, countries are free to employ subsidies under the "green" and "blue" boxes, certain *development measures*, and the *de minimis* subsidies. In addition there are some Non-trade concerns (NTCs) listed in the preamble to the AOA, which can be used to legitimize government programs that run contrary to the market-oriented agricultural trading system. They include food security, rural development and environmental protection. Subsidies in the Green box (AOA, Annex 2) have no or minimal distorting effect on production and hence trade. They include measures decoupled from output such as income-support payments (decoupled income support), safety-net programs, payments under environmental programs, and agricultural research and development subsidies. The Blue box (AOA, Art. 6.5) contains direct payments under production limiting programs. They cover payments based on acreage, yield, or number of livestock in a base year. Because countries are allowed to revise the base year over time, subsidies in the blue box may have an effect on current output.

Development measures cover direct or indirect permitted (AOA, Art. 6.2) assistance aimed at encouraging agricultural and rural development in developing countries and is allowed. They include investment subsidies generally available to agriculture such as research and development, extension programs, and soil and water conservation; and agricultural input subsidies available to low -income or resource-poor farmers such as fertilizer, water, and electricity. Under the *de minimis* provision, developed countries are allowed to use other subsidies with an aggregate value of up to 5 percent of the total value of domestic agricultural production in the case of developed countries and 10 per cent in the case of developing countries.

The Amber Box (AOA, Art. 6) contains category of domestic support that is scheduled for reduction based on a formula called the "Aggregate Measure of Support" (AMS). The AMS calculates the amount of money spent by governments on agricultural production, except for those contained in the Blue Box, Green Box and de minimis. It required member countries to report their total AMS for the period between 1986 and 1988, bind it, and reduce it according to an agreed-upon schedule. Developed countries agreed to reduce these figures by 20% over six years starting in 1995. Developing countries agreed to make 13% cuts over 10 years. Least-developed countries do not need to make any cuts.

9.3 EXEMPTION FROM REDUCTION COMMITMENT

There are certain exemptions from the reduction commitment. The exemptions are provided under Art.6 and Annex 2 of the Agreement on Agriculture.

Art.6 Exemptions

(i) Investment subsidies generally available to agriculture in developing countries

(ii) Input subsides generally available to low-income or resource poor producers in developing countries.

(iii) Support to producers in developing countries to encourage diversification from growing illicit narcotic crops

(iv) Product-specific domestic support which does not exceed 5% of the total value of the production of that product in the country during the year under consideration

(v) Nion-specific domestic support which does not exceed 5% of the value of the total agricultural production in the country.

(vi) Direct payments under production limiting programmes subject to certain maximum limits

Annex 2 Exemptions

Certain government service programs in which support is provided through a publicly funded program and the support does not have the effect of providing price support to producers. These are of the following types:

(i) General services, like research, pest and disease control, training, extention and advisory services, inspection services, marketing and promotion services and infrastructure services.

(ii) Public stockholding for food security purposes provided the purchasers are made at the current market prices and sales at no less than the current domestic market price.

(iii) Domestic food aid, provided the purchases are made at current market price. For developing countries it is permissible in this regard to provide food to the poor at reasonable price.

(iv) Certain type of direct payment to producers, like decoupled income support, financial participation in income insurance and income safety net programs, payment for relief from natural disasters, structural adjustment assistance through producer retirement programs, resource retirement programs or investment aids, payment for environmental programs and payment under regional assistance programs.

Export Subsidy

Export support include trade distorting programs such as Export Subsidy, State Trading Enterprises, Export Credits, Special and Differential Treatment, Special Products, and Sensitive Products aimed at benefiting the domestic producers against the international competition. AOA tends to eliminate or minimize such supports. The commitment for reduction of export subsidy is also included in the schedule of the Member. The commitment is in the form of maximum outlay and also the maximum quantity which will be covered by export subsidy in a given year. In actual implementation, flexibility under certain conditions including the provision that the total for the implementation period is not exceeded.

Some of the export subsidies included in the reduction commitment are as follows:

(i) Subsidies contingent on export performance

(ii) Sale or disposal for export of products by government at prices lower than those of like products in the domestic market.

(iii) Payments on the export of a product that are financed by virtue of governmental action, either through public account or through a levy on the product

(iv) Subsidies to reduce the cost of marketing, including handling, upgrading, processing and international transport and freight

(v) Provision of internal transport and freight charges on terms more favourable than for domestic transport (developing countries are exempt on this item)

(vi) Subsidies contingent on the incorporation of the product into exported products

9.4 LIMITATIONS ON ACTIONS AGAINST SUBSIDY

In respect of agriculture, there is a departure from the normal rules of action against subsidies in the case of domestic support measures and export subsidy. Domestic support are of two types, viz., those mentioned in Annex 2 of the Agreement on Agriculture and those

mentioned in Art.6 of the Agreement. Measures mentioned in the Annex 2 exempt from both countervailing duty action and countermeasures based on the dispute settlement process. Measures mentioned in Art.6 are exempt from countermeasures based on the dispute settlement process if the support is not in excess of the level in 1992. Further, no countermeasure based on the dispute settlement process can be taken against export subsidy which has been included in the schedule of a Member.

9.5 IMPACT OF AGREEMENT ON AGRICULTURE IN INDIA

Experts have identified both positive and negative effects of Agreement on Agriculture on developing countries like India. They are listed below.

(a) Negative Effects

(1) Special and differential treatment is available only for least developed countries. The concessions given to the developing countries in terms of long transition period etc., do not recognize their qualitatively different position in the world economic structure. In each of the areas under the disciplines, namely market access, domestic support and export competition, the developing countries have been given a raw deal.

(2) The forced opening up of the Indian market is one of the most dangerous consequences of the draft. It will be totally wrong to assume that India can be protected from that provisions on market access by taking recourse to the provisions are applicable only to those sections dealing with tariffication, not to those sections where market access is being negotiated on the basis of the requirements on current market access and minimum market access.

(3) According to GATT, 1994, current access opportunities cannot be less than the average annual import quantities for 1986-88 or what was permitted to be imported that period whichever is high. The implications of this will lead for the increase of imports under the GATT, 1994 and the powers of the government to stop these imports would be taken away.

(4) The developing countries are also supposed to grant a minimum market access of 2% of domestic consumption in 1993, to be increased to 3.33% by 2003. Hence, the domestic market is also going to be opened up in case of many commodities which had not been imported earlier.

(5) The agreement requires that governments should declare time schedules for the removal of import restrictions for balance of payment reasons.

(6) The agreement advocates for major changes in the internal agricultural policies of a nation. Governments of developing countries which don not as rule distorts trade by subsidising their agricultural exports are also being asked to undertake reductions. The only exception in this regard is for investment in agriculture.

(7) The ability of the governments to subsidize is severely restricted by the agreement. Reductions on subsidies are allowed only in case of low-income producers.

(8) Denial of subsidies to farmers, may force them to change cropping pattern.

(9) Critical aspect of the agreement is that the internal support by government is related Public Distribution System (PDS). Accordingly, only eligible on the basis of clearly defined criteria to nutritional objectives can be given subsidized food. This nullifies the effect of existing PDS in India.

(10) The agreement allows some forms of domestic support which can be used by the developed countries to continue to support their agriculture. The support systems in developed countries allow farmers to export below the cost of production and this might lead to dumping in Indian markets.

(b) Positive Effects

Agreement on Agriculture also has positive developments for developing countries. They are:

(1) Support program to farmers as scaling down of export subsidies to farm products in developed countries should produce beneficial effects on countries like India. The Policy aims at minimization or elimination of subsidy war or farm products. Once the farm support and export support programs are eliminated, the world prices of farm products would increase. In this situation, India would be in a position to increase export quantum of wheat, rice and sugar at higher prices.

(2) Developing countries will be in a position to export agriculture products because of its land and labour intensity. Commercialization of agriculture would be stimulated once the farmers get higher prices for their products. The spin-off effect would be the generation of new employment opportunities in rural areas.

9.6 DOHA ROUND ON AOA

The Fourth WTO Ministerial Conference was held in Doha , Qatar from 9 to 14 November 2001. In fact, the Doha Ministerial was a starting of a new round with unique

feature focused on implementation of A-o-A and "Development" of the developing countries so that they could meaningfully become part of the multilateral global trading system.

The following Fifth WTO Ministerial Conference held in Cancun, Mexico from 10 to 14 September 2003 was dedicated to stock taking of progress in negotiations and other work under the Doha Development Agenda (DDA). However, the DDA required correcting the imbalances that penalize developing countries and improve the commitment of WTO members. The modalities3 for the Doha Round are to be completed by the end of April 2006, the draft schedule based on these modalities by 31 July 2006 and the Round is expected to conclude by the end of 2006, a date chosen carefully for the Ministerial Meeting when the term of 'Trade Promotion

Authority of the United States' ends. In this round the latest Ministerial was held in Hong Kong Ministerial (Dec 13-18, 2005), which has given some hope for success as for the first time developing countries have managed to get a mention from developed countries of reduction in their subsidies otherwise most of the previous commitments have been falsified. The issues related to implementation of AOA dominate the Doha Round and they include:

1. High agriculture trade distorting subsidies granted by rich countries
2. Agriculture export subsidies
3. High tariffs on exports of agricultural and industrial products of interest to developing countries

However, at various Ministerial negotiations new items from other agenda have been added to make it a comprehensive round. For example, the modalities of the A-o-A are being coupled with GATS, and investment issues. Therefore, the proposals for negotiation have transformed to include among others the following (list of all items is provided in following sub-section):

1. On agriculture, 2013 as the end date for the elimination of export subsidies with an important part frontloaded by 2010
2. Agreement that the EU, US and Japan will undertake the biggest reductions on agricultural subsidies that distort trade and that these will be effective cuts, which is a serious improvement as compared to the previous round
3. On cotton, which is of key importance to many African countries, export subsidies on cotton to be eliminated by 2006 and cuts to domestic subsidies will be greater and faster than for the rest of products.

4. Special agriculture products and a safeguard to protect those agricultural products of developing countries with concerns about livelihood security, food security and rural development
5. On industrial products, a Swiss formula to cut tariffs, with high tariffs subject to bigger cuts, thus addressing tariffs peaks and tariff escalation in particular on products of interest for developing countries. Developing countries will for a start cut tariffs only in proportion to the cuts by developed countries.
6. A step forward towards a completely duty-free and quota -free access for the world poorest country Members of the WTO
7. On Services, the door has been opened to plurilateral negotiations
8. Countries have started tabling collective requests in the services of sectors that are of particular interest to them
9. Aid for Trade package, to help developing countries address their supply-side constraints

9.7 INDIA'S MINISTERIAL POSITIONS AT DOHA ROUNDS AND ON AOA

The visit of Pascal Lamy, WTO General Secretary in 2006 the second time in last indicates the gravity of problems being faced by Indians in meeting the demands of developed countries. The Indian position is that the development agenda and the farmers' interest cannot be diluted and that the industrial and agriculture issues should not be mixed, while at the same time the Indian negotiators feel that no change is made in subsidy position of the developed countries, yet new elements are being introduced. Nevertheless the Indian leadership has come up to the age of globalization and is slowly shedding its defensive posture and it has been demonstrating dynamism in the WTO negotiations.

India rejected the idea of introducing new issues such as Investment, Competition, Trade Facilitation or Transparency in Government Procurement, and did not consider the basic trade principles like non-discrimination or market access appropriate for dealing with issues like Investment and Competition. The Minister for Commerce and Industry raised the concerns that sensitive industries in developing countries including small-scale industries, which sustain a large labour force, could be destroyed. India was firmly opposed to any linkage between trade and labour standards and recalled that the Singapore Declaration had once and for all dealt with this issue and there was no need to refer to it again. Similarly, on environment, India was strongly opposed to the use of environmental measures for protectionist purposes and to imposition of unilateral trade restrictive measures and

considered that the existing WTO rules were adequate to deal with all legitimate environmental concerns. In fact the Minister termed them as Trojan horses of protectionism. Doha Ministerial was saved from failure to continue the work program. The African countries, deserted Indian hopes because they were promised the continuation of their trade preferences into the EU market for some more years. However, to the windfall pleasure of India, the round was launched with services brought into the fold of international rules through the General Agreement on Trade in Services (GATS).

At the Cancun Ministerial (10-14 September 2003), India felt that the draft Cancún Ministerial Text was grossly inadequate on implementation issues, precision, operational and effectiveness and fixing responsibility and would severely affect the interests of developing countries in agriculture, industrial tariffs and Singapore issues. There was no progress in removing barriers to export from developing countries to the developed countries.

India argued that all the time-lines set at Doha for their resolution have been breached. On certain issues even the mandate itself has been questioned. To make matters worse, the draft Ministerial text accords low priority to these issues. It does not envisage any time-frame for taking decisions for resolving outstanding issues. This is in sharp contrast to the issues of interest to developed countries for which time-lines have been provided for taking decisions.

On agriculture subsidies, India argued that the prevailing subsidies in the developed countries were not targeted to keeping small struggling family farms in business but to provide hefty rents to large farmers or corporates. On the other hand, against equity, justice and fair play, developing countries are being asked to liberalize their agriculture.

India felt there was an urgent need to bring down the high tariffs and non-tariff barriers on products of export interest to developing countries while ensuring that special and differential treatment for developing countries and policy space to deal with sensitive products remain an integral part of all elements of negotiations. India reiterates that under no circumstances can it accept any form or harmonization of tariffs in agriculture or obligations to create and expand tariff rate quotas. On market access negotiations on non-agricultural products (NAMA), India favored the formula mandated by the Doha Declaration, without any amendment in any aspect of the formula.

On investment, (one of the Singapore issues, others being, competition, transparency in government procurement, and trade facilitation) India felt that WTO was not the right forum, that the traditional WTO principles of non-discrimination particularly national

treatment are not appropriate for a development policy-related issue like investment and that trade negotiators are not the right people to deal with movements of capital that have dynamics of their own. It may be noted that China nor Brazil do not share this sentiment.

There was failure to adopt Draft Ministerial Declaration and it was left for further work and resulting delays. India was more progressive as it offered to undertake modest liberalisation in industrial products and agreed to negotiate on two of the four so-called Singapore issues: transparency in government procurement and trade facilitation. Why did then the negotiations fail? Panagariya (2004) blames western Non Government Organizations (NGOs), their media campaign that the current trading system is unfair to the poor countries and also the role of the United States, which departed from Cairns group and joined EU, the later having too ambitious agenda on including investment and competition.

At the Hong Kong Ministerial (13 - 18 December 2005), on agriculture trade and subsidies and other non-tariff barriers, India quipped that its farmers are quite willing to deal with trade flows – but not with an avalanche of subsidy flows from developed countries. India argued that exporters from developing countries face incredible non-tariff barriers. These include the abuse of both anti-dumping measures and technical standards, often dealing with peripheral matters and extraneous considerations. India also insisted the need to finalize the proposal for duty-free and quota-free access for exports of least developed countries to developed country markets, without hedging. On development, India holds the view that no single 'harmonized' development strategy could be adopted. Each country must choose the path that best suits its own genius. Clearly, a room for negotiation has been created.

9.8 SUMMARY

Agreement on Agriculture was made to achieve greater liberalization of trade in agriculture and to establish a fair and market oriented trading system. The main provisions of AOA focus on market access, domestic product and export subsidy. We can see both positive effects and negative effects on Indian Agriculture by the impact of AOA. Ar Doha Round on AOA, on agriculture subsidies, India argued that the prevailing subsidies in the developed countries were not targeted to keeping small struggling family farms in business but to provide hefty rents to large farmers or corporate.

9.9 KEYWORDS

1. AOA
2. Doha Round

3. Domestic Product
4. Export Subsidy
5. Market Access

9.10 SELF ASSESSMENT QUESTIONS

1. Explain the major provisions of AOA

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2. Comment India's stand on AOA at Doha Rounds

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3. Discuss the issue of Subsidy in Agriculture

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4. Critically examine the impact of AOA on India

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9.11 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade.

UNIT -10: WTO IN 21ST CENTURY

Structure

10.0 Objectives

10.1 Introduction

10.2 The Doha Development round in a Nutshell

10.3 Opportunities and Challenges in 21st Century for WTO

10.4 Social Clauses and WTO Agreements

10.5 Ministerial Conference and Labour Standards

10.6 Summary

10.7 Keywords

10.8 Self Assessment Questions

10.9 References

10.0 OBJECTIVES

1) To outline the challenges and opportunities for WTO in 21st century
2) To Explain Doha Development Round
3) To Understand social clauses in WTO Agreements
4) To examine various reform proposals

10.1 INTRODUCTION

Born in the twentieth century, the World Trade Organization (WTO) is still largely built on the rules and dispute settlement mechanisms it adopted at its inception in the last century. However, world trade is a rather different beast in the 21st century. The WTO must adapt to this new world or it will be quickly marginalized. The WTO is not keeping pace with the changes taking place in the world. The cross-border flows of goods, services, know-how, investment, and people participating in international production networks—supply-chain trade in economic jargon—have transformed the global economy. The WTO is caught between fulfilling its original mission and addressing new and emerging realities.

It seems mired in malaise. The 20th century conflicts over tariffs and agricultural barriers prevent the WTO from concluding the Doha Development Round commenced in November 2001. It seems equally incapable of moving forward in any other areas.

Consequently, the most stalwart WTO members are developing trade arrangements independently of existing WTO structures to regulate 21st century trade.

This failure is in several respects paradoxical. The malaise does not in itself reflect hostility towards the principles of free trade or the liberalization of international commerce. Quite the contrary, WTO members, including countries like India, Brazil, and China which have long criticized the organization, have conducted a massive liberalization of trade, investment, and services on their own accord since the beginning of the new century. In fact, WTO members have unilaterally, bilaterally, or regionally advanced the WTO's liberalization objectives everywhere except within the WTO itself.

Nor is the apparent disillusionment with the WTO a sign that it has lost popularity. The organization continues to attract new members, including powerful nations like the Russia, despite the political cost they must incur to gain a membership card. The WTO may seem less useful now to some members but it would be premature to write it off as irrelevant. Indeed, its dispute settlement procedures are used by an ever wider range of members. In short, when trade issues characteristic of the 20th century have to be addressed, the WTO's existence is still justified and it remains a viable entity.

The WTO is afflicted by the emergence of a new type of trade: the unbundling of production or, as it is more commonly expressed the emergence of Global Value Chains (GVCs) which have reshaped the geography of global production. Today, joining a supply chain is the fastest route to industrialization for emerging markets. Unbundling has also restructured the geography of global demand.

In this new trade configuration, there is no place for protectionism. In fact, countries that establish trade barriers are signaling local manufacturers to relocate elsewhere, thus excluding themselves from GVCs. In other words, protectionist measures have become, for all practical purposes, destructive measures.

New forms of trade need new governing rules which go beyond those of the WTO as they stand. Since the Uruguay Round of multilateral trade negotiations in 1995, virtually all the necessary new governance required has been formulated spontaneously by developing countries in regional trade agreements (RTA) or through unilateral trade policy reforms. The real danger for the WTO, therefore, is not so much its complete failure, but the erosion of its centrality in the global trading system.

In this context, the WTO's future will most likely take one of two forms. In the first scenario, it will merely handle matters associated with 20th century trade rules but irrelevant

for 21st century trade and GVCs. All "new generation" trade issues will be addressed in other formats, most likely in RTAs.

In this rather optimistic scenario, which seems to be the path currently being followed by the WTO, the Geneva-based organization will maintain its role as one of the pillars of world trade governance. This outcome would be reminiscent of the European Union's three-pillar structure, in which the first pillar (basically, the disciplines agreed to in different treaties up to the 1992 Maastricht Treaty) was supplemented by two new pillars to cover new areas of cooperation. A pessimistic version of this scenario envisions that a lack of progress in adopting new rules may undermine political support for the organization and that violations of WTO disciplines may become commonplace.

Under the second scenario, the emergence of other mechanisms of trade governance will reinvigorate the centrality of the WTO, forcing it to then engage in 21st century trade issues both by developing new multilateral disciplines—or at least general guidelines—on issues such as investment guarantees, and by providing a multilateral dimension to some of the new disciplines which have emerged in RTAs.

This future outlook could take different forms. The WTO's engagement may involve varying levels of pluri-lateralism where only a group of members sign up to new disciplines rather than the latter being binding on all WTO members. Several examples, such as the Information Technology Agreement (ATI) and the Government Procurement Agreement (GPA), embody this approach. Another variant is an expansion of the Doha Round agenda which would include some of the new trade issues which are now matters for RTAs.

Naturally, 20th century-type trade has not disappeared, but if it remains important in certain goods (e.g. primary products) and for some countries (Global Supply Chains are still rare in Latin America and Africa), the most dynamic aspect of trade in the 21st century is the development of GVCs. For this reason, the formulation of new rules and disciplines regulating trade, services, intellectual property, investment, and business mobility is being increasingly undertaken outside the structures of the WTO, which was not designed to regulate these issues.

Developing countries seek to quickly and unilaterally lower their tariffs (especially on intermediate goods), and unilaterally remove barriers and other "behind the border" obstacles (non-tariff barriers) to the expansion of trade, investment and services, and intellectual property rights protection. Moreover, both developed and developing countries are eager to

sign bilateral investment agreements and comprehensive RTAs which clearly stipulate the 21st century disciplines.

These developments have dramatically eroded the WTO's bearing in the global trade governance system. The implication for states' trade policies is obvious. WTO members will now have to decide whether the international trade organization should continue to regulate global trade with a 20th century mindset, or work constructively and creatively to delineate a new range of rules and disciplines to address the realities of 21st Century trade.

The Doha Round of world trade negotiations was launched in Doha, Qatar in November 2001. Named the Doha Development Agenda, this round of trade negotiations is targeted at further liberalizing trade, whilst facilitating the integration of developing countries, particularly Least Developed Countries (LDCs) into the WTO multilateral system. The first set of issues from the Doha Development Agenda was agreed by WTO Members at the 9th WTO Ministerial Conference that took place on 3-6 December 2013.

10.2 THE DOHA DEVELOPMENT ROUND IN A NUTSHELL

The main issues at stake are:

- Reforming agricultural subsidies
- Ensuring that new liberalisation in the global economy respects the need for sustainable economic growth in developing countries
- Improving developing countries' access to global markets for their exports

Thanks to its active engagement in the multilateral trade negotiations, the EU wants to boost the global Gross Domestic Product and creating a fair trade system for all countries, including LDCs.

10.3 OPPORTUNITIES AND CHALLENGES IN 21ST CENTURY WTO

1. **Global economic crises.** While it can be a transmitter of crises, trade (and its diversification) is also a way out of crises. Countries that were more diversified geographically (e.g. Uganda) or sectorally (e.g. Mauritius) proved to be more resilient to an economic downturn. Trade and exchange-rate policy during crises and finance for trade during crises are of fundamental importance. This entails a new agenda for the WTO.
2. Confronting scarcity. Trade is a solution to long-run challenges posed by increasing resource scarcity. Resource endowments vary globally and also within regions, both of which create opportunities in virtual trade of resources (commodities embedding water

and land). For example, South Africa is beginning to meet its water limits in certain areas while the Democratic Republic of Congo has abundant water. Egypt used to be the 'bread basket' of the world when its population was smaller, but now imports wheat and other commodities that depend on water- and land-intensive production. Tension in water-scarce areas could thus be resolved through trade in virtual water. Trade and natural resources is a new agenda for the WTO.

3. **Promoting innovation.**Trade enables countries to reap the returns of innovation and tap into technology networks. China has become a large exporter of solar panels. Bolivia has half the world's reserves of lithium crucial for green technology. Balancing the protection, promotion and access to innovation requires context specific analysis and solutions inspired by multilateral initiatives. Well governed trade can be good for profits, country and planet.
4. **Food security.** For inexplicable reasons, cereal exporters that have a comparative advantage in its production (e.g. Ukraine) employ export restrictions, while the EU without this comparative advantage subsidises its input-intensive farmers. This is a folly. If both were to reduce their distortions, the world would be more food secure for less money.
5. Aid for Trade and development**.** Aid can help low-income countries tackle these challenges and remove binding trade constraints. A key question for further work is to establish what types of Aid for Trade work in which context.

Trade is a solution to global challenges. The WTO is more important than we realise as long as it can adapt itself to 21st Century challenges and become more problem-driven.

10.4 SOCIAL CLAUSES AND WTO AGREEMENTS

Social clause is a provision in an international trade agreement that would link trade liberalization and labour standards. A social clause has been discussed but not adopted in the WTO. The implementation of GSP by both the EU and the US does include a social clause.

The only explicit reference to labour standards in the WTO agreements is Art.XX(e) of GATT 1947 allowing a prohibition on imports made with prison labour. However, it has been argued that various clauses of GATT could be interpreted so as to permit the imposition of barriers on goods where labour standards have been violated. These are Art.VI (anti-dumping), Art.XIX (safeguards), Art.XX (general exceptions), Art.XXIII (Nullification and impairment), Art.XXIV(customs unions and free trade areas) of GATT and Art.XIII of the WTO Agreement on opt-out provision. WTO is an international treaty and it has to be

interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT). Agreements have to interpreted in good faith giving effect to the ordinary meaning to the terms of the treaty in their context and in the light of its object and purposes. The main purposes are to be found in the first recital in the preamble to the Marrkesh Agreement which states that the parties recognize

“.....that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development....”

Even though, environmental concerns are specifically mentioned in the preamble, those relating to human resources not, there are several similarities between environmental and labour issues. Both involve non-trade values and both may be relevant to sustainable development. But there are also differences. Labour abuses do not give rise to pollution of the global commons nor to physical cross-border externalities. Labour standards are currently not subject to World Trade Organization rules and disciplines but some industrial nations believe the issue should be studied by the WTO as a first step toward bringing the matter of core labour standards into the organization.

These industrial member states believe the right to bargain collectively, freedom of association and workplace abuse, (including forced labour and certain types of child labour), are matters for consideration in the WTO. WTO rules and disciplines, they argue, would provide a powerful incentive for member nations to improve workplace conditions.

Arguments for the Inclusion of Labour Standards in WTO

(1) The social clause would enable WTO to move closer to its original objectives of increasing standard of living and full employment;

(2) Labour standards linked to international trade agreements could set minimum levels in the current competitive climate. This would prevent increasing competition in reducing the labour standards;

(3) The incorporation of labour will prevent the Sates from adopting protectionism tactics in the name of unemployment;

(4) Labour standards also serve to regulate production by multinational companies in the developing countries which often profit from the exploitation of labour

(5) There is need for socio-economic development. Social progress is possible only through prescribed labour standards.

(6) The 'Solidarity argument' That the industrial countries should prefer adoption of universal labour standards, failing which they may be seen as collaborating in the exploitation of workers in developing countries;

Arguments against the Inclusion of Labour Standards in WTO

(1) The competitive position of developing countries will be impaired by premature introduction of labour standards because it removes one of their few advantages compared with the developed countries, that is, availability of a large low-paid labour force;

(2) Developed countries may use labour standards as a guide for protectionism

(3) There is expertise as to labour standards in WTO. Labour standards are the work of ILO.

(4) The incorporation of labour standards into international treaties may result in a loss of sovereignty. The pressure involved in the imposition of labour standards, can detoriate into interferences in domestic affairs;

(5) Trade sanctions above cannot change the conditions which lead to child labour

In the Uruguay round has left the issue of the social clause open as the Members failed to gain consensus.

10.5 MINISTERIAL CONFERENCE AND LABOUR STANDARDS

The issue of labour standards was discussed the first Ministerial Conference of WTO at Singapore in 1996. Industrial countries have agreed that all members of the WTO should adhere to certain minimum commitments on workers' rights, such as right to association, abolition of forced labour and child labour. At the conference developing countries was different and argued that labour standards are not trade issues and hence it should be outside the ambit of WTO. At the second Ministerial conference at Geneva in 1998, the developing countries called upon the WTO to reject the new forces of protectionism that are disguised as concerns about environment, labour standards etc.

10.6 SUMMARY

The world trading system, led by the World Trade Organization (WTO), is under pressure to evolve and address 21st-century trade issues. Some of the major challenges WTO

faces include global economic crises, food security and promotion of innovations. Within the context of international trade, a **social clause** is the integration of seven core ILO labour rights conventions into trade agreements.Core labour standards would be inserted into an article within the WTO Agreements which could be a more viable option than amendment of the Agreements themselves.

10.7 KEYWORDS

1. Globalization
2. Labour Standards
3. Social Clause

10.8 SELF ASSESSMENT QUESTIONS

1. Explain the opportunities and challenges WTO has to deal with in 21st century

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2. What is social clause? Examine the arguments for inclusion or exclusion of labour standards under WTO agreements

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3. Write a note on Ministerial Conferences on labour standards

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4. Trace the Doha Development Rounds

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10.9 REFERENCE

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

BLOCK - III

UNIT- 11: TRANSNATIONAL COMMERCIAL LAWS

Structure:

11.0 Objectives

11.1 Introduction

11.2 Transnational Commercial Law and its Scope

11.3 History of Law Merchant or Lex Mercatoria

11.4 UNIDROIT

11.5 UNCITRAL

11.6 Summary

11.7 Keywords

11.8 Self Assessment Questions

11.9 References

11.0 OBJECTIVES

1. To define Transnational commercial law and its scope
2. To trace the history of lex Mercatoria
3. To understand the harmonization of international trade law
4. To study UNDROIT and UNCITRAL

11.1 INTRODUCTION

Transnational Business Law is a world based and provides business in a global economy. It helps to understand the world and the foreign policy choices faced by transnational and internationaltrade.**TransnationalLaw** All the law—national, international, or mixed—that applies to all persons, businesses, and governments that perform or have influence across state boundaries, is termed as transnational law.

Transnational law regulates actions or events that transcend national frontiers. It involves individuals, corporations, states, or other groups—not just the official relations between governments of states An almost infinite variety of transnational situations might arise, but there are rules or law bearing upon each. Since applicable legal rules might conflict with each other, “choice of law" is determined by rules of conflict of laws or private international law. The choice, usually between rules of different national laws, is made by a national court.

In other types of situations, the choice might be between a rule of national law and a rule of "public international law," in which case the choice is made by an international tribunal or some non-judicial decision-maker, such as an appointed body.

11.2 TRANSNATIONAL COMMERCIAL LAW AND ITS SCOPE

It consists of international conventions, model laws, and statements of principle (or standards). A recent compilation consists of some sixty instruments divided into twelve subject areas as diverse as contract law, electronic commerce, sales, agency and distribution, international credit transfers and bank payment undertakings, secured transactions, cross-border insolvency, conflict of laws, international civil procedure, and international commercial arbitration. This is a comprehensive collection is but not exhaustive.

The new transnational commercial law is driven by international institutions ranging from UNCITRAL, UNIDROIT, and the World Bank; regional governmental or economic bodies like the European Union or MERCOSUR; specialist international bodies such as the Basel Committees on Banking Supervision and Payment and Settlement Systems, and the International Organization of Securities Commissions (IOSCO); and industry bodies such as

the International Chamber of Commerce (ICC). There is a great deal of overlap in the application of their work in practice. Take, for instance, the area of transnational financial law: the Financial Stability Forum brings together national authorities responsible for financial stability around the world. In order to further its aims, the Forum advances a compendium of twelve key standards concerning transparency of policy making in the financial system, sound institutional and market infrastructure, and adequate financial regulation. The standards are drawn from a range of international bodies, including the International Monetary Fund (standards on macroeconomic policy and data transparency), the World Bank (insolvency and credit guidelines), Organisation for Economic Co-operation and Development (principles of corporate governance), the Basel Committee, IOSCO, and Financial Action Task Force on Money Laundering. As well as providing a fine overview of the area, Professor Mario Giovanoli has argued that the new transnational financial law is mainly stand-alone "soft law," independent of any international framework of binding legal rules and sometimes lacking the degree of precision indispensable to a legally enforceable Rule.

In addition to classifying the new transnational commercial law according to its subject matter or institutional source, one may classify it by the juridical nature of the instrument. Thus it is possible to divide transnational commercial law into principles (or standards), model laws, and international conventions. A very longstanding set of principles is the Uniform Customs and Practice for Documentary Credits, first published by the ICC in 1933. However, such principles of transnational commercial law extend well beyond trade. The well known UNIDROIT Principles of International Commercial Contracts are mentioned at greater length below. The standards collected by the Financial Stability Forum have been referred to. In the area of dispute settlement there are the ALI/UNIDROIT Principles of Transnational Civil Procedure. The *lex mecatoria* is more difficult to identify, as we shall see, but it consists of principles like good faith, reasonableness, the duty to negotiate, set-off, and the obligation to compensate on expropriation.

Among the model laws of transnational commercial law—a second category of instrument—are those of UNCITRAL, which now has Model Laws on International Commercial Arbitration, Cross-Border Insolvency, and International Credit Transfers.The model laws used by bodies like the World Bank and IMF in their technical assistance work are not always publicly available nor are records of which countries have adopted them and in what form. In effect, these World Bank Model Laws extend beyond the financial sector to

matters such as insolvency and security.

As to international conventions relating to transnational commercial law, these began in the first part of the twentieth century. To take just the financial area, conventions were drawn up for a Uniform Law on Bills of Exchange and Promissory Notes and a Uniform Law Concerning Cheques. International conventions from recent decades include the United Nations Convention on Contracts for the International Sale of Goods (CISG) (1980)9, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) (1958) and the United Nations Convention on the Assignment of Receivables in International Trade (2001).

11.3 HISTORY OF LAW MERCHANT OR LEX MERCATORIA

The history of the law merchant or Lex Mercatoria is actually the history of private international law which grew in great degree out of the transactions between different nations. And at one time, without doubt, it was the law of England simply because it was the law of other nations.

Evolution of Lex Mercatoria

The exact place and time of its origin is uncertain. Many writers have stated that it began in Italy in the central part of the middle Ages. But investigation of early documents shows that it goes back much further. For instance, to the time when the Arabs (1) dominated the Mediterranean. But they invented little and many of the terms which they used came from the Romans, Greeks and Phoenicians, who for many hundreds of years monopolized the sea commerce.

Magnitude of Trade of Arabs

The magnitude of the trade of the Arabs between the time of Mohammed and the Crusades was great. They made voyages to China and to India where they established colonies. This trade was temporarily interrupted by the Chinese insurrection of 875 A.D., but the intermediate commerce was not disturbed and trade with Indo-China, East Persia and India continued. By land there was a great deal of traffic with Persia, India, Bokhara and Samarkand. Until the 11th century both their caravans and vessels carried their merchandise along the North Coast of Africa while traders from Arabic Spain and Sicily trafficked to Egypt and the intervening ports.

At the time of the Crusades, the Arabs had an immensely heavy trade. This is attested by the fact that in 1191 during the Third Crusade, Richard, Coeur De Lion, captured one of Saladin's caravans, rashly traveling west of the Jordon and became possessed of "very rich

spoil of spices, gold, silver, silks, robes, arms of every kind, together with 4700 camels, besides asses and mules without number". This reciprocal trade was almost entirely between those of the same religion. When the Arab fleets went elsewhere, they sailed not for trade, but for rapine and conquest. But the intercourse between the Christians and the Saracens of South Italy and Sicily was not always hostile. Frederic II was especially friendly to the latter, and there were many treaties of peace and commerce between Aragon and El Mogreb.

It was into this rich eastern trade that the Italians and others came to share; the first Genoese fleet bringing supplies arriving in 1198, followed by the Pisans and Venetians and the men of Amalfi. Each nation seemed to have had its viscount with consuls in several cities for the purpose of self government and protection, observing their own laws and customs. Whether before this time they had adopted the sea law of the East or not, it is clear that it soon became part of the law of the Western Mediterranean. Venice, as the chief distributing mart of the middle Ages, became in the 14th century the southern terminus of a great land trade route.

First Treatise on Merchant Law in England - 1622

The first work on merchant law in England was written by Gerard Malynes published in 1622, entitled "Consultudo Vel Lex Mercatoria" or the Ancient Law Merchant. In his preface to this work, he stated that he had entitled it Lex Mercatoria instead of Jus Mercatorum because it is customary law provided by the authority of all kingdoms and Commonweals, and not a law established by the sovereignty of any prince. Blackstone stated that the affairs of commerce were regulated by a law of their own called the Law Merchant or Lex Mercatoria "which all nations agree in and take notice of and it is particularly held to be part of the law of England which justifies the causes of merchants and the general rules which obtain in all commercial countries." Still later, Lord Mansfield stated that "Mercantile law is not the law of a particular country but

On What Law Merchant Based

The Lex Mercatoria would seem to be in part based on Roman law, in part maritime custom, in part the law of the Medieval European fairs, and to a great extent upon the last.
Here we have coupled together Roman Law (the State is God), maritime law (international law of war and commerce) and Merchant Law which is the present-day law of national and international banking.

Contents of Lex Mercatoria

There is some obscurity as to what constituted the substance of the Lex Mercatoria, but it is definitely defined as the law administered as between merchants and the consular or commercial courts, some of it being substantive law and some rules of evidence and procedure.

Distinctive Elements in the Law Merchant

In every land during the 12th and following centuries, the towns began to record their laws and customs, which everywhere contain legal rules for commerce that differ from the common law of the land. In most of the Italian cities, commercial law is to be found mainly in the Statutes of the Merchant Guilds. These once confirmed, tacitly or expressly, had all the authority of state law, binding on all who traded within the city. As heads of the Guild, the consules mercatorum administered the law, but the city magistrates were under a strict obligation to which they had to swear on entering upon their office, to aid if necessary, the Guild Consuls with all the powers of the state in securing the execution of their judicial sentences.

Effect of the Law Merchant on Common & Statute Law

Many of the rules of the Law Merchant were directed to evade inconvenient rules of the common law. For example, one of the first rules of the common law is that a man cannot give what he himself has not. Hence, a man who has no title to goods cannot give title. Consequently, when you buy a thing, if you are to be sure that you have title to it, you must inquire into the title of that thing back to its remote possessors, to make sure that no one in the chain of title stole it or obtained it by fraud. Whereas, the merchant said that commercial business "cannot be carried on if we have to inquire into the title of everybody who comes to us with documents of title."

Lord Justice Bowen in Sanders v. McKlean, 11 Q.B.D. said, "The practice of merchants is not based on the supposition of possible fraud. The object of mercantile usage is to prevent the risk of insolvency, not of fraud; and anyone who attempts to follow and understand the Law Merchant will soon find himself lost, if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contra is the case. Credit, not distrust, is the basis of commercial dealings. Mercantile genius consists principally in knowing whom to trust and with whom to deal . . ."

The Law Merchant dealt with many choices in action, and it would have been very inconvenient, for example, when a man took a bill of exchange, if he were not able to sue on

it in his own name or would have to inquire into the title of all previous endorsers. [It is a uniform practice of banks, when processing checks, to stamp their endorsement on the back with the note "P.E.G.", which stands for "Prior Endorsement Guaranteed."]

Hence, the Law Merchant established certain documents or choses in action which were transferable by delivery and endorsement, or by delivery, so that the holder could sue in his own name and which passed good title to the transferee who took them in good faith, notwithstanding the transferor had no title. They could be sued on by the holder in his own name and were not affected by previous lack of title. This instrument was the original negotiable instrument. Hence, the law of negotiable instruments, with a few exceptions, is founded entirely upon the customs of merchants.

The Fairs of the Middle Ages

A fair was an imposing assemblage occurring as rule once a year, attended by merchants who traveled from far distant countries, bringing wares from perhaps even more distant countries. It would be conducted for a consecutive period of several weeks, would cover large space of ground on which would be erected temporary buildings and streets for the booths, etc., the sale of things in the different streets being carried on in the different booths and offered every conceivable commodity which could be made and sold. To regulate the currency and secure the country against the loss of specie, as well as to prevent importation of spurious or debased coin, the officer of the King's Exchange examined into the mercantile transactions of the foreign traders.

Consuls and Consulados

It is impossible to fix with certainty the origin of the institution of consuls, but it certainly goes back to the ancient Greeks, since the proxenia of ancient Greeks corresponds to the modern consular system. The proxenoi, like the consul, supplied information to the government that appointed them, and also furnished advice and assistance to the citizens who were subjects of that government while residing temporarily in the territory of another country. The more modern institution of consuls is probably more of Italian growth. The duties of these consuls at first was merely to attending the traveling merchants to the fairs, represent them generally in all matters connected with the fairs, with jurisdiction to settle all fair disputes which might arise between members of the same nationality.

Hanseatic League 1241 – 1269

This was a combination of merchants which provided rules and regulations for their conduct and which was to protect them when the law did not protect or recognize the rights

of the traders. It was a merchant guild formed in Germany in 1241 to protect the merchants. It came to control all the trade of Northern Europe and included eighty-five leading cities, among which was London. At its height it had considerable power; it maintained an army and a navy, guarded roads from city to city, kept a fortress and a storehouse in each city, waged war, enforced the merchant's laws at the various fairs. Its last general assembly is said to have been held about 1669.

Fairs in England

It is probable that the Romans introduced fairs into England as they did into so many other places. Alfred directed alien merchants to come only to the four fairs of London, York, Bristol and Winchester and to their remaining at each fair not more than 40 days. Athelred II proclaimed peace for ships of merchants, even though they be enemies, coming with goods into any port. Henry II granted to the citizens of London freedom
from lestage, a due for leave to sell at fairs and from other tolls.

Bills of Exchange

The earliest form of negotiable instrument was the Bill of Exchange. Blackstone (2 Com. 467) says in regard to their origin, "This method (bills of exchange) is said to have been brought into general use by the Jews and Lombards (3) when banished for their usury and their vices, in order to more easily draw their finances out of France and England into those countries in which they had chosen to reside." But the invention of it was earlier, for the Jews were banished from England in 1290, and in 1236 the use of paper credit was introduced into the Mogul Empire in China.

Daniels, in his work on Negotiable Instruments states that "There is reason to believe that bills of exchange were known in England as early as 1307 at least since in that year King Edward I ordered certain money collected in England for the Pope and it was to be remitted to him not by way of coin or bullion, but by way of exchange." The Jewish Encyclopedia suggests a much more probable origin of bills of exchange, viz: "The practice seems to have begun among the Arab traders of the Levant in the 8th century and from them passed to the Italian traders who followed the Crusades."

Obviously, it was impossible for caravan commerce to be carried on after the age of barter (sic) had passed, without some form of documentary credits, the distances to be traveled and the dangers traveled and the dangers of the routes making bills of some sort imperative. The relics which have come down to us, however, are few since every great

commercial center of the east has been thoroughly destroyed more than once. But there are some instances of certain forms of bills of exchange at very early dates.

Five tablets were some time ago dug up in one of the ancient Assyrian capitals, the first of which expresses a certain simple obligation by debtor to creditor, which was duly signed and witnessed and payable with interest; the second in which was an obligation payable at short maturity with a penalty clause; third was an obligation secured by a credit on a third person, who was to pay in case the debtor did not; fourth, reciting that signer had delegated to third person the right to recover the debt; and fifth, was a fully developed bill of exchange drawn up by one person at one place on another at another place and containing the name of the payee, date when payment was to be made, the bill being signed and witnessed. These clay documents were evidently issued before the use of coins. There are other examples extant of Babylonian letters of credit or bills of exchange in other tablets dating from 677 to 179 B.C.

Second Instrument to be made Negotiable

The Promissory Note was the next document which obtained the feature of negotiability. The first case in which a promissory note was recognized by the courts of England as negotiable instruments was that of Sheldon v.Hently, 2 Showers 160, decided in 1680, in which case the court held a promissory note to be a negotiable instrument expressly stating ". . It was the custom of merchants that made them good."

Bank Notes become Negotiable

The next instruments to become negotiable were the promissory notes payable on demand issued by bankers, that is, bank notes. To this again, the custom of merchants very speedily gave negotiability, and in the leading case of Miller v. Race, Lord Mansfield decided that bank notes also were negotiable instruments, holding that it was necessary for the purposes of commerce that their currency be established and secured. Next, the banks besides issuing their promissory notes payable on demand, accepted and honored bills of exchange drawn on them by their customers payable on demand, that is, the check came into existence, and the practice of merchants made it negotiable.

The influence of the fairs on the public law and their influence on the relationship of international law was great. The term fair was practically equivalent to the term peace. The reaction against the principals of primitive hostility was working under the influence of commercial needs. Thanks to the progress of the peace of the fairs and their safe conducts, the communications of foreigner with foreigner became more certain; international relations

multiplied; transactions were surrounded by guarantees and the idea of good faith and of the loyalty which should preside over commerce were more and more developed. Means of transport were perfected. Men, hitherto thrown back upon themselves in a family group came into contact with each other; original mistrust was weakening. Little by little the last vestiges of primitive hostility disappeared. They are the first places where the exchanges for value were able to develop; the law of supply and demand, the law of the balance of trade, find there their first application. It was at the fairs and markets that money ceased to be mere objects of consumption, and became capital. Due to them, traffic was regularized and submitted to the great law of competition.

Unification of Commercial Laws

In order to harmonize the law which governs international trade , two international institutions UNIDROIT and UNCITRAL, are entrusted with the responsibility of developing uniform laws.

11.4 UNIDROIT

The International Institute for the Unification of Private Law (UNIDROIT) is an independentntergovernmental Organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives.

Set up in 1926 as an auxiliary organ of the League of Nations, the Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute.

MEMBERSHIP AND FUNDING

Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute. UNIDROIT's 63 member States are drawn from the five continents and represent a variety of different legal, economic and political systems as well as different cultural backgrounds.

The Institute is financed by annual contributions from its member States which are fixed by the General Assembly in addition to a basic annual contribution from the Italian Government. Extra-budgetary contributions may be made to fund specific projects or activities.

STRUCTURE

UNIDROIT has an essentially three-tiered structure, made up of a Secretariat, a Governing Council and a General Assembly. The Secretariat is the executive organ

of UNIDROIT responsible carrying out its Work Programme from day to day. It is headed by a Secretary-General appointed by the Governing Council on the nomination of the President of the Institute. The Secretary-General is assisted by a team of international civil servants and supporting staff. The Governing Council supervises all policy aspects of the means by which the Institute's statutory objectives are to be attained and in particular the way in which the Secretariat carries out the Work Programme drawn up by the Council. It is made up of one ex officio member, the President of the Institute, and 25 elected members, mostly eminent judges, practitioners, academics and civil servants. The Governing Council is chaired by the President of the Institute who is a member of the Council ex officio. The General Assembly is the ultimate decision-making organ of UNIDROIT: it votes the Institute's budget each year; it approves the Work Programme every three years; it elects the Governing Council every five years. It is made up of one representative from each member Government. The Presidency of the General Assembly is held, on a rotating basis and for one year, by the Ambassador of one of the Organisation's member States.

LEGISLATIVE POLICY

UNIDROIT has over the years prepared over seventy studies and drafts. Many of these have resulted in international instruments, including international Conventions, Model Laws, Principles and Legal and Contractual Guides. In the case of Conventions, they were adopted by diplomatic Conferences convened by member States of UNIDROIT:

UNIDROIT's work has also served as the basis for a number of international instruments adopted under the auspices of other international Organisations, several of which are already in force.

Nature of instruments drawn up by UNIDROIT

UNIDROIT's basic statutory objective is to prepare modern and where appropriate harmonised uniform rules of private law understood in a broad sense. However, experience has demonstrated a need for occasional incursion into public law, especially in areas where hard and fast lines of demarcation are difficult to draw or where transactional law and regulatory law are intertwined. Uniform rules prepared by UNIDROIT are concerned with the unification of substantive law rules; they will only include uniform conflict of laws rules incidentally.

Technical approach to harmonisation or unification favoured by UNIDROIT

UNIDROIT's independent status amongst intergovernmental Organisations has enabled it to pursue working methods which have made it a particularly suitable forum for tackling more technical and correspondingly less political issues.

Factors determining eligibility of subjects for uniform law treatment

New technologies and international commercial practices call for new, harmonised and widely acceptable solutions. Generally speaking, the eligibility of a subject for harmonisation or even unification will to a large extent be conditional on the willingness of States to accept changes to domestic law rules in favour of a new international solution on the relevant subject. Legal and other arguments in favour of harmonisation have accordingly to be weighed carefully against such perception. Similar considerations will also tend to determine the most appropriate sphere of application to be given to uniform rules, that is to say, whether they should be restricted to truly cross-border transactions or extended to cover internal situations as well. While commercial law topics tend to make for most of the international harmonisation initiatives, the broad mandate given to UNIDROIT allows the organisation to deal with non-commercial matters as well.

Factors determining choice of instrument to be prepared

The uniform rules drawn up by UNIDROIT have, in keeping with its intergovernmental structure, generally taken the form of international Conventions, designed to apply automatically in preference to a State's municipal law once all the formal requirements of that State's domestic law for their entry into force have been completed. However, alternative forms of unification have become increasingly popular in areas where a binding instrument is not felt to be essential. Such alternatives may include model laws which States may take into consideration when drafting domestic legislation or general principles which the judges, arbitrators and contracting parties they address are free to decide whether to use or not. Where a subject is not judged ripe for uniform rules, another alternative consists in the legal guides, typically on new business techniques or types of transaction or on the framework for the organisation of markets both at the domestic and the international level. Generally speaking, "hard law" solutions (i.e. Conventions) are needed where the scope of the proposed rules transcends the purely contractual relationships and where third parties' or public interests are at stake as is the case in property law.

DEPOSITARY FUNCTIONS

UNIDROIT has been designated as the Depositary to its most recent instruments: the 2001 Cape Town Convention (pursuant its Article 62(1)), the 2001 Aircraft Protocol

(pursuant to its Article XXXVII(1)), which both entered into force on 1 March 2006, the 2007 Luxembourg Rail Protocol (pursuant to its Article XXXIV(1)), the 2012 Space Protocol (pursuant to its Article XLVIII(1)) which have not yet entered into force, as well as the 2009 UNIDROIT Convention on Substantive Rules for Intermediated Securities (pursuant to its Article 48 (1) (also not yet in force).

UNIDROIT's responsibilities as Depositary under those instruments are specified in each instrument, and include the operation of a system for the receipt and notification of all instruments of ratification, declarations and other documents lodged with the Depositary. UNIDROIT provides information for the assistance of States that are contemplating becoming Contracting States to them.

LEGISLATIVE ACTIVITIES

- Principles of International Commercial Contracts
- Protocol to the Cape Town Convention on Matters specific to Space Assets
- Netting of Financial Instruments
- Principles and rules capable of enhancing trading in securities in emerging markets
- Third Party Liability for Global Navigation Satellite System (GNSS) Services
- Preparation of a new Protocol to the Cape Town Convention on matters specific to agricultural, mining and construction equipment
- Private law and social and economic development
- Model legislative provisions on State ownership of undiscovered cultural objects

Legal co-operation

UNIDROIT makes its expertise in the field of legal harmonisation available to developing countries or regions and countries in economic transition, in particular, also with a view to promoting uniform law in those parts of the world. It also offers technical assistance with the drafting of national and regional legislation, a prime example being its co-operation with the Organisation for the Harmonisation of Business Law in Africa (OHADA). At the request of that Organisation, UNIDROIT prepared a preliminary draft OHADA Uniform Act on contract law, largely inspired by the UNIDROIT Principles. Moreover, UNIDROIT provides assistance in implementing and publicising UNIDROIT instruments and activities, including training and research in respect of uniform law. A research scholarships programme, funded largely by outside donors, enables the UNIDROIT Library to host a certain number of researchers each year.

11.5 UNCITRAL

The core legal body of the United Nations system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide for over 40 years, UNCITRAL's business is the modernization and harmonization of rules on international business. Trade means faster growth, higher living standards, and new opportunities through commerce. In order to increase these opportunities worldwide, UNCITRAL is formulating modern, fair, and harmonized rules on commercial transactions. These include:

- Conventions, model laws and rules which are acceptable worldwide
- Legal and legislative guides and recommendations of great practical value
- Updated information on case law and enactments of uniform commercial law
- Technical assistance in law reform projects
- Regional and national seminars on uniform commercial law

Origin

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

Mandate

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

Composition

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

11.6 SUMMARY

Transnational commercial law consists of international conventions, model laws, and statements of principle or standards. The history of the law merchant or Lex Mercatoria is actually the history of private international law which grew in great degree out of the transactions between different nations.The new transnational commercial law is driven by international institutions ranging from UNCITRAL, UNIDROIT, and the World Bank; regional governmental or economic bodies like the European Union or MERCOSUR.

11.7 KEYWORDS

1. Lex Mercatoria
2. Transnational Commercial laws
3. UNIDROIT
4. UNCITRAL

11.8 SELF ASSESSMENT QUESTIONS

1. Explain the scope of Transnational Commercial Laws

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2. Outline the historical evolution of lex mercatoria

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3. Examine the roles and functions of UNIDROIT

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4. Describe the contribution of UNCITRAL to international trade law

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11.9 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn

7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT -12: INTERNATIONAL SALES

Structure:

12.0 Objectives

12.1 Introduction

12.2 CIF Contracts

12.3 C & F Contracts

12.4 FOB Contracts

12.5 The Vienna Convention on Sale of Goods 1980

12.6 Summary

12.7 Self Assessment Questions

12.8 References

12.0 OBJECTIVES

1. To understand international sales contract
2. To identify rights and obligations of seller & buyer under international sales
3. To study the structure and features of Vienna Convention on Sale of Goods

12.1 INTRODUCTION

International sale contracts commonly contain abbreviations such as CIF (cost, insurance,freight), C&F (cost and freight), FOB (free on board) and FAS (free alongside ship). These abbreviations are trade terms which define the obligations of the seller and the buyer as regards the point of delivery, procurement of transport documents, contract of insurance, and other documents necessary for the export and import of cargo. Trade terms are largely a product of mercantile custom.

EX WORKS

Ex works is the most convenient trade term for the seller. Under an ex works sale contract, the seller undertakes to have the goods available for collection by the buyer at the seller's premises – for instance, factory, warehouse or mine. As to whether the seller is obliged to pack the goods for export or for taking delivery of the goods,this has to be determined from the terms of agreement. It is likely that the contract stipulates that the seller is to pack the goods for export at the buyer's expense.

12.2 CIF CONTRACTS

CIF is a trade term requiring the seller to arrange for the carriage of goods by sea to a port of destination, and provide the buyer with the documents necessary to obtain the goods from the carrier. CIF stands for cost, insurance, freight. The price of goods in CIF contracts is inclusive of freight (consideration, reward payable in respect of carriage of cargo from loading point to point of discharge) and insurance costs to the destination specified by the contract.

A CIF contract, as Scrutton J said in *Arnhold Karberg v Blythe, Green, Jourdain and Co*, is not a contract that goods shall arrive, but a contract to supply goods that comply with the contract of sale, and to obtain a contract for carriage and contract of insurance. CIF contracts are generally attractive to both seller and buyer. As far as the seller is concerned, he can charge a higher price taking into account the extra services – that is, obtaining shipping space and insurance – he provides. His margin of profit in a CIF contract could be

substantially higher than in an FOB contract since he may be able to obtain reasonable rates for freight and insurance depending on the prevailing economic conditions. The seller usually gets paid for the goods before their arrival at destination, since payment for goods in CIF contracts often takes place when the documents (that is, invoice, insurance policy and bill of lading) are tendered to the buyer, or to the bank in the event of a documentary credit arrangement between the seller and the buyer. However, it must be noted that payment does not always take place against tender of documents. The parties may have agreed to deferred payment credit – for example, providing for payment 30 days from the date of bill of lading.

The attractiveness of a CIF contract, as far as the buyer is concerned, is that he does not have to undertake the task of finding shipping space or insurance, which may be all the more difficult in a foreign country due to unfamiliarity with local business practices. Of course, the buyer could appoint an agent in the country of export to undertake the tasks of obtaining shipping space and insurance cover, but this assumes that the costs of an agent can be covered, or a reliable and trustworthy agent can be found for a reasonable remuneration. The risk of any increases in transportation and insurance costs also remains with the seller. Further, the goods do not have to be paid for until the relevant documents are tendered. Once the necessary documents are acquired, he is able to sell the goods to a third party on the strength of the documents.

Judicial definition of a CIF contract

CIF contracts have been judicially defined in a number of cases. The best definition provided in modern times is perhaps that of Lord Atkinson in *Johnson v Taylor Bros* who described a CIF contract as follows:

“. . . when a vendor and purchaser of goods . . . enter into a CIF contract . . . the vendor in the absence of any special provision to the contrary is bound by his contract to do [the following]. First, to make out an invoice of the goods sold. Secondly, to ship at the port of shipment goods of the description contained in the contract. Thirdly, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourthly, to arrange for insurance upon the terms current in the trade which will be available for the benefit of the buyer? Fifthly, with all reasonable dispatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolic delivery of the goods purchased, placing the same at the buyer’s risk and entitling the seller to payment of their price . . . if no place be named in the CIF contract for the tender of the shipping documents

they must *prima facie* be tendered at the residence or the place of business of the buyer ."

The above definition is what may be called a standard CIF contract. According to Lord Atkinson's definition, the seller is required to ship goods at the port of shipment in a CIF contract. However, this is not always the case. It is possible for the seller to contract on CIF terms for goods that are already afloat.

Is a CIF contract simply a sale of documents?

Since the goods can be paid for and sold on the strength of the documents, it is commonly said that a CIF contract is nothing more than a sale of documents. Judicial support for this is to be found in the statement of Scrutton J in *Arnhold Karberg v Blythe, Green, Jourdain and Co*:

". . . the key to many of the difficulties arising in CIF contracts is to keep firmly in mind the cardinal distinction that a CIF sale is not a sale of goods but a sale of documents relating to goods. It is not a contract that goods shall arrive, but a contract to ship goods complying with the contract of sale, to obtain, unless the contract otherwise provides, the ordinary contract of carriage to the place of destination, and the ordinary contract of insurance of the goods on that voyage, and to tender these documents against payment of the contract price. The buyer then has the right to claim the fulfilment of the contract of carriage, or, if the goods are lost or damaged, such indemnity for the loss as he can claim under the contract of insurance. He buys the documents, not the goods, and it may be that under the terms of the contracts of insurance and affreightment he buys no indemnity for the damage that has happened to the goods. This depends on what documents he is entitled to under the contract of sale. In my view, therefore, the relevant question will generally be not 'what at the time of declaration or tender of documents is the condition of the goods?' . . . but 'what at the time of tender of the documents, was the condition of those documents as to compliance with the contract of sale?'"

CIF Contract - Buyer and Seller Responsibilities

A	**The Seller Must**	B	**The Buyer Must**
A1	**Provision of Goods in Conformity with the Contract** The seller must provide the goods and the commercial invoice, or its equivalent	**B1**	**Payment of the Price** The buyer must pay the price as provided in the contract of sale.

	electronic message, in conformity with the contract of sale and any other evidence of conformity, which may be required by the contract.		
A2	**Licenses, Authorizations and Formalities** The seller must obtain at its own risk and expense any export licence or other official authorisation and carry out, where applicable, all customs formalities necessary for the export of the goods.	**B2**	**Licenses, Authorizations and Formalities** The buyer must obtain at its own risk and expense any import licence or other official authorisation and carry out, where applicable, all customs formalities for the import of the goods and for their transit through any country.
A3	**Contract of Carriage and Insurance** **(a) Contract of carriage** The seller must contract on usual terms at its own expense for the carriage of the goods to the named port of destination by the usual route in a seagoing vessel (or inland waterway vessel as the case may be) of the type normally used for the transport of goods of the contract description. **(b) Contract of insurance** The seller must obtain at its own expense cargo insurance as agreed in the contract, such that the buyer, or any other person having an insurable interest in the goods,	**B3**	**Contract of Carriage and Insurance** **(a) Contract of carriage** No obligation. **(b) Contract of insurance** No obligation.

	shall be entitled to claim directly from the insurer and provide the buyer with the insurance policy or other evidence of insurance cover. The insurance shall be contracted with underwriters or an insurance company of good repute and, failing express agreement to the contrary, be in accordance with minimum cover of the Institute Cargo Clauses (Institute of London Underwriters) or any similar set of clauses. The duration of insurance cover shall be in accordance with B5 and B4. When required by the buyer, the seller shall provide at the buyer's expense war, strikes, riots and civil commotion risk insurances if procurable. The minimum insurance shall cover the price provided in the contract plus ten per cent (i.e. 110%) and shall be provided in the currency of the contract.		
A4	**Delivery** The seller must deliver the goods on board the vessel at the port of shipment on the date or within the agreed period.	**B4**	**Taking Delivery** The buyer must accept delivery of the goods when they have been delivered in accordance with A4 and receive them from the carrier at the named port of destination.
A5	**Transfer of Risks**	**B5**	**Transfer of Risks**

	The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have passed the ship's rail at the port of shipment.		The buyer must bear all risk of loss of or damage to the goods from the time they have passed the ship's ail at the port of shipment. The buyer must, should he fail to give notice in accordance with B7, bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the period fixed for shipment provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.
A6	**Division of Costs** The seller must, subject to the provisions of B6, pay: All costs relating to the goods until such time as they have been delivered in accordance with A4; and The freight and all other costs resulting from A3 a), including the costs of loading the goods on board; and The costs of insurance resulting form A3 b); and Any charges for unloading at the agreed port of discharge which were for the	**B6**	**Division of Costs** The buyer must, subject to the provisions of A3, pay: All costs relating to the goods from the time they have been delivered in accordance with A4; and All costs and charges relating tot the goods whilst in transit until their arrival at the port of destination, unless such costs and charges were for the seller's

	seller's account under the contract of carriage; and Where applicable, the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export, and for their transit through any country if they were for the seller's account under the contract of carriage.		account under the contract of carriage; and Unloading costs including lighterage and wharfage charges, unless such costs and charges were for the seller's account under the contract of carriage; and All additional costs incurred if he fails to give notice in accordance with B7, for the goods from the agreed date or the expiry date of the period fixed for shipment, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods; and Where applicable, all duties, taxes and other charges as well as the costs of carrying out customs formalities payable upon import of the goods and, where necessary, for their transit through any country unless included within the cost of the contract of carriage.
A7	**Notice to the Buyer**	**B7**	**Notice to the Seller**

	The seller must give the buyer sufficient notice that the goods have been delivered in accordance with A4 as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable it to take the goods.		The buyer must, whenever he is entitled to determine the time for shipping the goods and/or the port of destination, give the seller sufficient notice thereof.
A8	**Proof of Delivery, Transport Document or Equivalent Electronic Message** The seller must, at its own expense, provide the buyer without delay with the usual transport document for the agreed port of destination. This document (for example a negotiable bill of lading, a non-negotiable sea waybill or an inland waterway document) must cover the contract goods, be dated within the period agreed for shipment, enable the buyer to claim the good from the carrier at the port of destination and, unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer (the negotiable bill of lading) or by notification to the carrier.	**B8**	**Proof of Delivery, Transport Document or Equivalent Electronic Message** The buyer must accept the transport document in accordance with A8 it is in conformity with the contract.
A9	**Checking - Packaging - Marking** The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, and	**B9**	**Inspection of Goods** The buyer must pay the costs of any pre-shipment inspection except when such

	counting) which are necessary for the purpose of delivering the goods in accordance with A4. The seller must provide at its own expense packaging (unless it is usual for the particular trade to ship the goods of the contract description unpacked) which is required for the transport of the goods arranged by it. Packaging is to be marked appropriately.		inspection is mandated by the authorities of the country of export.
A10	**Other Obligations** The seller must render the buyer at the buyer's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A8) issued or transmitted in the country of shipment an/or of origin which the buyer may require for the import of the goods and, where necessary, for their transit through any country. The seller must provide the buyer, upon request, with the necessary information for procuring any additional insurance.	**B10**	**Other Obligations** The buyer must pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A10 and reimburse those incurred by the seller in rendering its assistance in accordance therewith. The buyer must provide the seller, upon request, with the necessary information for procuring insurance.

12.3 C&F CONTRACTS

It is often the case that sellers and buyers contract on C&F terms instead of CIF terms. The seller under C&F (cost and freight) terms undertakes to contract for the carriage of goods but does not undertake to obtain insurance. As Brandon J said, in *The antanassa*, 'C&F contracts only differ from CIF contracts in that the sellers are not required to insure the goods for the buyer' . The undertakings in respect of transport arrangements and export licences in a

C&F contract are the same as those expected of the seller in a CIF contract. 'C&F terms are commonly used where the importing country prohibits insurance of cargo by the buyer abroad – a step frequently resorted to in developing countries to protect the local insurance industry.

According to the list issued by the International Union of Marine Insurance (IUMI) in 2008, developing nations, such as Nigeria, Pakistan, Bangladesh, Venezuela, Ghana and Ecuador prohibit insurance of imports abroad. It would theoretically be possible for the seller to quote CIF prices and obtain insurance from an insurer in the country of import. In practice, however, the buyer is likely to have a better understanding of local insurance customs and may well be better placed to obtain cover at lower premiums.

It goes without saying that the seller needs to inform the buyer of shipment to enable the latter to take out insurance. Failure to notify would mean that the seller bears the risk of loss during transit under the Sale of Goods Act.

12.4 FOB CONTRACTS

Unlike CIF contracts where definitions abound, there are no definitions concerning free on board (FOB) contracts – a consequence of the variety of uses to which the term was put during its 200-year history. It was used in domestic, as well as in export, contracts. In domestic contracts, the manufacturer or wholesale trader would often quote a price on FOB terms to the exporter. And, in export contracts, the use of the term was not restricted to sea carriage. It came to be associated with rail (FOR – free on rail), road (FOT – free on truck) and air transport (FOB airport).

It was in *Pyrene and Co v Scindia Navigation Co Ltd*117 that Devlin J categorised the different forms of FOB contracts. This classification was approved and neatly summarised in the subsequent case of *The El Amria and The El Minia*,118 as follows:

"In the first, or classic type, the buyer nominated the ship and the seller put the goods on board for the account of the buyer, procuring a bill of lading. The seller was a party to the contract of carriage and if he had taken the bill of lading to his order, the only contract of carriage to which the buyer could become a party was that contained in or evidenced by the bill of lading which was endorsed to him by the seller. The second is a variant of the first, in that the seller arranges for the ship to come on berth, but the legal incidents are the same. The third is where the seller puts the goods on board, takes a mate's receipt and gives this to the buyer or his agent who then takes a bill of lading. The buyer was a party to the contract *ab initio."*

THE Main Differences between CIF and FOB contracts

CIF contract is that when the seller has delivered the goods or provides them afloat. He has to perform the contract by tendering conforming documents to the buyer. The significant feature of a CIF contract is that performance of bargain is to be fulfilled by delivery of documents and not by actual physical delivery of goods by the seller.

FOB contract can be described as a flexible instrument. Because, the buyer has to nominate a ship and the seller has to put the goods on board of vessel for account of the buyer and procuring a bill of lading. The important differences between FOB and CIF contract is that, FOB contract specifies the port of loading, however CIF contract specifies the port of arrival.

12.5 THE VIENNA CONVENTION ON THE INTERNATIONAL SALE OF GOODS 1980

The law relating to sale contracts varies from state to state and any uncertainty with regard to applicable law means uncertainty also in respect of the rights and obligations of the parties to the contract and the available remedies in the event of a dispute. One way to tackle this uncertainty is to harmonise the law relating to international sales in the form of an international convention for worldwide adoption, thus enabling the application of a uniform set of rules to such transactions.

This task of harmonising the law relating to international sales of goods at an international level started in 1930 under the auspices of the International Institute for the Unification of Private Law (UNIDROIT).Interrupted by the Second World War, work resumed in the early 1950s, and in 1964 two conventions were adopted:

Uniform Law on International Sales (ULIS) and Uniform Law on the Formation of International Sales (ULFIS). Ratified only by a handful of states, including the United Kingdom, they were criticised on both political and legal grounds. Unpopularity of the ULIS and ULFIS meant a return to the drawing board. The United Nations Commission on International Trade Law (UNCITRAL) was seen as the ideal organisation to undertake the task of drafting such an international convention, since its membership consisting of developing (Third World) and developed nations, and socialist countries, would counter any political objections that might be leveled by the socialist or Third World quarters. The Working Group set to work in 1969 with ULIS and ULFIS as springboards and submitted two draft conventions in 1976 and 1977 to the Commission. On review, the Commission combined the two draft conventions into one – the Convention on the International Sale of

Goods – and submitted it to the Diplomatic Conference held at Vienna.8 The Convention on International Sales of Goods 1980 ('CISG' or popularly known as the 'Vienna Convention') came into force in 1988 with the required 10 ratifications. Since then, there has been a steady stream of ratifications.

Structures and features of Vienna Convention

The drafters intended to offer the Vienna Convention as a truly international instrument in the interests of wide acceptance, thus furthering the fundamental objectives of harmonisation and certainty. As such, it does not promote or adopt principles found in any one legal system in preference to another but strives towards a compromise that would be acceptable to all regardless of their legal or economic background.

As one writer points out, it is 'a marriage between socialist, third world, common, and civil law principles'. As to whether the marriage is a successful one or not will become clearer over time with an analysis of the fast growing case law database from different jurisdictions (currently, mostly European) collected by UNCITRAL.As part of the harmonisation drive and to endorse the international nature of the convention, it has, unlike many of the other international conventions, such as the Warsaw Convention and the Hague Rules on air and sea carriage respectively, a provision on its interpretation. The desire for global acceptance was pursued at the cost of leaving out legal issues central to a sales transaction. Passing of property,validity of contract, product liability, and consumer sales are some of the areas that have not been tackled in the Vienna Convention. In these matters, one must resort to the relevant domestic law applicable to the contract. Other features are party autonomy (freedom of the parties to a transaction to opt out of the convention) and use of language exhibiting a pragmatism that would appeal to the mercantile community. In order to avoid the perceived difficulties associated with legal technical language by non-lawyers and lawyers (from different jurisdictions) alike, the provisions avoid, for the most part, technical legal jargon thus making it more accessible.

The Vienna Convention is comprised of four parts: Part I (Arts 1–13) on sphere of application and general provisions; Part II (Arts 14–24) on formation of contract; Part III (Arts 25–88) on obligations of the seller, the buyer, remedies for breach of contract by seller and buyer, passing of risk and damages; and Part IV (Arts 89–101) on final provisions dealing with matters such as depository, reservations and entry into force.

Sphere of Operation Article 1 of the convention starts off by saying that it applies to 'contracts of sale of goods'. Predictably, the first question that is likely to come to mind is

‘What constitutes a sale for the purposes of the Vienna Convention?’No definition is provided. Nevertheless, an understanding of a contract of sale can be gathered from the rights and obligations of the seller and the buyer. Derived from the convention’s provisions and widely accepted, the sale contract is defined as ‘the contract by virtue of which the seller has to deliver the goods, hand over any documents relating to them and transfer any property in the goods, whereas the buyer is bound to pay the price for the goods, and take delivery of them’. Since payment of a price is central to a sale contract, the generally held view is that the convention does not apply to barters where goods are exchanged for goods or services31 and both parties take on the role of seller and buyer. The same goes for distribution agreements, though it seems that sales concluded under a distribution agreement will attract the application of the Vienna Convention. Also agency agreements are outside its scope.

A contract for the sale of goods will come within the ambit of the Vienna Convention if:

• the places of business are in different states (Art 1); and

• both these states are contracting states to the Vienna Convention (Art 1(1)(a)); and

• both parties know that they have places of business in different states on the basis of the contract, or dealings or information disclosed before or at the conclusion of the contract (Art 1(2)).

Nationality of the parties is an irrelevant factor for the application of the convention (Art 1(3)).

Place of Business

In spite of the importance of place of business for the applicability of the Vienna Convention, it is left undefined. Article 10 addresses the situation where a party has more than one place of business. Is the place of business the place where the business organisation is registered? Or, is it the place where important decisions regarding the organisation’s running are taken? Permanency may be one contributory factor. And the place where the transaction is to be performed may also be a relevant factor on the basis of Art 10. This lack of clarity leaves room for a variety of interpretations. The approach of the Vienna Convention to leave areas of controversy and areas adequately addressed by internationally recognised rules well alone affects certain types of transactions and the sale of certain types of goods.

First in the list are consumer transactions – goods bought for personal, family or household use, provided the seller is aware, are excluded. Predictably, these are excluded since consumer transactions are normally protected to varying degrees by the mandatory laws of a state. It would be difficult to achieve a common framework for consumer sales in the

absence of a common policy amongst states. Of course, the provision leaves a penumbra of uncertainty. For instance, will the purchase of a laptop by a doctor which he intends to use mostly for personal use and occasionally for professional purposes fall within or outside the convention? Further, who bears the burden of proving the seller's knowledge of the intended use of the goods for personal, family or household use? The Vienna Convention does not tackle procedural issues such as burden of proof and the suggestion often made is that such matters are to be decided by the law of the forum.

Exclusion of issues

A number of areas of an international sales transaction are specifically excluded by Art 4. Validity of the contract is excluded from the Vienna Convention. This means that issues such as legal capacity, illegality, mistake and agency contracts are left untouched. Applicable law will therefore be relevant where validity of the contract is at issue. In spite of its importance, the issue of property is also excluded, since it was felt that due to the divergent approaches it would be difficult to reach a consensus. The exclusion does not mean that the Vienna Convention does not broach the matter at all; it does in so far as placing the seller under an obligation to transfer property in the goods to the buyer. As to when, where and how, they are matters to be Article 1 of the convention starts off by saying that it applies to 'contracts of sale of goods'. Predictably, the first question that is likely to come to mind is 'What constitutes a sale for the purposes of the Vienna Convention?' No definition is provided. Nevertheless, an understanding of a contract of sale can be gathered from the rights and obligations of the seller and the buyer. Derived from the convention's provisions and widely accepted, the sale contract is defined as 'the contract by virtue of which the seller has to deliver the goods, hand over any documents relating to them and transfer any property in the goods, whereas the buyer is bound to pay the price for the goods, and take delivery of them'. Since payment of a price is central to a sale contract, the generally held view is that the convention does not apply to barters where goods are exchanged for goods or services and both parties take on the role of seller and buyer. The same goes for distribution agreements, though it seems that sales concluded under a distribution agreement will attract the application of the Vienna Convention. Also agency agreements are outside its scope. Resolved by the applicable law. Article 5 extends the exclusion to include liability for personal injury or death; it is silent, however, on the issue of liability for damage to property. While there are proponents for the view that this is a matter for tort, the widely held opinion is that the Vienna Convention displaces tort liability, and compensation is to be calculated on

the basis provided by Art 74. Case law tends to support the majority view. For instance, a Swiss court held that damage caused to the buyer's premises due to a leak was within the ambit of the Vienna Convention.

Party autonomy and the Vienna Convention

The Vienna Convention endorses the principle of party autonomy recognised as fundamental to international commercial transactions by private international law rules in most legal systems. The Vienna Convention is not mandatory in character and Art 6 provides that parties may exclude its application altogether. There is no indication in Art 6 whether this agreement should be express or implied. The best method obviously is clear in express words such as 'This contract is not subject to the Vienna Convention'. It could also be excluded with a choice of law clause, or agreeing to terms that are inconsistent with the Vienna Convention provisions. For instance, parties (with places of business in contracting states) to a sale contract may choose English law as the governing law of their contract, or they may use standard terms that are derived from English sales law.

Interpretation of the Vienna Convention

While adoption of an international convention introduces harmonisation and certainty, there is no surety that the degree of harmonisation and certainty achieved will be high since different jurisdictions are likely to interpret the provisions variously given the richness of language. One way to counter disharmony is to include an interpretation provision within the convention itself. The Vienna Convention has just such a provision in its Art 7, which states:

(1) In the interpretation of this convention, regard is to be had to its international character and to the need to promote uniformity on its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Formation of a contract

The Vienna Convention adopts the traditional offer-acceptance framework for determining the existence of a contract. Consideration, a concept found in common law, plays no role. However, the common lawyer will find much that is familiar and unfamiliar in the formation of contract under the Vienna Convention. No specific formal requirements are imposed and a contract can be concluded in any form, oral exchange or otherwise.89 Article

11, however, was the subject of some debate since socialist countries such as Russia, used to strict formal requirements for international trade transactions,90 were unhappy with contracts coming into existence on the basis of oral communication; similarly, with modification and termination. It was therefore Agreed that states requiring written communication could make a reservation under Art 96. Once a reservation is made under Art 96, it is mandatory and the contracting parties cannot agree to depart from the writing requirement. To illustrate, a contract of sale between two parties with places of business in contracting states, one of whom has an Art 96 reservation, will not be able to opt out of the formal requirement that the contract be in writing.

An offer, under the Vienna Convention (Art 14):

• must be addressed to a specific person;

• must be sufficiently definite (that is, the offer must indicate the goods and fix the quantity and price explicitly or implicitly); and

• must indicate the intention on the offeror's part to be bound in the event of Acceptance.

Obligations of the seller

According to Art 30, the seller is under an obligation to:

• deliver goods;

• hand over the documents; and

• transfer property in the goods

Obligations of the buyer

The buyer is obliged to take delivery of the goods under Art 53, and Art 60 obliges the buyer to doing all acts which could reasonably be expected of him in order to enable the seller to make delivery and in taking over the goods. He is also placed under a duty to examine the goods once the goods have been delivered and give timely notice in the event of non-conformity of goods. Unlike ULIS, which requires the buyer to examine the goods promptly, under Art 38(1) of the Vienna Convention the examination of the goods must take place within as short a time as is practicable in the circumstances. Under Art 38(1), it is not a requirement that the buyer personally examines the goods. The goods may be examined by his employees or through others appointed by him for that task. It could also be a third party, such as the second buyer, who has bought the goods during transit from the first buyer.

Passing of risk

Passing of risk is an important event in the sale of goods. Once the buyer acquires risk, he becomes liable for the price even if the goods are lost or damaged. Under English law

– that is, the Sales of Goods Act 1979 – the general rule is that risk passes along with property though there are exceptions to this.[See relevant provisions under Indian Sale of Goods Act]

The Vienna Convention also contains provisions relating to passing of risk. The consequences of the passing of risk from seller to buyer. Article 66132 states that:

. . . loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Remedies

In the event of a breach either by the seller or the buyer, the Vienna Convention makes available a number of remedies. Most of the available remedies are common to the seller and buyer. The remedies for breach of contract by the buyer are described in Articles 61-65. In addition, the provisions on damages in Articles 74-77 and on interest in Article 78 are also applicable to breach of contract by the buyer. The provision on avoidance in Article 64 is supplemented by Article 72 on avoidance prior to the date for performance and by Articles 81-84 on the effects of avoidance. In addition, under Article 71 the seller may suspend his performance in certain cases. The provisions on preservation of the goods are also important in an evaluation of the system of remedies. Some of the remedies described in Articles 61-65 are available to the seller irrespective of the kind of breach by the buyer. Other remedies are available only for breach of a certain obligation. This Section of the Convention actually contains three sets of remedies consolidated into a single text. The Convention does not describe in detail the relation between the different remedies available to the seller. Irrespective of whether the seller declares the contract avoided or requires performance, he may claim damages. This is explicitly stated in Article 61(2).

12.6 SUMMARY

International sale contracts commonly contain abbreviations such as CIF (cost, insurance,freight), C&F (cost and freight), FOB (free on board) and FAS (free alongside ship).The UN Convention on Contracts for the International Sale of Goods was adopted on April 11, 1980.The Convention consists of four parts. Part I (Articles 1-13) deals with the sphere of application and general provisions. In Part II (Articles 14-24) one may find provisions on formation of contracts on the international sale of goods. Part III (Articles 25-88) deals with sale of goods, while the Final Provisions of the Convention are included in Part IV (Articles 89-101).

12.7 KEYWORDS

1. CIF
2. C&F
3. FOB
4. International Sale
5. Vienna Convention on Sale of Goods

12.8 QUESTIONS FOR SELF-STUDY

1. What is international sale? Explain CIF contracts

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2. Distinguish between CIF and FOB contracts

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3. Discuss the structure and features of Vienna Convention on Sale Of Goods

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4. Explain the remedies under available under Vienna Convention

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5. Write a note on C & F Contracts

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6. Write a note on 'Passing of Risks'

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12.9 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn

7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT-13: INTERNATIONAL CARRIAGE OF GOODS

Stricture:

13.0 Objectives

13.1 Introduction

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13.0 OBJECTIVES

1. To study the laws relating to carriage of goods
2. To understand the laws applicable to Carriage by Sea and Air
3. To explain the Multi-modal transport under MMTG Act,1993

13.1 INTRODUCTION

Transportation of goods from the seller's country to the buyer's country is an important part of any international sale contract.

International carriages is the carriage of persons or goods between two or more nations, which is regulated by various international conventions. The international carriage of goods by sea is governed by the Hague Rules (1924), the Hague–Visby Rules (1968), and the Hamburg Rules (1978, not yet in force); that of goods by road by the Geneva Convention (1956); and that of goods by rail by a convention of 1980. (See also carriage of goods by air.) There are also conventions regulating the international carriage of passengers by sea, rail, and road. India is a party to various of these conventions and has legislated to give them legal effect.

Much of the cargo in international trade is still transported by sea, and bills of lading continue to play an important role as a transport document. Among its many characteristics is its role as a transferable document of title which contributes to its popularity. International developments in relation to the carriage of goods by sea are significant. The number of conventions in force – the Hague Rules, the Hague-Visby Rules and the Hamburg Rules – affecting sea transportation, in particular, bills of lading, and the new transport convention (the Rotterdam Rules) indicate the commercial and political interest vested in sea carriage by both the developed and developing countries. The Hague Rules and the Hague-Visby Rules, products of ship owning interests are influential and widely accepted, determine the responsibilities and liabilities of the carrier where goods are transported using bills of lading or documents of title. On the contrary, the Hamburg Rules, which casts its net wider as a result of a strong political agenda on the part of developing nations, when measured against the numbers of ratification, are of limited application. The current regime of three conventions is, to say the least, undesirable. Emerging new practices in relation to transport documents in the form of electronic bills of lading and electronic waybills as a result of developments in information technology also compound the uncertainties. Hence, the drafting of a new convention which was adopted in 2008. Containerisation brought its own exciting developments in the form of door-to-door transport using a combination of modes of

transportation and the use of a multimodal (combined) transport document. Attempts to harmonise the law through an international convention surprisingly have been unsuccessful.

13.2 LAW OF CARRIAGE OF GOODS

In the commercial life of any country, the need for carrying goods from one place to another cannot be over emphasised. Also, goods are to be moved from one country to another. For these purposes, a contract of carriage is to be entered into. The persons, organisations or associations which carry goods are known as carriers. Goods may be carried by land (including inland waterways), sea or air. Accordingly, the law relating to carrying of goods is contained in the following enactments:

1. In case of carriage of goods by land:

(i) The Carriers Act, 1865.

(ii) The Railways Act, 1989.

2. In case of carriage of goods by sea:

(i) The (Indian) Bills of Landing Act, 1856.

(ii) The Carriage of Goods by Sea Act, 1925.

(iii) The Merchant Shipping Act, 1958.

(iv) The Marine Insurance Act, 1963.

3. In the case of carriage of goods by air: The Carriage by Air Act, 1972. Wherever there is no specific provision for a particular matter in these statutes, then the Indian Courts resort to English Common Law. A contract of carriage of goods is a contract of bailment for reward, or locatio operis faciends. However, the contract of bailment is modified by the different statutes mentioned above in the case of carriage of goods by land, sea or air.

Definition of a Contract of Carriage.

A contract of carriage of goods is a contract of bailment for reward, or locatio operis faciends. However, the contract of bailment is modified by the different statutes mentioned above in the case of carriage of goods by land, sea or air.

Classification of Carriers

Generally speaking carriers are classified into (i) common carriers, (ii) private carriers and (iii) gratuitous carriers.

Common Carriers: The Carriers Act, 1865 defines a common carrier as any individual, firm or company (other than the government, who or which transports goods as a business, for

money, from place to place, over land or inland waterways, for all persons (consignors) without any discrimination between them. A carrier must carry goods of the consignor for hire and not free of charge in order to be called a common carrier. Further, he must be engaged in the business of carrying goods for others for money from one place to another. A person who carries goods occasionally or free of charge is not a common carrier. Furthermore he is bound to carry goods for all persons (consignors) without any discrimination provided:
(i) the freight chargeable by him is paid to him;
(ii) there is accommodation on his conveyance; and
(iii) there is nothing objectionable or illegal about the carrying of goods of a particular consignor.

If, in spite of the above conditions being satisfied, a carrier reserves to himself the right to accept or reject an offer, he is not a common carrier. It is worth noting that the Carriers Act, 1865 covers only common carriers of goods and not passengers.

Private Carriers: A private carrier is one who does not transport goods from one place to another regularly; he may engage in some casual jobs of carrying goods for certain selected persons between certain terminals. In fact, he carries his own goods and that's why he is known as a private carrier and not a common carrier. Also, he does not make a general offer to carry goods for any one from one place to another for hire. However, he may enter into a contract with someone to carry goods on the terms agreed upon between them. In such a situation, it is a contract of bailment. Therefore, such transactions are not covered by the Common Carriers Act, 1865.

Gratuitous Carrier: When a person carries goods of another free of charge, he is a gratuitous carrier. Similarly a person may give lift in his transport to another person voluntarily without any compensation. Thus a gratuitous carrier may carry not only goods but persons also free of charge. Responsibility of Common Carrier and Bailee. We know that a bailee is responsible only when the goods entrusted to him are lost or damaged due to his fault or negligence. But the responsibility of a common carrier is more onerous; he is to deliver the goods safely. Therefore, in the case of a common carrier, it is immaterial whether the loss or damage to the goods is due to his or someone else's negligence.

13.3 CARRIAGE BY SEA

As seen in previous unit, under a contract for sale on cost, insurance, freight (CIF) terms, the seller is responsible for arranging transport of cargo from his country to the buyer's. Even where the sale is not on CIF terms, transport is still an integral part of an

international sale transaction. For instance, in a free on board (FOB) contract, the buyer may arrange transport, or he may ask the seller to arrange transport on his behalf. Depending on the amount of cargo, a number of options are open to the shipper (seller or buyer) where sea carriage is envisaged. Where the cargo is insufficient to fill the entire cargo space of a ship, it is normal for the shipper to find space on a liner service1 and obtain a bill of lading – a document that the seller is obliged to tender to the buyer in a CIF contract. Where the shipper is the buyer, he is also likely to obtain a bill of lading which, due to its versatility, can be used to sell the goods on to a third party or used as security for raising money to finance the sale. Where the amount of cargo is sufficient to take up a vessel's full cargo carrying capacity, it is commonplace to charter a ship. Under this type of arrangement, the ship-owner agrees to make the ship available to the charterer for a specified voyage(s) – for example, from Southampton to Singapore – or a specified period of time – from 1 January 2008 to 1 January 2009. However, not all charter parties fall neatly into these two classifications.

A number of variations are found in practice – trip charter, consecutive voyage charter and long term freighting contracts. In a trip charter, the contract is for a voyage on time charter terms thereby providing a minimum/maximum period for the voyage.

In a consecutive voyage charter, the contract is for a number of consecutive voyages within an agreed period, and in a long term freighting contract, the agreement is to carry quantities of cargo on particular routes over an agreed period of time with the ship owner choosing the ships.

The contract between the charterer (one who charters the ship) and the ship owner is known as a charter party. The charter party will identify the vessel, the cargo it is to carry, the voyage(s) or time for which the ship is made available, and contain terms in respect of the various responsibilities and liabilities of the ship owner and the charterer. Charter parties have been standardised since the beginning of the 20th century by organisations such as the Baltic and International Maritime Conference – now known as the Baltic and International Maritime Council (BIMCO) – and the Chamber of Shipping. A number of standard charter forms are available – some for use with all cargoes, and some for special cargoes, such as grain.

13.4 TYPES OF CHARTERPARTIES

Charterparties are classified into three (basic) types: voyage charterparties, time charterparties and demise charterparties.

Voyage charterparty

Under a voyage charterparty, the shipowner agrees to charter the vessel to the charterer for one or more specified voyages. The vessel remains under the control of the shipowner who is responsible for equipping and manning the vessel. The crew and master are employees of the shipowner, and he is responsible for their wages. The shipowner in a voyage charterparty undertakes to transport the goods to the port(s) specified in the charterparty. The charterer undertakes to provide the specified cargo and pay for the services either as a lump sum for the voyage, or in terms of the amount and type of cargo carried.

Time charterparty

Under a time charterparty, the charterer hires the vessel for a specified period of time. As in a voyage charter, the shipowner retains control of the ship and the employees on board the ship. However, the charterer is responsible for its deployment, the number of voyages it undertakes, and the destination of the voyages. The shipowner in a time charterparty does not undertake to transport the goods to a specified port(s) as in a voyage charterparty.

Demise charterparty

Also known as a bareboat charterparty, in this type of charterparty, the shipowner passes possession and control of ship to the charterer. The shipowner is no longer responsible for equipping the ship or employing the crew as in a voyage or time charterparty. For the duration of the charter, the charterer is responsible for manning, equipping and insuring it. Mackinnon LJ, in *Sea and Land Securities v Dickinson and Co*,14 formulated the difference thus:

". . . the distinction between the demise and other forms of charter contract is as clear as the difference between the agreement a man makes when he hires a boat in which to row himself and the contract he makes with a boatman to take him for a row"

Common law implies a number of undertakings on the part of the shipowner and the charterer. On the part of the shipowner, common law implies that he will:

(a) provide a seaworthy ship;

(b) proceed with due dispatch;

(c) carry the cargo to the agreed destination without deviation; and

(d) use due care and skill in navigating the vessel and carrying the goods.

These obligations on the part of the shipowner are also implied in a bill of lading governed by common law.

For the charterer's part, common law implies that he will:

(a) nominate a safe port; and

(b) not ship dangerous goods without disclosure.

COMMON LAW IMMUNITIES

Common law implies a number of immunities that operate in favour of the shipowner in charter parties. The shipowner is not liable for loss or damage to cargo that is caused by:
(a) an act of God;
(b) an act of the Queen's enemies; and
(c) inherent vice.
These immunities are also implied in bills of lading governed by common law
In India the legal provisions pertaining carriage of goods by sea Indian Carriage of Goods by Sea Act, 1925 (in short the COGSA). The COGSA substantially follows the provisions of the International Convention for the Unification of certain rules relating to Bills of Lading signed at Brussels in 1924 (commonly known as the Hague Rules). The Hague Rules were amended by two protocols in 1968 and 1979 (commonly known as the Hague-Visby Rules). Though at the international level further developments like the Hamburg Rules were evolved, the Indian law retained the Hague Rules as the norms governing the carriage of goods by sea. Finally in the year 1993 the Indian COGSA was amended by to give effect to the Hague-Visby Rules. The Indian COGSA as amended by Act 28 of 1993 in Article III Clause 6 lays down the limitation period within which a claim is to be raised and a suit is to be filed for enforcing the claim. The said provision reads as follows:
6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

13.5 BILL OF LADING:

A document issued by a carrier, or its agent, to the shipper as a contract of carriage of goods. It is also a receipt for cargo accepted for transportation, and must be presented for taking delivery at the destination. Among other items of information, a bill of lading contains (1) consignor's and consignee's name, (2) names of the ports of departure and destination, (3) name of the vessel, (4) dates of departure and arrival, (5) itemized list of goods being

transported with number of packages and kind of packaging, (6) marks and numbers on the packages, (7) weight and/or volume of the cargo, (8) freight rate and amount.

It serves as a proof of ownership (title) of the cargo, and may be issued either in a negotiable or non-negotiable form. In negotiable form, it is commonly used in letter of credit transactions, and may be bought, sold, or traded; or used as security for borrowing money. A bill of lading is required in all claims for compensation for any damage, delay, or loss; and for the resolution of disputes regarding ownership of the cargo. The rights, responsibilities, and liabilities of the carrier and the shipper under a bill of lading (often printed on its back) are governed generally either by the older Hague rules, or by the more recent Hague-Visby rules. .

Case Laws

In East & West Steam ship Co. V. S.K. Remalingam [AIR 1960 SC 1058] the question that came up for consideration before the Hon'ble Supreme Court was whether in saying that the ship or the carrier will be "discharged from liability", only the remedy of the shipper or the consignee was being barred or the right was also being terminated. Taking note of the importance of the distinction between extinction of a right and the extinction of a remedy for the enforcement of that right, the Hon'ble Supreme Court held that the words "discharged from liability" means that the liability has totally disappeared and not only that the remedy as regards the liability has disappeared. It was emphasized that the said words are apt to express an intention of total extinction of the liability and should especially in view of the international character of the legislation be construed in that sense. It was also clarified that once the liability is extinguished, there is no scope of any acknowledgment of liability thereafter.

In M/s Madura Co. V. Thangal Kunju Musaliar [1963 KLJ 1233] the period of one year expired on a holiday and the suit was instituted on the court reopening. In the said case court invoked the principle that the act of the court shall not prejudice any person and since it was because the court was closed that the act of filing within the period was incapable of compliance the suit filed when the court reopened was held to have been filed in time. In Merchant S.N. Co. V. Thanulingam Pillai [1968 KLT 486] a suit was instituted within the period of one year before a court which had no jurisdiction and was later re-presented in a court which had jurisdiction but that was beyond the period of one year and the period of prosecution in the court which had no jurisdiction was sought to be excluded. The Learned Judge after reminding himself of the law as laid down by the Hon'ble Supreme Court in East

& West Steam ship Co. Case held that it is difficult to deduce therefrom that the law of limitation has no application at all to cases arising from the COGSA. The court held it significant to note that in East & West Steam ship Co. Case no suit was filed within the one year as prescribed in Rule 6 of Art.III and it was under the said circumstance that the court had to hold that the right was extinct and when the right is extinct the liability is also extinct. The Learned Judge distinguished the said situation from the facts of the case at hand wherein a suit had been filed within one year though in a wrong court.

Following the decision of the Supreme Court, a division bench of the High Court of Kerala in Union of India V. Scindia Steam Navigation [1973 KLT 952] held that the provision in clause (3) in Paragraph 6 of Article III is not that a suit shall be brought within one year from a specified date or that no suit shall be brought after the expiry of one year, but that if the suit is not brought within the time specified, the carrier and the ship would be discharged from all liability in respect of loss or damage . When once the liability of the carrier or ship terminates there is no survival of the cause of action against them for claiming damages caused by short delivery. The question as to whether such suit could nevertheless be entertained by reason of the various provisions for exclusion of periods in computing the period of limitation under the Limitation Act does not arise in a case to which the relevant provision in the Indian Carriage of Goods by Sea Act applies. When once it is shown that the suit has not been instituted within the period specified, there is no liability on the part of the carrier or ship with the result that they can take up the defence that there is no cause of action surviving and therefore the suit must be thrown out. The court held that the question of exclusion by applying the provisions of Limitation Act is out of place in view of the language of paragraph 3 in clause 6 of Article III of the schedule to the Act.

13.6 CARRIAGE BY AIR

The law relating to the international carriage by air of cargo, passengers and luggage is to be found in two distinct sources, (1) Montreal Convention 1999,1 and (2) a network of legal instruments commonly known as the Warsaw system. The Montreal Convention 1999 is largely a tidying up exercise of the fragmentation of law found in the Warsaw system, examined in the following section. It consolidates and modernises the Warsaw system where needed and reflects the liability scheme adopted by the Warsaw Convention as amended by the Hague Protocol as further amended by Montreal Additional Protocol No.4. A knowledge of the Warsaw system is therefore necessary in order to understand the liability scheme adopted by the Montreal Convention, besides providing guidance on how the provisions of

this new Convention are likely to be interpreted by the courts. Further, it must be noted that not all parties to the various instruments found in the Warsaw system have as yet ratified the Montreal Convention. Hence a carriage by air from a state that has ratified the Montreal Convention to a state that is a party to the Warsaw Convention 1929 will be governed by the latter.

The Warsaw system consists of the following legal instruments:

• Warsaw Convention 1929;4

• Warsaw Convention as amended by the Hague Protocol 1955;5

• Guadalajara Convention 1961

Warsaw Convention as amended at The Hague and by the Guatemala Protocol 1971;7

• Montreal Additional Protocol No 1 1975;8

• Montreal Additional Protocol No 2 1975;9

• Montreal Additional Protocol No 3 1975;10 and

• Montreal Additional Protocol No 4 1975.

However, not all states who were parties to the Warsaw Convention 1929 ratified the Hague Protocol with the result that international carriage by air law is as complex, if not more, as the law of carriage of cargo by sea. Other than the above, there are numerous inter-carrier agreements13 – drawn up largely to satisfy the US' demand for higher liability limits for passengers. These agreements are by no means amendments to the Warsaw Convention 1929, and are a matter of contract between the parties.

India is a signatory to the Warsaw Convention of 1929, which is an international agreement governing the liability of the air carriers in respect of international carriage of passengers, baggage and cargo by air. The law relating to carriage by Air is regulated by Carriage by Air Act, 1972 and applies to international carriage of goods and passengers. The basic provisions of the Act are that the Air consignment note is prima facie evidence of conclusion of contract, of the receipt of the goods and of the conditions of carriage. The consignee is entitled on arrival of the goods at the destination to require the carrier to hand over to him the air consignment note and to deliver the goods to him. The rights against the carrier can be enforced either by the consignee or consignor and either in this own interest or in the interest of the other, provided that they fulfill the obligations imposed upon them by the contract.

As the Statute mentioned of Francs, it was also provided that they be converted into rupees at the rate of exchange prevailing on the date on which the amount of damages to be paid by the carrier.

Sec 17 mentions that the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury. Sec 18 is about carrier's liability for damage, destruction or loss of any registered luggage or goods

Sec 22. Specified the limits of liability as sum of 1,25,000 francs for passengers and 250 francs per kg in respect of registered luggage or goods. There exists provision for special declaration of value at delivery and paying supplementary sum (if required), so that the Carrier will be liable for such declared value

13.7 MULTI-MODAL TRANSPORTATION OF GOODS ACT, 1993 & MULTIMODAL TRANSPORT DOCUMENT (MTD) AND HIS IMPLEMENTATION IN INDIA

Multimodal Transportation

Multimodal transport is a term used to describe a shipment and delivery strategy that involves the use of two or more different modes of transportation. A strategy of this type may involve a combination of methods that includes the use various shipment options that fall into the broad categories of air, sea, rail, and road transportation. As long as at least two of these modes of transport are used, the movement can be considered multimodal in nature.

A simple example of a multimodal transport would involve the shipping of a customer order that leaves the warehouse by way of a truck. The truck then travels a designated route to a railway, where the goods are unloaded and placed into a railroad car. The rail service is used to transport the goods to an airport, where they are then loaded onto a cargo plane. Upon reaching an airport near the destination, the goods are once again loaded onto a delivery truck, which uses a road system to complete the final leg of the delivery route.

The Multimodal Transportation of Goods Act, 1993 (MMTG) provides for the regulation of Multimodal Transportation of Goods from any place in India to any place outside India involving two or more modes of Transport on the basis of a single Multimodal Transport Contract. This act came into force from 2.4.1993 and it provides for Registration of a person a Multimodal Transport operator and Multimodal Transportation can be carried out only by persons registered as MTO under MMTG Act, 1993. The Director General of Shipping has been notified as the competent authority to perform functions under the Act including registration of MTOs. The MTO registration is valid for period of 1 year and may be renewed for further period of one year from time to time. The Director General of

Shipping has, after obtaining the prior approval of Ministry of Surface Transport, prescribed the Multimodal Transport Document under Rule 3 of Multimodal Transport Document Rules, 1994.

The Multimodal Transportation of Goods Act, 1993 was introduced to facilitate the exporters and give them a sense of security in transporting their goods. The concept of door to door delivery, which is MULTIMODAL Transportation is all about, is catching up fast in international trade. Reduction of logistics costs is one of the important aspects of Multimodal Transportation, thereby reducing the overall cost to the exporter and making his products more competitive in the international market. It is in this context that the Government of India thought it necessary to codify the rules and regulations governing Multimodal Transportation and enacted the Multimodal Transportation of Goods Act, 1993 based on the UNCTAD/ICC rules which have gained widespread acceptance. The Multimodal Transportation Act lays down the standard terms and conditions governing this activity. Under the provision of the Act only those companies who are registered by the competent authority which has been notified to be the Director General of Shipping, can carry out Multimodal Transportation. This requirement of registration has been imposed by the government to ensure that only such companies which have the necessary expertise infrastructure and financial capability are allowed to undertake Multimodal Transportation so that the interests of shippers are fully protected.

As per the MMTG Act three categories of companies are eligible to be registered as MTO's. They are (1) shipping Companies (2) Freight Forwarding Companies (3) Companies which do not fall in either of the above two categories. In the case of Shipping Companies (which own and operate vessels) as well as Freight Forwarding Companies the turnover of the last three years should bed Rs. 50 lakhs or more to make them eligible for registration as MTO.

In the case of a company falling under third category above, the Subscribed share Capital of the company should be Rs.50 lakhs or more. In addition the applicant company should satisfy the following:

1. Submit a certificate of turnover duly signed and issued by a Chartered Accountant within the meaning of C. A. Act, 1949.
2. have offices/agents/representative in atleast two other countries.

Multimodal Transport Document and its implementation in India -

1. The business environment is moving faster than ever before. Increased competition at

home and abroad means quality as well as profitability must be preserved. We live in a constantly evolving world where harmonization is extremely important and the trade desperately requires an efficient and simple door to door liability system. This was one of the reasons why ICC and UNCTAD developed the new UNCTAD/ICC Rules for Multimodal Transport Documents.

2. Increased containerization has resulted in Multimodal Transport of Goods under a single transport document covering all modes of transport from the exporters premises to the consignee's premises such Multimodal Transportation under a single document has a number of advantages like reduction in overall transport cost reduction in delays, smoother and quicker movement of an improvement in quality of services. In India there was no uniformity followed in respect of MULTIMODAL Transport of goods. Government felt that absence of uniformity in such practices, leads to ambiguity and imbalance of interests between the operators and the cargo owners. A working ground was accordingly, set up to examine the prevalent situation and to recommend a law which should clearly determine the responsibilities and liabilities of MULTIMODAL transport operators for loss or damage. The new law on MULTIMODAL transport was enacted by issue of an ordinance in October 1992 and was later on replaced by the Multimodal Transportation of Goods Act 1993.

MULTIMODAL TRANSPORT DOCUMENT:

With the advent of containers, the ocean carriers started extending their services to Inland locations, as containers, are smoothly and easily handled from one mode of transport to another. One of the most important ingredients involved in such Multimodal Transport is the existence of a legal regime to govern the terms of the contract and specify the basis of liability and responsibilities of the Multimodal Transport Operator. Previously, a documents called Combined Transport Document (CTD) was being issued. However, although the format of the document broadly conformed to a specimen prescribed by the International Chamber of Commerce (ICC), the CTD has not been adopted by all operators uniformly. Thus, there was an absence of uniformity of liability and other condition. In India the Foreign Exchange Dealers Association of India (FEDAI) has evolved its own rules laying down the responsibilities and liabilities of Combined Transport Operators from the inland container depots. However, these rules could not obtain wide acceptance mainly because the Combined Transport Document evolved by FEDAI did not confer negotiability and title to the goods and also because such documents were required to be exchanged for a regular on - board ocean bill of lading at the port unless the letter of credit specifically permitted the production

of a combined transport Document in place of a regular Bill of Lading. Looking to the urgent need of Industry and keeping in view the provisions of the Multimodal Transportation of Goods Act 1993 which is substantially based on the rules framed by the ICC and also taking into account the provisions of the UN Convention of 1980 on Multimodal Transportation of Goods, the Director General of Shipping, with the approval of the Govt., has issued an Order on 17th March, 1994 prescribing a model for the Multimodal Transport Document (MTD). The document has been prepared for carrying out the provisions of the Act keeping in view the primary objective of the legislation that the carriers are there to serve trade and not the other way around. The Multimodal Transport Document issued under the present law would be :i) a contract for the Transportation of Goods by Multimodal Transport. ii) a negotiable document unless it is marked non negotiable at the option of the consignor.iii) a document of title on the basis of which its holder can take delivery of the goods covered by it. The concerned parties who would have commercial interest who would be governed by the document once it is executed would be: i) The MTO who is the person responsible for the execution of the Multimodal Transport Contract. ii) The consignor who places the goods in question with the MTD for transporting the same and the consignee who is to take delivery at the destination. iii) The bankers who would provide the mechanism for documentary credit. iv) The insurers who insure the goods against loss or damage and the liability insurers who would cover the MTO's liability under contract.

MTD AS AN INSTRUMENT TO ENFORCE THE PROVISIONS OF THE ACT. Once the Multimodal Transport Operator executes the Multimodal Transport Document, he immediately assumes the role of the owner of the goods, the Principal thereby authorizing the MTO to exercise the rights as that of the owner for claiming damages etc. and for other purposes, wherever necessary. The provisions of the Act shall have overriding effect over all other laws and any contract for MULTIMODAL Transport made in contravention of the provisions of the Multimodal Transport Act would be null and void. The issuance of the Multimodal Transport Document confers and imposes on all interested parties the rights, obligations and defences set out in the act. In issuing the MTD, the MULTIMODAL transport operator assumes responsibility for the execution of the contract as well as would be liable for the loss or damage to goods or delay in delivery as contained in the Multimodal Transportation of Goods Act 1993.

CONTENTS OF THE MTD - GENERAL NATURE

The document contains, interalia, particulars regarding general nature of goods, the name and principal place of business of MTD, the name of the consignor, the name of the consignee if specified by the consignor, the place and date of taking charge of the goods by the MTO, the place of delivery of the goods, the date or the period of delivery of the goods at the place of delivery, whether it is negotiable or non-negotiable, the place and date of its issue, etc. In addition, the standard terms and conditions regarding basis of liability of the MTO for loss or damage, delay etc. have been incorporated in the document. Relevant particulars contained in the internationally accepted documents recognized by International Chamber of Commerce have been taken into consideration while prescribing the document. The MTOs can now issue on a uniform basis Multimodal Transport Document as a negotiable instrument as per the Multimodal Transportation of Goods Act, 1993 and the banks will have no difficulty in discounting the bills when such a document is presented.

STANDARD CONDITIONS GOVERNING MULTIMODAL TRANSPORT:

There are 24 main paras with sub-paras laying down the standard conditions governing Multi Modal Transportation in accordance with the Multi Modal Transportation of Goods Act 1993. Definitions of relevant terms are given in para 1 and are in accordance with the Act. Since this is a recent legislation required to be applied in connection with India's overseas trade and the consignees would be outside the country, it is necessary to give the definitions in these standard conditions so that all concerned parties in different countries are aware of the meaning of various terms as understood under the Act. The scope of applicability of the document is to be restricted in accordance with the preamble of the Act and has, therefore, been specified in the second condition. Similarly, the effect of issuance of the MTD should be well known to the parties affected by the document as this is an essential part of the Multimodal Transport contract and therefore, the same has been shown in the document. The negotiability and the title to the goods have been incorporated in the standard conditions in accordance with Section 8 of the Act. Reservations regarding inaccuracies, grounds of suspicion or the absence of reasonable means of checking have been mentioned in condition 5 and are in line with Section 10 of the Act. The evidentiary effect of the Multimodal Transport Document is in accordance with Section 11 of the Act. Guarantee by the consignor as stipulated in Section 12 has been specified in Condition No.7. Conditions governing Dangerous Goods, as required in Section 21 of the Act, have also been incorporated in the standard conditions. Basis of liability and conditions of liability of the

MTO for loss or damage when the stage of transport where the loss or damage occurred is not known/known have been covered in Condition Nos. 10, 11 & 12 and are in accordance with corresponding provisions in the Act. Similarly, the liability for delay, which is in keeping with Section 16 of the Act, has been stated in the standard conditions. The limits of liability are clearly spelt out in the said conditions. Section 20 of the Act lays down the conditions relating to notice of loss, damage or delay and these have been brought out in Condition No. 17. Further, provisions in respect of liens, limitation of action, jurisdiction, general average clauses, etc. have been clearly spell out in the document in accordance with corresponding provisions of the Act. Besides, specifying the applicable provisions of the Act the document also contains some of the conditions which are necessary to facilitate smooth transaction of Multimodal Transport. There is a residuary condition No. 25 relating to arbitration which permits concerned parties to incorporate suitable provisions by mutual agreement.

STATUS OF THE MTD VIS-SIS PRESENTLY USED CTD

The combined transport document, which is presently being used also for Multimodal Transportation, is essentially a document of contract for the carriage of goods for one mode of transport with the facility of inbuilt documentation for carriage of the same goods by another one or more modes of transport after the completion of the first mode. It may thus be appreciated that the CTD used in overseas carriage of goods is basically a commercial document for inter-modal transportation and a legal document for uni-modal transportation for each particular mode of transport covered under the CTD. The CTD facilitates onward movement of cargo by one mode to another mode on the basis of the original document with suitable endorsements. However, it is not meeting the requirements of providing a legal regime of uniform liability on the basis of a single contract of carriage of goods by Multimodal Transportation. The CTD, therefore will not meet requirements of the MULTIMODAL Transportation of Goods Act 1993 or even for that matter the UN Convention on Multimodal Transportation, strictly. The Multimodal Transport Document Model prescribed by the Govt. of India will not only be a commercially acceptable and negotiable document but will also be the basis for a contract of carriage governed by uniform liability regime for Multimodal Transportation of Goods in International trade besides being a legally tenable and enforceable instrument.

13.8 SUMMARY

International carriages are the carriage of persons or goods between two or more nations, which is regulated by various international conventions. The international carriage of

goods by sea is governed by the Hague Rules (1924), the Hague–Visby Rules (1968), and the Hamburg Rules .Carriage goods by road by the Geneva Convention (1956). Carriage of goods by Air is governed by Montreal Convention and Warsaw system. MMTG Act, 1993 has been enacted in India to regulate mulit-modal transportation.

13.9 KEYWORDS

1. Carriage
2. Charterparties
3. Goods
4. Multi-modal
5. Transportation

13.10 SELF ASSESSMENT QUESTIONS

1. Explain the laws relating to carriage of Goods by sea

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2. Discuss the legal provisions relating to carriage of Goods by Air

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3. What is Multi-Modal Transport? Explain the salient features of MMTG Act, 1993

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4. Write a note on Charterparties

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5. Write a note on types of carriers

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13.11 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn

6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT -14: INTERNATIONAL PAYMENTS

Structure:

14.0 Objectives

14.1 Introduction

14.2 International Payments - Key points

14.3 International Chamber of Commerce - ICC

14.4 World Chamber Federation

14.5 Uniform Customs & Practices for Documentary Credits

14.6 Summary

14.7 Keywords

14.8 Self Assessment Questions

14.9 References

14.0 OBJECTIVES

1. To understand international payments in international trade
2. To explain the role of ICC in international commerce
3. To discuss Uniform Customs and Practices on documentary credits

14.1 INTRODUCTION

A **payment** is the transfer of an item of value from one party (such as a person or company) to another in exchange for the provision of goods, services or both, or to fulfill a legal obligation. International transactions are complex and require secured payment mechanisms to ensure success in global market place.

14.2 INTERNATIONAL PAYMENTS -KEY POINTS

- International trade presents a spectrum of risk, which causes uncertainty over the timing of payments between the exporter (seller) and importer (foreign buyer).
- For exporters, any sale is a gift until payment is received.
- Therefore, exporters want to receive payment as soon as possible, preferably as soon as an order is placed or before the goods are sent to the importer.
- For importers, any payment is a donation until the goods are received.
- Therefore, importers want to receive the goods as soon as possible but to delay payment as long as possible, preferably until after the goods are resold to generate enough income to pay the exporter.

Cash-in-Advance

With cash-in-advance payment terms, an exporter can avoid credit risk because payment is received before the ownership of the goods is transferred. For international sales, wire transfers and credit cards are the most commonly used cash-in-advance options available to exporters. With the advancement of the Internet, escrow services are becoming another cash-in-advance option for small export transactions. However, requiring payment in advance is the least attractive option for the buyer, because it creates unfavorable cash flow. Foreign buyers are also concerned that the goods may not be sent if payment is made in advance. Thus, exporters who insist on this payment method as their sole manner of doing business may lose to competitors who offer more attractive payment terms.

Letters of Credit

Letters of credit (LCs) are one of the most secure instruments available to international traders. An LC is a commitment by a bank on behalf of the buyer that payment

will be made to the exporter, provided that the terms and conditions stated in the LC have been met, as verified through the presentation of all required documents. The buyer establishes credit and pays his or her bank to render this service. An LC is useful when reliable credit information about a foreign buyer is difficult to obtain, but the exporter is satisfied with the creditworthiness of the buyer's foreign bank. An LC also protects the buyer since no payment obligation arises until the goods have been shipped as promised.

Documentary Collections

A documentary collection (D/C) is a transaction whereby the exporter entrusts the collection of the payment for a sale to its bank (remitting bank), which sends the documents that its buyer needs to the importer's bank (collecting bank), with instructions to release the documents to the buyer for payment. Funds are received from the importer and remitted to the exporter through the banks involved in the collection in exchange for those documents. D/Cs involve using a draft that requires the importer to pay the face amount either at sight (document against payment) or on a specified date (document against acceptance). The collection letter gives instructions that specify the documents required for the transfer of title to the goods. Although banks do act as facilitators for their clients, D/Cs offer no verification process and limited recourse in the event of non-payment. D/Cs are generally less expensive than LCs.

Open Account

An open account transaction is a sale where the goods are shipped and delivered before payment is due, which in international sales is typically in 30, 60 or 90 days. Obviously, this is one of the most advantageous options to the importer in terms of cash flow and cost, but it is consequently one of the highest risk options for an exporter. Because of intense competition in export markets, foreign buyers often press exporters for open account terms since the extension of credit by the seller to the buyer is more common abroad. Therefore, exporters who are reluctant to extend credit may lose a sale to their competitors. Exporters can offer competitive open account terms while substantially mitigating the risk of non-payment by using one or more of the appropriate trade finance techniques covered later in this Guide. When offering open account terms, the exporter can seek extra protection using export credit insurance.

Consignment

Consignment in international trade is a variation of open account in which payment is sent to the exporter only after the goods have been sold by the foreign distributor to the end

customer. An international consignment transaction is based on a contractual arrangement in which the foreign distributor receives, manages, and sells the goods for the exporter who retains title to the goods until they are sold. Clearly, exporting on consignment is very risky as the exporter is not guaranteed any payment and its goods are in a foreign country in the hands of an independent distributor or agent. Consignment helps exporters become more competitive on the basis of better availability and faster delivery of goods. Selling on consignment can also help exporters reduce the direct costs of storing and managing inventory. The key to success in exporting on consignment is to partner with a reputable and trustworthy foreign distributor or a third-party logistics provider. Appropriate insurance should be in place to cover consigned goods in transit or in possession of a foreign distributor as well as to mitigate the risk of non-payment.

14.3 INTERNATIONAL CHAMBER OF COMMERCE - ICC

Founded in 1919 in Paris, France, the International Chamber of Commerce seeks to foster international trade and commerce, as well as to protect and promote open markets for goods and services, along with the free flow of capital. The ICC also battles corruption and commercial crime to foster more economic growth, job creation and prosperity.

Governing Bodies of ICC:

World Council

ICC's supreme governing body is the World Council, consisting of representatives of national committees. The World Council elects ICC’s highest officers, including the Chairman and the Vice-Chairman, each of whom serves a two-year term. The Chairman, Vice-Chairman and the Honorary Chairman (the immediate past Chairman) provide the organization with high-level world leadership. They play an important role in ICC section.

Executive Board

Strategic direction for ICC is provided by its Executive Board, consisting of up to 30 business leaders and ex-officio members. It is elected by the World Council on the recommendation of the Chairmanship. Meeting three times a year, the Executive Board oversees the establishment of ICC’s strategic priorities and the implementation of its policies.

International Secretariat

The ICC International Secretariat, based in Paris, is the operational arm of ICC. It develops and carries out ICC’s work programme, feeding business views into intergovernmental organizations on issues that directly affect business operations. The

International Secretariat is led by the Secretary General, who is appointed by the World Council.

National Committees

In 92 countries, members have established formal ICC structures called national committees. In countries where there is no national committee, companies and organizations such as chambers of commerce and professional associations can become direct members.

Finance Committee

The Finance Committee advises the Executive Board on all financial matters. On behalf of the Executive Board, it prepares the budget and regularly reports to the board. It reviews the financial implications of ICC activities and supervises the flow of revenues and expenses of the organization.

Dispute Resolution Services

ICC's administered dispute resolution services help solve difficulties in international business. ICC Arbitration is a private procedure that leads to a binding and enforceable decision. The International Court of Arbitration of the International Chamber of Commerce steers ICC Arbitration and has received 20,000 cases since its inception in 1923. Over the past decade, the Court's workload has considerably expanded. The Court's membership has also grown and now covers 85 countries and territories. With representatives in North America, Latin and Central America, Africa and the Middle East and Asia, the ICC Court has significantly increased its training activities on all continents and in all major languages used in international trade.

ICC Dispute Resolution Services exist in many forms:

- Arbitration is a flexible and efficient dispute resolution procedure leading to binding and final decisions subject to enforcement worldwide.
- Mediation is a flexible technique, conducted privately and confidentially, in which a neutral facilitator helps parties to seek a negotiated settlement of their dispute.
- Dispute boards are independent bodies designed to help resolve disagreements arising during the course of a contract.
- Expertise is a way of finding the right person to make an independent assessment on any subject relevant to business operations.
- DOCDEX provides expert decisions to resolve disputes related to documentary credits, collections and demand guarantees, incorporating ICC banking rules.

14.4 WORLD CHAMBER FEDERATION [WCF]

In 1951 ICC established the World Chambers Federation (WCF), formerly the International Bureau of Chambers of Commerce. WCF is the unique global forum uniting the worldwide network of more than 12,000 chambers of commerce and industry. It aims to facilitate the exchange of best practice and the development of new global products and services for chambers, and foster international partnerships between chambers and other stakeholders to help local businesses grow. WCF is a non-political, non-governmental body, with its membership comprising local, regional, national, bilateral and transnational chambers of commerce, as well as public-law and private-law chambers.

WCF was established by ICC and its chamber members following a resolution at the conclusion of the World Congress of Chambers of Commerce (Rome 1950). At its inaugural committee meeting held in Paris in December 1950, WCF was to be first known as the International Information Bureau of Chambers of Commerce. As its role expanded and grew during the 1960s, its name changed to become the International Bureau of Chambers of Commerce and by June 2001, it became known as the World Chambers Federation. With a history spanning over 400 years, chambers today exist in almost every country and business community around the world. Chambers of Commerce and Industry can be defined as:

- multi-sector organizations that accept members without sectorial restrictions
- not pursuing political goals (i.e., they do not participate in elections or nominate candidates for political positions)
- acting as a voice for the business community (i.e., they advocate for business and promote legislation that is advantageous to business)
- facilitating the role of chambers of commerce as local business support agencies
- Administering the international guarantee chain of ATA Carnets, the Customs document allowing the duty-free and tax-free temporary import of goods
- Improving the capacity of chambers in issuing certificates of origin, including the management of an International CO chain
- World Chambers Network – a website platform with services including a Global Chamber Directory, Business Opportunities Promotion Service Chamber Trust Business Accreditation Programme
- Chamber Professional and institutional development services

WCF also organizes the World Chambers Congress every two years in a different region of the world. The Congress is the only international forum for chamber leaders and

professionals to share best practices, exchange insights, develop networks, address the latest business issues affecting their communities, and learn about new areas of innovation from chambers around the world. During the Congress, WCF also announces the winners of World Chambers Competition, the only global awards program to recognize the most innovative projects undertaken by chambers of commerce and industry from around the world. The next Congress will be held in Torino in 2015.

14.5 UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS

The **Uniform Customs and Practice for Documentary Credits** (UCP) is a set of rules on the issuance and use of letters of credit. The UCP is utilized by bankers and commercial parties in more than 175 countries in trade finance. Some 11-15% of international trade utilizes letters of credit, totaling over a trillion dollars (US) each year. Historically, the commercial parties, particularly banks, have developed the techniques and methods for handling letters of credit in international trade finance. This practice has been standardized by the ICC (International Chamber of Commerce) by publishing the UCP in 1933 and subsequently updating it throughout the years. The ICC has developed and moulded the UCP by regular revisions, the current version being the UCP600. The result is the most successful international attempt at unifying rules ever, as the UCP has substantially universal effect. The latest revision was approved by the Banking Commission of the ICC at its meeting in Paris on 25 October 2006. This latest version, called the UCP600, formally commenced on 1 July 2007. The latest {July 2007} revision of UCP is the sixth revision of the rules since they were first promulgated in 1933. It is the outcome of more than three years of work by the ICC's Commission on Banking Technique and Practice.

UCP 600 is comprised of 39 Articles. These are a comprehensive and practical working aid to bankers, lawyers, importers, and exporters, transport executives, educators, and all others who are engaged and interested in letter of credit transactions. The UCP remain the most successful set of private rules for trade ever developed. A range of individuals and groups contributed to the current revision including: the UCP Drafting Group, which waded through more than 5000 individual comments before arriving at this final text; the UCP Consulting Group, consisting of members from more than 25 countries, which served as the advisory body; the more than 400 members of the ICC Commission on Banking Technique and Practice who made pertinent suggestions for changes in the text; and 130 ICC National Committees worldwide which took an active role in consolidating comments from their members.

During the revision process, notice was taken of the considerable work that had been completed in creating the **International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP)**, ICC Publication 745. This publication has evolved into a necessary companion to the UCP for determining compliance of documents with the terms of letters of credit. It is the expectation of the Drafting Group and the Banking Commission that the application of the principles contained in the ISBP, including subsequent revisions thereof, will continue during the time UCP 600 is in force. At the time UCP 600 is implemented, there will be an updated version of the ISBP to bring its contents in line with the substance and style of the new rules.

The UCP was developed as a supplement to UCP due to the sense at the time that banks and corporates together with the transport and insurance industries were ready to utilise electronic commerce. The hope and expectation that surrounded the development of eUCP has failed the UCP600 and it will remain as a supplement albeit slightly amended to identify its relationship with UCP600. An updated version of the eUCP came into effect on 1 July 2007 to coincide the commencement of the UCP600. There are no substantive changes to the UCP, merely references to the UCP600.

14.6 SUMMARY

International transactions are complex and require secured payment mechanisms to ensure success in global market place. The International Chamber of Commerce seeks to foster international trade and commerce, as well as to protect and promote open markets for goods and services, along with the free flow of capital. Uniform Customs and Practice for Documentary Credits (UCP) is a set of rules on the issuance and use of letters of credit. The UCP is utilized by bankers and commercial parties in more than 175 countries in trade finance.

14.7 KEYWORDS

1. International Payments,
2. ICC
3. UCP

14.8 SELF ASSESSMENT QUESTIONS

1. Discuss issues and challenges in international payments

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2. Examine the role of ICC in promoting international trade

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3. Explain norms of UCP

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4. Write a note on WCF

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14.9 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT – 15: INTERNATIONAL COMMERCIAL ARBITRATION

Structure

15.0 Objectives

15.1 Introduction

15.2 History of International Commercial Arbitration

15.3 UNCITRAL Arbitration

15.4 UNCITRAL Model Law

15.5 International Commercial Arbitration

15.6 History of Arbitration in India

15.7 Summary

15.8 Keywords

15.9 Self Assessment Questions

15.10 References

15.0 OBJECTIVES

1. To understand the elements of Arbitration
2. To explain international commercial arbitration
3. To study Indian Arbitration for enforcing foreign awards

15.1 INTRODUCTION

Arbitration is a type of alternative dispute resolution (ADR. It is a technique for the resolution of disputes outside the courts. The parties to a dispute refer it to *arbitration* by one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), and agree to be bound by the arbitration decision (the "award"). A third party reviews the evidence in the case and imposes a decision that is legally binding on both sides and enforceable in the courts.

Elements of Arbitration:

Its principal characteristics are:

- arbitration is a mechanism for the settlement of disputes;
- arbitration is consensual;
- arbitration is a private procedure;
- arbitration leads to a final and binding determination of the rights and obligations of the parties.

International arbitration is a leading method for resolving disputes arising from international commercial agreements and other international relationships. As with arbitration generally, international arbitration is a creation of contract. Increasing international trade and investment is accompanied by growth in cross-border commercial disputes. Given the need for an efficient dispute resolution mechanism, international arbitration has emerged as the preferred option for resolving cross-border commercial disputes and preserving business relationships. With an influx of overseas commercial transactions and open ended economic policies acting as a catalyst, international commercial disputes involving India are steadily rising. This has led to tremendous focus from the international community in India's international arbitration regime.

15.2 HISTORY OF INTERNATIONAL COMMERCIAL ARBITRATION

International commercial arbitration is a work in progress. The first events took place some eighty years ago, in 1923. There are negotiations currently going in the United Nations Commission on International Trade Law. (UNCITRAL) that may lead to new developments. The developments that take place at the international level are implemented by States at

different times, some sooner, and some not at all. The growth of investment arbitration as a form of international commercial arbitration promises to have a significant impact on the entire field, but the nature of that impact is not yet clear.

Most societies developed at an early date systems of "arbitration" for the settlement of disputes. Disputes between private parties that are settled by arbitration might be of a family nature, concern labor relations or be between two commercial enterprises. In the past such disputes were almost exclusively domestic and the systems of arbitration that developed reflected the nature of the particular society. It is no surprise, therefore, to find vast differences between domestic arbitration in Continental Europe, Latin America, Islamic countries, the United States and China. In some countries, particularly in Latin America and in England, arbitration was traditionally seen as an extension of the State system of litigation. In such an atmosphere the procedure followed in arbitration was necessarily closely modelled on the procedure followed in litigation in the courts. Even where arbitration was not seen as an extension of the State system of litigation, and the law did not require the local court procedure to be followed in arbitration, the habits developed by lawyers in the courts were carried over into arbitration.

Yet another compelling influence on domestic arbitration in the commercial/economic sphere was to be found in countries with a State-trading system. Economic enterprises were by their nature part of the governmental administration. While the dispute settlement mechanisms established to handle disputes between such enterprises were often called arbitration, they were in fact usually a form of administrative adjudication with a high level of political and administrative control over the entities created to settle those disputes. International commercial arbitration as we know it today began in Continental Europe in the 1920s. There were two major difficulties in the then current situation.

The first difficulty was that in many countries an agreement to arbitrate could be validly entered into only in regard to an existing dispute by a so-called compromise. (The terms of reference in International Chamber of Commerce arbitration arose out of that history, though the current justification for terms of reference lies elsewhere.) In those countries an agreement to arbitrate all disputes that might arise in the future in connection with a contract was not valid. It was also common that, even in countries in which the agreement to arbitrate was valid, it often did not effectively prohibit a court from taking jurisdiction over the dispute. If one of the parties commenced an action in court in spite of the

agreement to arbitrate, there might later be an action for damages for breach of the agreement to submit the dispute to arbitration, but that tended to be an empty remedy.

The second widely recognized difficulty was in regard to the recognition and enforcement of foreign arbitral awards. Therefore, four years after the adoption of the Protocol on Arbitral Clauses, in 1927 the League of Nations adopted the Geneva Convention for the Execution of Foreign Arbitral Awards. Contracting States agreed to enforce arbitral awards made in conformity with the 1923 Protocol in the territory of another contracting State. The Convention was, like the Protocol, adopted by a large number of States and was generally a success in regard to its substance.

At the same time a need was felt for an arbitration organization that would be "international". Consequently, in 1922 the International Chamber of Commerce (ICC) adopted its first rules of arbitration and in 1923 established the Court of Arbitration. Although the headquarters of the ICC are in Paris, there has never been any suggestion that the ICC Court of International Arbitration (as it is now known) was a French arbitral organization.

15.3 UNCITRAL ARBITRATION

The e desire for internationally acceptable rules of procedure was demonstrated by the rapid and overwhelming reception of the UNCITRAL Arbitration Rules after they were adopted by the United Nations Commission on International Trade Law in April 1976. The Rules, which were specifically designed for use in ad hoc common law/civil law arbitrations, received the endorsement of the Asian-African Legal Consultative Committee (AALCC)in July of that year. Six months later an agreement was reached to recommend that trade contracts between the Soviet Union and the United States should call for arbitration of any disputes that might arise with the arbitrations to take place in Stockholm under the UNCITRAL Arbitration Rules.

The endorsement of the Rules by the AALCC, representing a large number of developing countries, the Soviet Union and the United States meant that the Rules were politically acceptable in a large segment of the world. Although prepared for use in ad hoc arbitrations, they were increasingly used as well by arbitral organizations as their institutional rules with suitable changes. By 1982 UNCITRAL found it desirable to issue its Guidelines for Administering Arbitrations under the UNCITRAL Arbitration Rules, which included a description of the changes that might be made in the Rules when adapting them for use as institutional rules. Because the UNCITRAL Arbitration Rules were written for ad hoc

arbitrations, they necessarily allowed the parties complete freedom as to how to proceed with the arbitration. Nevertheless, the Rules recognized that the law governing the arbitration might contain a "provision of law from which the parties cannot derogate", in which case that provision would prevail.

15.4 UNCITRAL MODEL LAW

The UNCITRAL Arbitration Rules were followed in the Model Law in 1985. What is striking about the Model Law is the extent to which it not only gives support to the arbitral process, but the extent to which it permits the parties to conduct the arbitration as they wish. The arbitration may be institutional or it may be ad hoc. Subject to the binding rule in Article 18 that "[t]he parties shall be treated with equality and each party shall be given a full opportunity to presenting his case", "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

It was thought by many that the Model Law would be useful for developing countries that did not already have a modern law of arbitration, and it has been widely used by them. However, the first country to adopt the Model Law was Canada. To date the Model Law has been adopted by 39 countries, several of the individual States in the United States, Hong Kong and Macau. In addition to Canada, developed countries that have adopted the Model Law are Australia, Germany, Japan, New Zealand, Singapore and Spain.

It is important to note that the Model Law was drafted to govern only international commercial arbitration with the expectation that a State that enacted it might have a separate law governing domestic arbitrations. Even if a State wished to limit the freedom of the parties, arbitral institutions and arbitral tribunals in respect of domestic arbitrations, adoption of the Model Law would permit the State to offer a law of arbitration that met the prevailing consensus on the procedures that should govern international commercial arbitration. The Model Law is not complete. It must be supplemented by additional provisions at the time of enactment and it has by most States that have adopted it. That was anticipated at the time the Model Law was adopted by UNCITRAL in 1985. The Commission is currently considering several measures that are expected to enhance its effectiveness.

15.5 INTERNATIONAL COMMERCIAL ARBITRATION

The term "international commercial arbitration" has never been defined. However, there is fairly clear agreement on its constituent elements. The most important of the three words is arbitration itself. It is a dispute settlement procedure that, like litigation in the State

courts, leads to a final and binding result that will be given execution by the courts. The primary difference between arbitration and litigation is that arbitration is consensual and the final award may treat only those matters that were referred to arbitration by the parties.

The New York Convention permits a State to declare that it will apply the Convention only in regard to matters that it considers commercial under its own law. The resulting uncertainty as to what might be considered commercial under the law of a given State is a potentially serious problem, but it has not given rise to significant difficulties to date. The Model Law goes a long way to overcoming the matter by the long and non-inclusive list of activities that are to be considered as commercial. The question as to whether arbitration is international may be important for determining the matters that can be considered by the arbitral tribunal. In some countries anti-trust issues can be submitted to an international arbitration even though they might not be permitted in a domestic arbitration. Similarly, some States permit the State or State entities to submit to arbitration only if the arbitration is international. The question as to whether an arbitration would be international is relevant in the Model Law to determine whether arbitration would be governed by the Model Law or a different law for domestic arbitrations. The Model Law uses a very broad test of internationality to determine its scope of application.

15.6 HISTORY OF ARBITRATION IN INDIA

Before the enactment of Arbitration and Conciliation Act 1996, the law governing arbitration in India consisted mainly of three statutes:

i. The Arbitration (Protocol and Convention) Act, 1937

ii. The Indian Arbitration Act, 1940

iii. The Foreign Awards (Recognition and Enforcement) Act 1961

Framework under Arbitration and Conciliation Act, 1996

The Act has three significant parts. Part I of the Act ("Part I") deals with domestic arbitrations and ICA when the arbitration is seated in India. Thus, arbitration seated in India between one foreign party and an Indian party, though defined as ICA is treated akin to a domestic arbitration. Part II of the Act (" Part II ") only specifically deals with foreign awards and enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (" New York Convention "), or Convention on the Execution of Foreign Arbitral Awards, 1927 (" Geneva Convention "). Part III of the act is a statutory embodiment of conciliation provisions.

In Part I, Section 8 regulates the commencement of arbitration in India, Sections 3, 4, 5, 6, 10 to 26, 28 to 33 regulate the conduct of arbitration, Section 34 regulates the challenge to the award, Sections 35 and 36 regulate the recognition and enforcement of the award. Sections 1, 2, 7, 9, 27, 37, 38 to 43 are ancillary provisions that either support the arbitral process or are structurally necessary. Further Courts have found that Chapters III to VI i.e. Section 10 to 33 of Part 1 of the Act contains curial or procedural law which parties would have autonomy to opt out from. The other Chapters of Part I of the Act form part of the proper law thus making those provisions non-derogable by parties subjected to Part I, even by contract.

Part II, on the other hand regulates arbitration only in respect of commencement and recognition /enforcement of a foreign award and no provisions under the same can be derogated by a contract between two parties. Section 2(1) (f) of the Act defines an ICA to mean one arising from a legal relationship which must be considered commercial where either of the parties is a foreign national or resident or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands. Thus, under the Indian Law, an arbitration with a seat in India but involving a foreign party, will also be regarded as an ICA and hence subject to Part I of the Act Where an ICA is held outside India, Part I of the Act would have no applicability to the parties but the parties would be subject to Part II of the Act.

The scope of this section was determined by the Supreme Court in the case of TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.where despite TDM Infrastructure Pvt. Ltd. had a foreign control he SC concluded that, “a company incorporated in India can only have Indian nationality for the purpose of the Act.” Thus though the act recognizes companies controlled by foreign hands as a foreign body corporate the Supreme Court has excluded its application to companies registered in India and which thus have Indian nationality. Hence in case a corporation has dual nationality, one based on foreign control and other based on registration in India, for the purpose of the Act such corporation would not be regarded as a foreign corporation.

15.7 SUMMARY

International arbitration is a leading method for resolving disputes arising from international commercial agreements and other international relationships. As with arbitration generally, international arbitration is a creation of contract. Indian Arbitration Act includes New York and Geneva conventions for the purpose of enforcing foreign arbitral awards.

15.8 KEYWORDS

1. Arbitration
2. Geneva Convention
3. New York Convention

15.9 SELF ASSESSMENT QUESTIONS

1. Examine the provisions of New York and Geneva Conventions for enforcing foreign arbitral awards

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2. Explain the scope of international commercial arbitration

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3. Explain the salient features of Arbitration and Conciliation Act,1996

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4. Explain the provisions of UNCITRAL Model law on arbitration

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5. Write a note on history of arbitration in India

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15.10 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

BLOCK - IV

UNIT – 16: LAW AND POLICY OF EXPORT-IMPORT TRADE IN INDIA

Structure:

16.0 Objectives

16.1 Introduction

16.2 EXIM Policy

16.3 Objectives of EXIM Policy

16.4 Import Policy

16.5 WTO Agreement on Import Licensing Procedure

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16.0 OBJECTIVES

1. To study the Foreign Trade Policy of India
2. To outline the objectives and purposes of Trade Policy
3. To explain the regulatory framework for import-export
4. To discuss WTO agreement on Import Licensing

16.1 INTRODUCTION

Export-Import Policy (Exim Policy) or Foreign Trade Policy is a set of guidelines and instructions established by the DGFT in matters related to the import and export of goods in India. The Foreign Trade Policy of India is guided by the Export Import in known as in short EXIM Policy of the Indian Government and is regulated by the Foreign Trade Development and Regulation Act, 1992. DGFT (Directorate General of Foreign Trade) is the main governing body in matters related to Exim Policy. The main objective of the Foreign Trade (Development and Regulation) Act is to provide the development and regulation of foreign trade by facilitating imports into, and augmenting exports from India. Foreign Trade Act has replaced the earlier law known as the Imports and Exports (Control) Act 1947.

16.2 EXIM POLICY

Indian EXIM Policy contains various policy related decisions taken by the government in the sphere of Foreign Trade, i.e., with respect to imports and exports from the country and more especially export promotion measures, policies and procedures related thereto. Trade Policy is prepared and announced by the Central Government (Ministry of Commerce). India's Export Import Policy also known as Foreign Trade Policy, in general, aims at developing export potential, improving export performance, encouraging foreign trade and creating favorable balance of payments position.

History of Exim Policy of India

In the year 1962, the Government of India appointed a special Exim Policy Committee to review the government previous export import policies. The committee was later on approved by the Government of India. Mr. V. P. Singh, the then Commerce Minister and announced the Exim Policy on the 12th of April, 1985. Initially the EXIM Policy was introduced for the period of three years with main objective to boost the export business in India

EximPolicyDocuments

The Exim Policy of India has been described in the following documents:

- Interim New Exim Policy 2009 - 2010
- Exim Policy: 2004- 2009
- Handbook of Procedures Volume I
- Handbook of Procedures Volume II
- ITC(HS) Classification of Export- Import Items

The major information in matters related to export and import is given in the document named "Exim Policy 2002-2007" An exporter uses the Handbook of Procedures Volume-I to know the procedures, the agencies and the documentation required to take advantage of a certain provisions of the Indian EXIM Policy. For example, if an exporter or importer finds out that paragraph 6.6 of the Handbook of Procedures Volume-II provides very crucial information in matters related to the Standard Input-Output Norms (SION). Such Input output norms are applicable for the products such as electronics, engineering, chemical, food products including fish and marine products, handicraft, plastic and leather products etc. Based on SION, exporters are provided the facility to make duty-free import of inputs required for manufacture of export products under the Duty Exemption Scheme or Duty Remission Scheme.

The Export Import Policy regarding import or export of a specific item is given in the ITC- HS Codes or better known as Indian Trade Clarification Code based on Harmonized System of Coding was adopted in India for import-export operations. Indian Custom uses an eight digit ITC-HS Codes to suit the national trade requirements. ITC-HS codes are divided into two schedules. Schedule I describe the rules and exim guidelines related to import policies where as Export Policy Schedule II describe the rules and regulation related to export policies. Schedule I of the ITC-HS code is divided into 21 sections and each section is further divided into chapters. The total number of chapters in the schedule I is 98. The chapters are further divided into sub-heading under which different HS codes are mentioned.

16.3 OBJECTIVES OF THE EXIM POLICY

Government control import of non-essential items through the EXIM Policy. At the same time, all-out efforts are made to promote exports. Thus, there are two aspects of Exim Policy; the import policy which is concerned with regulation and management of imports and the export policy which is concerned with exports not only promotion but also regulation. The main objective of the Government's EXIM Policy is to promote exports to the maximum extent. Exports should be promoted in such a manner that the economy of the country is not

affected by unregulated exportable items specially needed within the country. Export control is, therefore, exercised in respect of a limited number of items whose supply position demands that their exports should be regulated in the larger interests of the country. In other words, the main objective of the Exim Policy is:

- To accelerate the economy from low level of economic activities to high level of economic activities by making it a globally oriented vibrant economy and to derive maximum benefits from expanding global market opportunities.
- To stimulate sustained economic growth by providing access to essential raw materials, intermediates, components,' consumables and capital goods required for augmenting production.
- To enhance the techno local strength and efficiency of Indian agriculture, industry and services, thereby, improving their competitiveness.
- To generate new employment.
- Opportunities and encourage the attainment of internationally accepted standards of quality.
- To provide quality consumer products at reasonable prices.

Governing Body of Exim Policy

The Government of India notifies the Exim Policy for a period of five years (1997-2002) under Section 5 of the Foreign Trade (Development and Regulation Act), 1992. The current Export Import Policy covers the period 2009-2014. The Exim Policy is updated every year on the 31st of March and the modifications, improvements and new schemes became effective from1st April of every year. All types of changes or modifications related to the EXIM Policy is normally announced by the Union Minister of Commerce and Industry who co ordinates with the Ministry of Finance, the Directorate General of Foreign Trade and network of Daft Regional Offices.

Exim Policy 1992 -1997

In order to liberalize imports and boost exports, the Government of India for the first time introduced the Indian Exim Policy on April I, 1992. In order to bring stability and continuity, the Export Import Policy was made for the duration of 5 years. However, the Central Government reserves the right in public interest to make any amendments to the trade Policy in exercise of the powers conferred by Section-5 of the Act. Such amendment shall be made by means of a Notification published in the Gazette of India.

Export Import Policy is believed to be an important step towards the economic reforms of India.

Exim Policy 1997 -2002

With time the Exim Policy 1992-1997 became old, and a New Export Import Policy was need for the smooth functioning of the Indian export import trade. Hence, the Government of India introduced a new Exim Policy for the year 1997-2002. This policy has further simplified the procedures and educed the interface between exporters and the Director General of Foreign Trade (DGFT) by reducing the number of documents required for export by half. Import has been further liberalized and better efforts have been made to Licence (OGL) List.

Main Elements of Exim Policy 2004-2009

Permeable of Exim Policy 2004-2009: It is a speech given by the Ministry of Commerce and Industries. The speech for the Exim Policy 2004-2009 was given by Kamal Nath, on 31ST AUGUST, 2004.

Legal Framework of Exim Policy 2004-2009

1.1 Preamble

The Preamble spells out the broad framework and is an integral part of the Foreign Trade Policy.

1.2 Duration

In exercise of the powers conferred under Section 5 of The Foreign Trade (Development and Regulation Act), 1992 (No. 22 of 1992), the Central Government hereby notifies the Exim Policy for the period 2004-2009 incorporating the Export Import Policy for the period 2002-2007, as modified. This Policy shall come into force with effect from 1st September, 2004 and shall remain in force up to 31st March, 2009, unless as otherwise specified.

1.3 Amendments

The Central Government reserves the right in public interest to make any amendments to this Policy in exercise of the powers conferred by Section-5 of the Act. Such amendment shall be made by means of a Notification published in the Gazette of India.

1.4 Transitional Arrangements

Notifications made or Public Notices issued or anything done under the previous Export / Import policies and in force immediately before the commencement of this Policy shall, in so far as they are not inconsistent with the provisions of this Policy, continue to be in

force and shall be deemed to have been made, issued or done under this Policy. Licenses, certificates and permissions issued before the commencement of this Policy shall continue to be valid for the purpose and duration for which such licence; certificate or permission was issued unless otherwise stipulated.

1.5 Free Export Import

In case an export or import that is permitted freely under Export Import Policy is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted notwithstanding such restriction or regulation, unless otherwise stipulated, provided that the shipment of the export or import is made within the original validity of an irrevocable letter of credit established before the date of imposition of such restriction.

Special Focus Initiative of Exim Policy 2004-2009

With a view to doubling our percentage share of global trade within 5 years and expanding employment opportunities, especially in semi urban and rural areas, certain special focus initiatives have been identified for agriculture, handlooms, handicraft, gems & jewellery, leather and Marine sectors. Government of India shall make concerted efforts to promote exports in these sectors by specific sectoral strategies that shall be notified from time to time.

Board of Trade of Exim Policy 2004-2009

BOT has a clear and dynamic role in advising government on relevant issues connected with foreign trade.

- To advise Government on Policy measures for preparation and implementation of both short and long term plans for increasing exports in the light of emerging national and international economic scenarios;
- To review export performance of various sectors, identify constraints and suggest industry specific measures to optimize export earnings;
- To examine existing institutional framework for imports and exports and suggest practical measures for further streamlining to achieve desired objectives;
- To review policy instruments and procedures for imports and exports and suggest steps to rationalize and channelize such schemes for optimum use;
- To examine issues which are considered relevant for promotion of India’s foreign trade, and to strengthen international competitiveness of Indian goods and services; and
- To commission studies for furtherance of above objectives.

General Provisions Regarding Exports and Imports of Exim Policy 2004-2009

The Export Import Policy relating to the general provisions regarding exports and Imports is given in Chapter-2 of the Exim Policy. Countries of Imports/Exports - Unless otherwise specifically provided, import/ export will be valid from/to any country. However, import/exports of arms and related material from/to Iraq shall be prohibited. The above provisions shall, however, be subject to all conditionality, or requirement of licence, or permission, as may be required under Schedule II of ITC (HS).

Promotional Measures of Exim Policy 2004-2009

The Government of India has set up several institutions whose main functions are to help an exporter in his work. It would be advisable for an exporter to acquaint him with these institutions and the nature of help that they can provide so that he can initially contact them and have a clear picture of what help he can expect of the organized sources in his export effort. Some of these institutions are as follows.

Export Promotion Capital Goods Scheme (EPCG) of Exim Policy 2004-2009

Introduced in the EXIM policy of 1992-97,Export Promotion Capital Goods Scheme (EPCG) enable exporters to import machinery and other capital goods for export production at concessional or no customs duties at all. This facility is subject to export obligation, i.e., the exporter is required to guarantee exports of certain minimum value, which is in multiple of total value of capital goods imported. Capital goods imported under EPCG Scheme are subject to actual user condition and the same cannot be transferred /sold till the fulfillment of export obligation specified in the licence. In order to ensure that the capital goods imported under EPCG Scheme, the licence holder is required to produce certificate from the jurisdictional Central Excise Authority (CEA) or Chartered Engineer (CE) confirming installation of such capital goods in the declared premises.

Special Economic Zone (SEZ) under the Exim Policy 2004-2009

A Special Economic Zone in short SEZ is a geographically distributed area or zones where the economic laws are more liberal as compared to other parts of the country. SEZs are proposed to be specially delineated duty free enclaves for the purpose of trade, operations, duty and tariffs. SEZs are self-contained and integrated having their own infrastructure and support services. The area under 'SEZ' covers a broad range of zone types, including Export Processing Zones (EPZ), Free Zones (FZ), Industrial Estates (IE), Free Trade Zones (FTZ), Free Ports, Urban Enterprise Zones and others. In Indian, at present there are eight functional Special Economic Zones located at Santa Cruz (Maharashtra), Cochin (Kerala), Kandla and

Surat (Gujarat), Chennai (Tamil Nadu), Visakhapatnam (Andhra Pradesh), Falta (West Bengal) and Noida (Uttar Pradesh) in India. Further a Special Economic Zone at Indore (Madhya Pradesh) is also ready for operation.

Free Trade & Warehousing Zones of Exim Policy 2004-2009

Free Trade & Warehousing Zones (FTWZ) shall be a special category of Special Economic Zones with a focus on trading and warehousing. The concept of FTWZ is new and has been recently introduced in the five-year foreign trade policy 2004-09. Its main objective is to provide infrastructure for growth of the economy and foreign trade. Free Trade & Warehousing Zones (FTWZ) plays an important role in achieving global standard warehousing facilities as free trade zones. Free Trade & Warehousing Zones is a widely accepted model with a history of providing Substantial encouragement to foreign trade and warehousing activity.

Deemed Exports under the Exim Policy 2004-2009

Deemed Export is a special type of transaction in the Indian Exim policy in which the payment is received before the goods are delivered. The payment can be done in Indian Rupees or in Foreign Exchange. As the deemed export is also a source of foreign exchange, so the Government of India has given the benefit duty free import of inputs.

Types of Import Licenses

India's import and export system is governed by the Foreign Trade (Development & Regulation) Act of 1992 and India's Export Import (EXIM) Policy. Imports and exports of all goods are free, except for the items regulated by the EXIM policy or any other law currently in force. Registration with regional licensing authority is a prerequisite for the import and export of goods. The customs will not allow for clearance of goods unless the importer has obtained an Import Export Code (IEC) from the regional authority.

16.4 IMPORT POLICY

The Indian Trade Classification (ITC)-Harmonized System (HS) classifies goods into three categories:

1. Restricted
2. Canalized
3. Prohibited

Goods not specified in the above mentioned categories can be freely imported without any restriction, if the importer has obtained a valid IEC. There is no need to obtain any

import license or permission to import such goods. Most of the goods can be freely imported in India.

RestrictedGoods

Restricted goods can be imported only after obtaining an import license from the relevant regional licensing authority. The goods covered by the license shall be disposed of in the manner specified by the license authority, which should be clearly indicated in the license itself. The list of restricted goods is provided in ITC (HS). An import license is valid for 24 months for capital goods, and 18 months for all other goods.

CanalizedGoods

Canalized goods are items which may only be imported using specific procedures or methods of transport. The list of canalized goods can be found in the ITC (HS). Goods in this category can be imported only through canalizing agencies. The main canalized items are currently petroleum products, bulk agricultural products, such as grains and vegetable oils, and some pharmaceutical products.

ProhibitedGoods

These are the goods listed in ITC (HS) which are strictly prohibited on all import channels in India. These include wild animals, tallow fat and oils of animal origin, animal rennet, and unprocessed ivory.

Export Policy

Just like imports, goods can be exported freely if they are not mentioned in the classification of ITC (HS). Below follows the classification of goods for export:

- Restricted
- Prohibited
- State Trading Enterprise

RestrictedGoods

Before exporting any restricted goods, the exporter must first obtain a license explicitly permitting the exporter to do so. The restricted goods must be exported through a set of procedures/conditions, which are detailed in the license.

ProhibitedGoods

These are the items which cannot be exported at all. The vast majority of these include wild animals, and animal articles that may carry a risk of infection.

State Trading Enterprise (STE)

Certain items can be exported only through designated STEs. The export of such items is subject to the conditions specified in the EXIM policy.

Students are advised to see India’s New Foreign Trade Policy 2009-2014 and 2015 - 2020 at www.daft.gov.in

16.5 WTO AGREEMENT ON IMPORT LICENSING PROCEDURES

WTO agreement on import licensing is an important agreement as it facilitates international trade. All the members of the World Trade Organization (WTO) have agreed to apply the procedures described in this Agreement when they grant import licenses. The agreement mandates that these procedures should be administered in a fair and equitable manner. Any member country that exports goods to a WTO member country that requires import licenses for those goods can benefit from this Agreement.

The WTO Import Licensing Agreement requires that: rules and procedures for submitting import license applications must be published before they come into effect, including information on eligibility requirements for persons, firms or institutions applying for licenses and a listing of all products subject to licensing requirements; a country's forms and procedures (including both application and renewal forms) must be made as simple as possible;applicants must have a reasonable amount of time to submit their license applications; and importers generally should only be required to contact a single administrative body to obtain a license, and in no event can they be required to apply to more than three such bodies.

License applicants should have at least 21 days (with provisions for extensions if necessary) to submit their applications. Any changes in a country's rules on import licensing procedures or in the list of products subject to import licenses must be published, where possible, 21 days in advance of the effective date of the changes and in such a way that governments and traders can become familiar with the changes. This information, along with copies of all implementing legislation or directives, must also be submitted to the Secretariat of the World Trade Organization.

The Licensing Agreement allows WTO member countries to implement either automatic or non-automatic import licensing systems. Automatic licenses, which are freely granted by a government and do not restrict imports, may be required to gather trade data, origin statistics or other information. In contrast, non-automatic licenses are not granted in all cases. They are used to administer quotas or other types of import restrictions. According to

the agreement, non-automatic licenses may not have trade-distorting effects on imports in addition to those caused by the restriction they implement, and must be no more burdensome than absolutely necessary to administer the measure.

16.6 SUMMARY

Export-Import Policy (Exim Policy) or Foreign Trade Policy is a set of guidelines and instructions established by the DGFT in matters related to the import and export of goods in India. Indian EXIM Policy contains various policy related decisions taken by the government in the sphere of Foreign Trade, i.e., with respect to imports and exports from the country and more especially export promotion measures, policies and procedures related thereto. WTO agreement on import licensing is an important agreement as it facilitates international trade. The agreement mandates that these procedures should be administered in a fair and equitable manner.

16.7 KEYWORDS

DGFT, Export, Import, WTO Import Licensing agreement

16.8 SELF ASSESSMENT QUESTIONS

1. What is Foreign Trade Policy? Examine the role of DGFT in formulating Foreign Trade Policy in India

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2. Explain the features of Foreign Trade policy of 2009-14

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3. Explain different types of import licensing

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4. Examine the provisions of WTO Agreement on import licensing

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16.9 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009

3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT- 17: LIBERALIZATION OF TRADE AND EXIM POLICY

Structure:

17.0 Objectives

17.1 Introduction

17.2 From Rigidity to Liberalization

17.3 Growth of Indian economy

17.4 Salient Features of Foreign Trade Development and Regulation Act , 1992

17.5 Foreign Exchange Management Act

17.6 Summary

17.7 Keywords

17.8 Self Assessment Questions

17.9 References

17.0 OBJECTIVES

1. To understand the impact of liberalization on Trade Policy
2. To discuss the features of Foreign Trade Act
3. To discuss the features of Foreign Exchange Management Act

17.1 INTRODUCTION

Trade Liberalization means the removal or reduction of restrictions or barriers on the free exchange of goods between nations. This includes the removal or reduction of both tariff (duties and surcharges) and non-tariff obstacles (like licensing rules, quotas and other requirements). Liberalization policies in India have been generally in tandem with the industrial policies followed over years. The industrial Policy of 1948 emphasized as India aimed to build a strong heavy capital goods industry base in the economy. However, faced with low growth rate and lack of the sector's capability to build a strong industrial base, the industrial policy of 1956 encouraged foreign capital. It was envisaged that foreign capital would bring better technology and lead to spill-over effects on the domestic industry. But, the still sticky growth of the sector for the next two decades led to a change in the attitudes and direction of industrial policy of 1980 which encouraged export oriented industries and import of technology and raw materials.

In 1991, imports were regulated by a narrow positive list of freely importable items. Items not in the positive list were either prohibited for imports or could be imported subject to compliance with the requirements of a complex licensing system. The overall approach to import management was selective and geared to curtailment of non-essential and low-priority imports, with particular emphasis on discouraging inventory build-up of imported inputs through the use of fiscal and monetary modes of regulation. Although multilateral trade rules of GATT in general prohibited Quantitative Restrictions (QRs) of import or export of any product, these rules provided exceptions to this fundamental principle on Balance-of-Payment (BOP) grounds. India resorted to the BOP exception and maintained QRs on imports on almost 80% products prior to the economic reforms of 1991. This edifice of regulated trade was gradually dismantled through tariff reforms and simplification of import procedures and requirements.

The reforms of 1991 brought some major changes in the existing tariff structure. Average and weighted tariff declined from 81.9 to 49.5 % in 1991 respectively. A number of other changes were made to simplify the system and many exemptions related to end use were removed. One of the major important steps undertaken in 1992 was to shift the basis of

regulating imports from a positive list of freely importable items to a limited negative list. Now, except the products listed in the negative list, all other products could be freely imported.

17.2 FROM RIGIDITY TO LIBERALIZATION

The EXIM policy of 1992 substantially eliminated licensing and discretionary controls on trade and provided further impetus to exports. Apart from consumer goods, almost all capital goods' raw materials and intermediate goods could be freely imported subject only to payment of customs duty. For consumer goods, a major step taken was to allow import under Special Import License (SIL) issued to certain categories of exporters including deemed exporters, trading/export houses and manufacturers who had acquired ISO 9000 or BIS 14000 certification of quality. SIL were freely transferable. During 1995-96, the definition of consumer goods was changed to suit importer's needs, so that they could freely import parts, components and spares of consumer goods as well. These items were earlier restricted to the extent that they could be imported without a license only by actual users. Further, the list of freely importable consumer goods was expanded to include 78 items, which included natural essential oils, instant coffee, refrigerated trucks, cranes and other utility vehicles. By 1995, more than 3000 tariff lines covering raw materials, intermediates and capital goods were freed of import licensing requirements and supplementary licensing for all importers except small-scale industries were abolished. In 1996, 300 items could be imported under SIL.

Although the reforms of 1991 brought in some important changes in the tariff regime and simplified many administrative and import controls, these reforms were not uniform across the board and continued to provide selective protection. Import restrictions on capital goods, raw materials and components were liberalized on a fast track, while import restrictions were maintained for most consumer goods. India continued to maintain quantitative restrictions on a large number of consumer goods. Consequently, the consumer goods sector was somewhat insulated from competition. In 1996, when the tariff line-wise import policy was first announced, around 40% of the total tariff lines were still under QRs.

India undertook far reaching reforms in other sectors as well. For instance, in the telecommunication sector, which was state-owned until 1991, private participation was gradually introduced by inviting bids for non-exclusive licenses to provide cellular services in Delhi, Mumbai, Kolkata and Chennai. Over the past two decades the market has graduated from being one where competition was limited by design to one where entry restrictions have

been phased out to embrace the competitive model.

17.3 GROWTH OF INDIAN ECONOMY

After 1990's reforms, the Indian Economy has enjoyed a strong growth with average annual growth exceeding 8% since 2003. Even amidst the global slowdown, its GDP grew by 8.8% in 2010. In 2011, India's growth is likely to have slowed to 7.6%. Nevertheless, overall this has been a very impressive performance, which has translated into a strong rise in average real per capita income. The real per capita grew from 3.2 % in the 1980s to 3.6% in 1990s and surged to 5.4% in 2009-10.Private investment have grown very fast and have always been higher than public sector investments since 1988. Private investments constituted around 80% of total investment in 2010-11. Domestic savings in the 2000s represented a substantial 31% of the GDP and provided a significant part of the investment. Increasing per capita income with a corresponding rise in per capita consumption and private investment has generated a strong domestic demand, the driving force behind India's growth.

This growth process has been accompanied by some unique structural changes. Particularly, the share of services in the total GDP increased from 43% in 1990-91 to 58% in 2010-11, whereas agriculture's share declined from 28% to 14% and the manufacturing sector's share remained more or less the same. Unlike experience of other developing countries, the industrial sector does not appear to be the core of India's growth dynamics. Although the industrial sector's contribution to total output remained more or less the same, this does not imply that the sector did not contribute to the growth process. In fact, it grew fast but not as fast as the services sector.

In India's external sector, the ratio of trade in goods and services to GDP increased from an average of 15% in the 918s to 39% in the decade of 2000, indicating closer commercial links between India and the global economy since 1991. The trends in India's international trade over the past three decades provide useful messages. First, despite significant policy changes during 1990s aimed at dismantling import barriers, the annual average growth in imports was 8%, which was 1% point lower than the import growth in the 1980s. Import compression during the 1990s appears to have adversely affected the export performance, as the average annual export growth during this decade was only marginally higher than that of the previous decade. Second, the removal of quantitative restrictions, lowering of customs duties and simplification of tax administration during the 2000s appear to have been more instrumental in boosting imports, compared with liberalization measures taken during the 1990s. The average annual of import touched 21% in this decade.

17.4 SALIENT FEATURES OF FOREIGN TRADE DEVELOPMENT AND REGULATION (FTDR) ACT, 1992

Foreign Trade is one of the most important factors in the overall economic development of the country. For a common man it is a very complex area which involves a whole gamut of policies, procedures etc. laid down by different Departments of the Government, which are responsible for this activity. Therefore, it is not easy to understand this complex maze of policies/procedures and an exporter or prospective exporter in a country like India who wants to enter into this area, does not know where to start. The basic idea of this module would enable the students to understand the various aspects of foreign trade. Main Government departments which deal with the foreign trade in India are the Ministry of Commerce and Industry, Office of Directorate General of Foreign Trade, Ministry of Finance, Draw Back Directorate, Export Inspection Council etc.

(i) This Act replaced the earlier Act which used to be called as Import and Export (Control) Act 1947.

(ii) The basic objective of FTDR 1992 is to provide a frame work for development and regulation of foreign trade by facilitating imports into the country, as well as, taking measures to increase exports from India and any other related matters.

(iii) The Act empowers the Central Government to make any provision in order to fulfill these objectives.

(iv) In terms of these powers contained in FTDR Act 1992, the government makes provisions to fulfill the objectives by way of formulation of the Export and Import Policy.

(v) Earlier this policy used to be called as Export and Import Policy i.e. Exim Policy, however, of late the Policy is being termed as Foreign Trade Policy (FTP) of the country as it covers areas beyond export and import in the country. This Policy, in terms of the Act is formulated by the office of the Directorate General of Foreign Trade (DGFT), an attached office of the Ministry of Commerce & Industry, Government of India.

(vi) The Act lays down that no person can enter into import or export business in India unless he is issued an Importer Exporter Code No. (IEC No.) by the office of the DGFT.

(vii) In case any exporter or importer in the country violates any provision of the Foreign Trade Policy or for that matter any other law inforce, like Central Excise or Customs or Foreign Exchange, his IEC number can be cancelled by the office of DGFT and thereupon that exporter or importer would not be able to transact any business in export or import.

(viii) The Act also provides for issuance of a permission called licence or authorization for import or export, wherever it is required in terms of the policy. Similarly, powers to suspend and cancel the licence for import or export are also provided for in the Act.

(ix) The powers related to search and seizure etc. of the premises, where any violation of Export Import Policy has taken place or is expected to take place are also provided for in the Act.

(x) What constitutes a violation of the provision of this Act is also contained in the Act itself . Violations would cover situations when import or export has been made by unauthorized persons who are not legally allowed to carry out import or export or when any person carries out or admits to carry out any import or export in contravention of the basic Export Import Policy.

(xi) The penalties which can be imposed by the authorities, competent to do so, in case of any contravention or violation of the Foreign Trade Policy are also described in the Act.

(xii) As is the norm in any Act of the Government, in order to fulfill the basic dictum of natural justice, detailed provisions for appeal and revision of orders are also provided for in the Act. In terms of these provisions, any person who is aggrieved by any decision taken by an authority under the Act can make an appeal to the superior Authority for appeal and revision of the orders issued by the subordinate Authority.

(xiii) In terms of the Act an order has also been issued which lists down the categories which are exempted from the application of provisions of the Foreign Trade Policy. This order is called Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993. This order separately lists the institutions and entities for export, as well as, imports on which the rules framed under FTDR Act, 1992 are not applicable.

(xiv) To operationalize the provisions of any Act, Rules are required. For the FTDR Act, the rules framed and issued by the Government are called Foreign Trade (Regulation) Rules, 1993 which lay down the various operational provisions such as fee requirements for issuance of licenses, conditions of licenses, refusal, suspension and cancellation of licenses etc. As explained above, the Foreign Trade Policy (FTP) is the most important policy document related to Imports & Exports in the country which is issued under the provisions of the FTDR Act, 1992.

17.5 FOREIGN EXCHANGE MANAGEMENT ACT

When a business enterprise imports goods from other countries, exports its products to them or makes investments abroad, it deals in foreign exchange. Foreign exchange means

'foreign currency' and includes:- (i) deposits, credits and balances payable in any foreign currency; (ii) drafts, travellers' cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency; and (iii) drafts, travellers' cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency. In India, all transactions that include foreign exchange were regulated by Foreign Exchange Regulations Act (FERA),1973. The main objective of FERA was conservation and proper utilisation of the foreign exchange resources of the country. It also sought to control certain aspects of the conduct of business outside the country by Indian companies and in India by foreign companies. It was a criminal legislation which meant that its violation would lead to imprisonment and payment of heavy fine. It had many restrictive clauses which deterred foreign investments.

In the light of economic reforms and the liberalised scenario, FERA was replaced by a new Act called the Foreign Exchange Management Act (FEMA), 1999. The Act applies to all branches, offices and agencies outside India, owned or controlled by a person resident in India. FEMA emerged as an investor friendly legislation which is purely a civil legislation in the sense that its violation implies only payment of monetary penalties and fines. However, under it, a person will be liable to civil imprisonment only if he does not pay the prescribed fine within 90 days from the date of notice but that too happens after formalities of show cause notice and personal hearing. FEMA also provides for a two year sunset clause for offences committed under FERA which may be taken as the transition period granted for moving from one 'harsh' law to the other 'industry friendly' legislation.

Broadly, the objectives of FEMA are: (i) To facilitate external trade and payments; and (ii) To promote the orderly development and maintenance of foreign exchange market. The Act has assigned an important role to the Reserve Bank of India (RBI) in the administration of FEMA. The rules, regulations and norms pertaining to several sections of the Act are laid down by the Reserve Bank of India, in consultation with the Central Government. The Act requires the Central Government to appoint as many officers of the Central Government as Adjudicating Authorities for holding inquiries pertaining to contravention of the Act. There is also a provision for appointing one or more Special Directors (Appeals) to hear appeals against the order of the Adjudicating authorities. The Central Government also establishes an Appellate Tribunal for Foreign Exchange to hear appeals against the orders of the Adjudicating Authorities and the Special Director (Appeals). The FEMA provides for the establishment, by the Central Government, of a Director of

Enforcement with a Director and such other officers or class of officers as it thinks fit for taking up for investigation of the contraventions under this Act.

FEMA permits only authorised person to deal in foreign exchange or foreign security. Such an authorised person, under the Act, means authorised dealer,money changer, off-shore banking unit or any other person for the time being authorised by Reserve Bank. The Act thus prohibits any person who:-

- Deal in or transfer any foreign exchange or foreign security to any person not being an authorized person;
- Make any payment to or for the credit of any person resident outside India in any manner;
- Receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside India in any manner;
- Enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person is resident in India which acquires, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

17.6 SUMMARY

Liberalization policies in India have been generally in tandem with the industrial policies followed over years. The industrial Policy of 1948 emphasized as India aimed to build a strong heavy capital goods industry base in the economy. The basic objective of FTDR 1992 is to provide a frame work for development and regulation of foreign trade by facilitating imports into the country, as well as, taking measures to increase exports from India and any other related matters. In the light of economic reforms and the liberalised scenario, FERA was replaced by a new Act called the Foreign Exchange Management Act (FEMA),1999.

17.7 KEYWORDS

1. Economy
2. Foreign Exchange
3. Foreign Trade Policy
4. Liberalization

17.8 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer

2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT -18: SPECIAL ECONOMIC ZONES

Structure:

18.0 Objectives

18.1 Introduction

18.2 Objectives of SEZs

18.3 Legal Framework for SEZs

18.4 Salient Features of the SEZ Act, 2005

18.5 Summary

18.6 Keywords

18.7 Self Assessment Questions

18.8 References

18.0 OBJECTIVES

1. To understand the significance of Special Economic Zones
2. To study the legal control of Special Economic Zones
3. To Explain the Authorities for SEZs

18.1 INTRODUCTION

Conceptually, Special Economic Zone (SEZ) is a geographical region that has economic laws different from a country's generally applicable economic laws, with the underlying objective being an increase in economic growth and activity through increased foreign investment. In India, a policy was introduced on April 1, 2000 for setting up of Special Economic Zones with a view to provide an internationally competitive and hassle-free environment for exports. The policy provides for setting up of SEZ's in the public, private, joint sector or by State Governments. It was also envisaged that some of the existing Export Processing Zones would be converted into Special Economic Zones. Accordingly, the Government had converted the following seven EPZs into SEZs.

18.2 OBJECTIVES OF SEZ

Globally, establishment of SEZs have revolved around achieving the following basic objectives:

- Economic growth and development – through exports and backward integration
- Foreign Investment

- Infrastructure development
- Employment generation
- Up-gradation of managerial and technical skills

Achievement of the above objectives through SEZs is typically facilitated through the following -

- Income tax Holidays
- Hassle Free Environment
- Exemption from Indirect duties and taxes
- No currency restrictions
- Relaxed foreign investment norms
- Excellent infrastructure facilities

Evolution of SEZs in India

SEZs have been established with Focus on Export Promotion' SEZs represent India's export policy orientation.

Since the 60s, India has seen the emergence of several initiatives to boost exports, some good, some bad, some indifferent. Notable amongst these are:

a) Export Processing Zone (EPZ) Scheme

b) Export Oriented Units (EOU) Scheme

c) Software Technology Park (STP) Scheme

d) Electronic Hardware Technology Park (EHTP) Scheme

e) Export Promotion Capital Goods (EPCG) Scheme

f) Advance Licensing and Deemed Exports Scheme

g) Free Trade Zone (FTZ) Scheme

Past schemes of promoting exports have hardly paid off. All India has to show after a decade and a half of export processing zones, export-oriented units and other measures outlined above is a measly share of less than 1% of world exports. This, as is widely accepted within the Government, is quite insignificant for a country of our size and capabilities. It was early 2000 when the then Union Commerce and Industry Minister, the late Murasoli Maran, undertook a trip to China to get first-hand experience of how China had come to become the darling of foreign investors. Included in his itinerary was a visit to SEZs, which led the announcement of SEZs in India through the annual Export-Import (EXIM) Policy of March 2000. It is now almost eight years since the concept has been part of India's economic policy.

The country not only has greenfield SEZs, but also has the erstwhile export processing zones / Free trade Zones converted into SEZs.

The SEZ policy not only represents the most ambitious of export boosting efforts, but it goes much further, in that it seeks to radically change the environment for exports and FDI , by offering a trouble-free business-friendly environment and world class infrastructure.

It allows the Government to experiment with radical economic reform on a localized basis, introducing reforms that are difficult to implement at the national level, given the country's large size and social disparities.

India's SEZ policy can be looked at as the logical outcome of developments in India's export-import policy in recent years. Trade policy reforms over the last decade have moved towards providing

- an export-friendly environment
- simplified procedures
- better input availability
- quality / technology up gradation
- Improved competitiveness

Underlining this, recent modifications in the EXIM policy (over the last 4-5 years) have focused on four major areas:

a) In the first place, efforts have been made towards removing restrictive export import regulations. An important first step in this regard was the proposal to set up SEZs.

b) Secondly, conscious steps have been initiated to ensure that the process of trade liberalization in India remains aligned to the norms of multilateral trading agreements. Thus, the incentive structure for exporters has been recast to make it consistent with India's commitments to WTO. Tariff changes and Quantitative Restriction (QR) reforms in accordance with WTO commitments have been made.

c) Thirdly, measures have been initiated to simplify and decentralize the procedures associated with the administration of foreign trade. The current SEZ framework brings this factor to the fore.

d) Lastly, policy announcements have been made to provide special incentives to certain categories of Indian exports

Importantly, the EXIM policy (now the Foreign Trade Policy) also seeks to motivate and involve State Governments in export-promotion efforts. With SEZs acting as the engines of growth, the underlying policy objective of the Central Government was to increase India's

economic growth and activity through increased foreign investment. For achieving this objective, the Government encouraged and enabled the establishment of SEZs by the State governments themselves, or in the private or joint sector in association with the State governments.

Meanwhile, a lot of time was spent in evolving an all-encompassing legislation called the Special Economic Zones Bill, which was introduced in Parliament and passed subsequently. The Special Economic Zones Act, 2005, got the Presidential imprimatur on June 23, 2005 and got notified on 10 February 2006. This led to a tremendous surge in interest for the launch of SEZs, as is evident from the growing number of big industrial houses applying to the Board of Approval for putting up SEZs in many areas.

18.3 LEGAL FRAMEWORK FOR SEZS

Special Economic Zone Act, 2005 - Preamble of the Act states that -

"An Act to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto." Special Economic Zone Act, 2005 ('The Act'), which was partially notified on February 10, 2006, is a self contained legislation encompassing the framework of Special Economic Zones ('SEZs'). Post notification of the Act a host of legislations and underlying rules and regulations have ceased to govern the SEZs and units therein, namely:

a) Foreign Trade Policy 2004-09 notified under Foreign Trade (Development & Regulation) Act, 1992;

b) Chapter XA of the Customs Act, 1962; and

c) SEZ Rules and Regulations notified under Chapter XA of the Customs Act, 1962.

The Act also makes modifications in a number of other legislations including –

- Income-tax Act, 1961
- Insurance Act, 1938
- Banking regulation Act, 1949
- Indian Stamp Act, 1899

18.4 SALIENT FEATURES OF THE SEZ ACT 2005

- The Act has over-riding effect over all other laws, for the time being in force.
- The Central Government is empowered to direct non / modified applicability of Central Acts (except labour matters) to SEZs and units therein.

- State Governments have been empowered to enact laws / notify policies for grant of fiscal and other concessions.
- SEZ shall be deemed to be a territory outside the customs territory of India.
- SEZ shall be deemed to be a port, airport, inland container depot, land station and land customs stations, as the case may be, under the Customs Act, 1962.

IMPORTANT DEFINITIONS IN THE ACT

'Special Economic Zone' -means a Special Economic Zone notified under this Act and includes a Free Trade and Warehousing Zone (FTWZ) and existing Special Economic Zone

'Developer' -means a person who has been given permission by the Central Government to develop the SEZ. In case one person does not have enough land to meet the minimum area requirements, more than one person may apply for developer status and each such person shall be deemed to be a developer in respect the land owned by such person. 'Co-developer' - is a person who develops infrastructure facilities or undertakes authorised operations after entering into agreement with developer and obtaining requisite approval of the Central Government.

'Unit' - means a unit set up within the SEZ.

'Domestic Tariff Area'- means the whole of India (including the territorial waters and continental shelf) but does not include the areas of the Special Economic Zones.

'Board of Approval' (BoA) is the body setup for -

– granting / rejecting proposals for establishment of the SEZs;

– granting approval of authorised operations to be carried out in the SEZ by developer;

– granting of approval to developers or units for foreign collaborations and foreign direct investments, (including investments by a person resident outside India), in the SEZ for its development, operation and maintenance;

– granting / rejecting of proposal for providing infrastructure facilities in a SEZ

– suspension approval granted to a developer and appointment of administrator

– disposing of appeals arising from decisions of the Approval Committee

'Approval Committee' (AC) - means a committee setup in each SEZ for the purpose of

– accepting / rejecting proposals for setting up SEZ Unit

– monitor compliance with conditions mentioned in approval letter

– approve import/procurement of goods from Domestic Tariff Area (DTA) and outside India

‘Development Commissioner’ (DC) is an officer of the GOI who is the nodal officer for that SEZ.

‘Authorised Operations’ means activities approved by the BoA / Development Commissioner. Presently, SEZ Rules expressly specify what constitutes authorised operations.

‘Export’ definition expanded to include supply of goods/ provision of services:

– From DTA to a SEZ unit or developer; or

– From one SEZ unit to another or developer in the same SEZ or different SEZ

– Supply outside India

‘Import’ apart from including bringing of goods and service from outside India, it also includes receipts by a SEZ unit / developer from another SEZ unit or developer of same SEZ or a different SEZ.

‘Services’ means such tradable services which – are covered under the General Agreement on Trade in Services annexed as IB to the Agreement establishing the World Trade Organisation concluded at Marrakesh on 15 April, 1994

– may be prescribed by the Central Government for the purposes of this Act, and

– earn foreign exchange.

SEZ Authority’ - means an Authority to undertake requisite measures for development, operation and management setup by the government of India

‘Free Trade and Warehousing Zone’ means a SEZ where mainly trading and warehousing activities are carried out.

‘Offshore Banking Unit’ (OBU) means a bank branch located in the SEZ which has obtained requisite approvals under the Banking Regulation Act

‘International Financial Services Centre’ (IFSC) means an International Financial Services Centre approved by the Central Government.

18.5 SUMMARY

Special Economic Zone (SEZ) is a geographical region that has economic laws different from a country’s generally applicable economic laws, with the underlying objective being an increase in economic growth and activity through increased foreign investment. Special economic Zones Act, 2005 was enacted in India to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto.

18.6 KEYWORDS

1. Economic Laws
2. Special Economic Zones

18.7 SELF ASSESSMENT QUESTIONS

1. Explain the significance of SEZs

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2. Discuss the legal control of SEZs

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3. Write a note on SEZ Authority

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4. Write a note on Developer

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18.8 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT – 19: CUSTOMS LAW

Structure:

19.0 Objectives

19.1 Introduction

19.2 Sources of Customs Law

19.3 Nature of Customs Duty

19.4 Types of Customs Duties

19.5 Education Cess on Customs Duty

19.6 Import and Export Procedures

19.7 Summary

19.8 Keywords

19.9 Questions for Self-Study

19.10 References

19.0 OBJECTIVES

1. To explain law relating to customs
2. To understand the Customs Tariff
3. To understand customs rates and valuation of Goods

19.1 INTRODUCTION

Indian Customs Tariff is based on the Harmonized System of Nomenclature (HSN). Differential rates for different tariff lines and customs duty exemptions based on sub-classification of goods result in disputes. Today, most multinationals have subsidiaries in India necessitating cross border transactions in goods and services between such entities. Indian companies are also acquiring trans-national character. Indian customs policy and provisions confer numerous exemptions to importers and exporters. The tax-breaks belong to several categories. End-use based exemptions where the benefit is dependent on fulfillment of a condition for particular use of imported goods are most common. Besides, tax enclaves like SEZs which enjoy full tax holiday, are accorded priority by the administration in recent times.

19.2 SOURCES OF CUSTOMS LAW

1.CUSTOMS ACT, 1962 - This is the main Act, which provides for levy and collection of duty, import/export procedures, prohibitions on importation and exportation of goods, penalties, offences etc.

2.CUSTOMS TARIFF ACT, 1975 - The Act contains two schedules - Schedule 1 gives classification and rate of duties for imports, while schedule 2 gives classification and rates of duties for exports. In addition, the CTA (Customs Tariff Act) makes provisions for duties like additional duty (CVD), preferential duty, anti-dumping duty, protective duties etc.

3.RULES UNDER CUSTOMS ACT - Under section 156 of Customs Act, 1962, Central Government has been empowered to make rules, consistent with provisions of the Act, to carry out the purposes of the Act. Various rules have been framed under these powers. Major among these are : Customs Valuation Rules, 1988: for valuation of imported goods for calculating duty payable; Customs and Central Excise Duties Drawback Rules, 1995: mode of calculating rates of duty drawback on exports; Baggage Rules, 1998: rules and allowances for bringing in baggage from abroad by Indians and tourists; Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996 : provides procedure to be followed when goods are imported for export purposes; Other rules are:

Rules regarding notified goods, specified goods, determination of additional duty for dumping, determination of origin of goods etc

REGULATIONS UNDER CUSTOMS ACT -

Under section 157 of Customs Act, 1962, Board (CBE&C) has been empowered to make regulations, consistent with provisions of the Act, to
carry out the purposes of the Act. Various regulations have been framed under these powers.
Major among these are : Project Import Regulations, 1986 : procedures for project imports; Customs House Agents Licensing Regulations, 1984: Regulation of CHA.

Other regulations regarding transshipment of goods, Import and Export report, Import and Export manifest, manufacture in warehouse, shipping bill and bill of export (form) etc. have been made. In Sukhdev Singh v. Bhagatram Sardar Singh (1975) 1 SCC 421 = AIR 1975 SC 1331 (SC Constitution Bench), it was held that regulations framed under statutory provisions would have the force of law.

19.3 NATURE OF CUSTOMS DUTY

Entry 83 to List I - (Union List) of Seventh Schedule to Constitution reads 'Duties of customs including export duties'. Thus, import and export duty is a Union subject and power to levy is derived from Constitution. Section 12 of Customs Act, often called charging section , provides that duties of customs shall be levied at such rates as may be specified under 'The Customs Tariff Act, 1975', or any other law for the time being in force, on goods imported into, or exported from, India Section 3 of Customs Tariff Act has also been held as 'charging section' (for levy of CVD - additional customs duty) -Jain Brothers v. UOI AIR 1999 SC 2550 (SC 3 member bench). Taxable Event for Import duty - Goods become liable to import duty or export duty when there is ' import into, or export from India'. As per section 2(28), 'export' with its grammatical variations and cognate expressions, means taking out of India to a place outside India. As per section 2(23), 'import' with its grammatical variations and cognate expressions, means bringing into India from a place outside India. In Gramophone Company of India v. Birendra Bahadur Pandey (AIR 1984 SC 667), it was held that 'import' included goods imported for transit across to Nepal. Section 2(27) of Customs Act defines 'India' as inclusive of territorial waters. Hence, it was thought that 'import' is complete as soon as goods enter territorial water. Similarly, export is complete only when goods cross territorial waters. There were conflicting judgments of High Courts.

Finally, in Kiran Spinning Mills v. CC 1999(113) 2000 AIR SCW 2090 (SC 3 member bench), it has been held that import is completed only when goods cross the customs barrier.

The taxable event is the day of crossing of customs barrier and not on the date when goods landed in India or had entered territorial waters. In the case of goods which are in the warehouse the customs barrier would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country.

In Garden Silk Mills Ltd . v. UOI AIR 2000 SC 33 [SC 3 member bench - same bench which passed judgement in Kiran Spinning Mills (Supra)], it was held that import of goods in India commences when they enter into territorial waters but continues and is completed when the goods become part of the mass of goods within the country. The taxable event is reached at the time when the goods reach customs barrier and bill of entry for home consumption is filed.

In case of warehoused goods, the goods continue to be in customs bond. Hence, 'import' takes place only when goods are cleared from the warehouse - confirmed in UOI v. Apar P Ltd. 1999 AIR 1999 SC 2515 (SC 3 member bench).-followed in Kiran Spinning Mills v. CC 1999(113) 2000 AIR SCW 2090 (SC 3 member bench), where it was held that taxable event occurs when goods cross customs barrier and not when goods land in India or enter territorial waters.

In CC v. HPCL 2000(121) ELT 109 (CEGAT), it was held that the 'bulk liquid cargo' would be considered to have crossed customs barrier only when they are pumped into shore tanks. That being the taxable event, duty is leviable only on that quantity. - - The view has been accepted by department. It has been confirmed that duty will be payable on the basis of 'shore tank receipt' i.e. dip measurement in tanks on shore into which oil is pumped from tanker; and not on the basis of ulage survey report i.e. ulage quantity at the port of discharge on board the vessel, as determined by independent surveyors in presence of customs officers. – MFCA(DR) circular No. 96/2002-Cus dated 27-12-2002

Goods' under Customs Act -

Customs duty is on 'goods' as per section 12 of Customs Act. The duty is payable on goods belonging to Government as well as goods not belonging to Government. Section 2(22), gives inclusive definition of 'goods' as - 'Goods' includes (a) vessels, aircrafts and vehicles (b) stores (c) baggage (d) currency and negotiable instruments and (e) any other kind of movable property. Thus, ships or aircrafts brought for use in India or for carrying cargo for ports out of India, would be dutiable. Definition of goods has been kept quite wide as Customs Act is used not only to collect duty on 'goods' but also to restrict/prohibit import or export of 'goods' of any description. Main two tests for 'goods' are (a) they must be movable

and (b) they must be marketable. The very fact that goods are transported by sea/air/road means that they are ‘movable'. Since most of imports are on payment basis, test of ‘marketability' is obviously satisfied.

DUTIABLE GOODS - Section 2(14) define 'dutiable goods' as any goods which are chargeable to duty and on which duty has not been paid. Thus, goods continue to be 'dutiable' till they are not cleared from the port. However, once goods are assessed at 'Nil' rate of duty, they no more remain 'dutiable goods'.

IMPORTED GOODS - Section 2(25) define ‘imported goods' as any goods brought in India from a place outside India, but does not include goods which have been cleared for home consumption. Thus, once goods are cleared by customs authorities from customs area, they are no longer ‘imported goods'. (Though in common discussions, goods cleared from customs are also called 'imported goods').

EXPORT GOODS – As per section 2(19) of Customs Act, ‘export goods’ means any goods which are to be taken out of India to a place outside India. Goods brought near customs area for export purpose will be ‘Export goods'. Note that once goods leave Indian territory, Indian laws have no control over them and hence the term ‘exported goods' has not been used or defined.

19.4 TYPES OF CUSTOMS DUTIES

Tariff Rates for customs duty are prescribed in Customs Tariff Act, 1975. The types of duties are:

Basic, Additional (CVD), Additional (to compensate duty on inputs used by Indian manufacturers),

Anti-dumping duty, protective duty, the duty on Bounty Fed articles and safeguard duty. These are explained below.

Basic Customs Duty -

This is the duty levied under section 12 of Customs Act. Normally, it is

levied as a percentage of Value as determined under section 14(1). The rates vary for different items, but general rate at present is 25%, w.e.f. 1-3-2003. Customs duty rates are 5%, 15%, 25%

and 30% for different commodities. Duty on products in Information Technology sector is generally 15%.

To protect Indian agriculture and Indian automobile sector, duties on some articles is higher e.g. -Import duty on some products w.e.f. 1.3.2001 is - * New cars 60% * Old cars less than 3

years old – 105% (Cars older than 3 years or right hand drive cars are not permissible for import) * Tea, coffee, copra, coconut – 70% * Crude edible oil – 75% * Refined (edible) oil – 85%.

19.5 EDUCATION CESS ON CUSTOMS DUTY

An education cess has been imposed on imported goods w.e.f. 9-7-2004. The cess will be 2% of the aggregate duty of customs. However, education cess will not be payable on safeguard duty under sections 8B and 8C, countervailing duty under section 9, Anti Dumping Duty under section 9A of the Customs Tariff Act and education cess on imported goods (i.e. these duties). Section 94 of Finance (No. 2) Act, 2004 states that education cess on customs duty a 'duty of customs'. As per section 94(3) of Finance (No. 2) Act, 2004, all provisions of Customs Act, and rules and regulations made under that Act will apply to education cess on imported goods, including those relating to refund, exemption from duty and imposition of penalty. Additional duty is levied under section 3(1) of Customs Tariff Act. Thus, it is not a 'duty under the Customs Act'. -CC v. Indian Organic Chemicals
2000 AIR SCW 1633. However, it is 'duty of customs'. –CC v. Presto Industries 2001 AIR SCW 828. In this case, it was also held that 'additional customs duty' is not called as 'Countervailing duty' though it may result in serving such purpose for manufacturer of such articles in India.

Classification for Customs and Rate of Duty

Classification is as per Central Excise Tariff Act for Central Excise and as per Customs Tariff Act for Customs. Both are based on HSN. Customs Tariff Act, 1975 earlier contained schedule based on CCCN - Customs Cooperation Council Nomenclature. This was replaced by schedule based on Harmonised Commodity Description and Coding system w.e.f. 28th Feb., 1986. Central Excise Tariff Act, based on HSN was also brought into force on same day. Though both tariffs are based on HSN, they are not copies of HSN. Many changes have been made to suit requirements of customs and excise. Customs tariff and excise tariffs are also not identical and both vary from each other. However, broad sections and chapter headings are same.

Value for purpose of Customs Act

Customs duty is payable as a percentage of 'Value' often called 'Assessable Value' or 'Customs Value'. The Value may be either (a) 'Value' as defined in section 14 (1) of Customs Act or (b) Tariff value prescribed under section 14 (2) of Customs Act.

Tariff Value -

Tariff Value can be fixed by CBE&C (Board) for any class of imported goods or export goods. Government should consider trend of value of such or like goods while fixing tariff value. Once so fixed, duty is payable as percentage of this value. (The percentage applicable is as prescribed in Customs Tariff Act). As we will see later, fixing tariff value is not permitted under GATT convention and is in fact contrary to provisions of Customs Valuation Rules. However, the provision of fixing tariff values has been retained though used rarely. In August 2001, tariff value for crude palm oil, RBD Palmolein and palm oil was fixed by way of a notification.

19.6 IMPORT AND EXPORT PROCEDURES

Import Procedures

Procedures have to be followed by 'person-in-charge of conveyance' as well as the importer.

WHO IS 'PERSON IN CHARGE' - As per section 2(31), 'person in charge' means (a) In case of vessel - its master (b) In case of aircraft - its commander or pilot-in-charge (c) In case of train - its conductor or guard and (d) In case of vehicle or other conveyance - its driver or other person in charge.

The significance of this definition is -

- He is responsible for submitting Import Manifest and Export Manifest
- He is responsible to ensure that the conveyance comes through approved route and lands at approved place only.
- He has to ensure that goods are unloaded after written order, at proper place. Loading also has to be only after permission.
- He has to ensure that conveyance does not leave without written order of Customs authorities.
- He can be penalised for (a) Giving false declaration and statement (b) shortages or non- accounting of goods in conveyance

Export Procedures

Procedures have to be followed by (a) 'person-in-charge of conveyance' and (b) the exporter. The procedures are similar to procedures for import, of course, in reverse direction.

NO STOPPAGE OF EXPORT CONSIGNMENT - Exports are vital for our economy. Any stoppage in export consignment means loss of export orders to the exporter and loss of foreign exchange to the country. Hence, it has been provided that movement of export

consignment will not be interrupted and no export consignment shall be withheld for any reason whatsoever. In case of any doubt, customs authorities may ask for an undertaking that the export is on sole responsibility of the exporter. [Highlights of EXIM policy 1997-2002 as amended on 13.4.1998]

19.7 SUMMARY

Indian customs policy and provisions confer numerous exemptions to importers and exporters. The tax-breaks belong to several categories. End-use based exemptions where the benefit is dependent on fulfillment of a condition for particular use of imported goods are most common. Customs Act, 1992 is the primary legislation that regulates collection of customs. Tariff Rates for customs duty are prescribed in Customs Tariff Act, 1975.

19.8 KEYWORDS

1. Custom Duty
2. Export Procedure
3. Tariff Rates
4. Valuation

19.9 SELF ASSESSMENT QUESTIONS

1. Explain the importance of custom duties in international trade

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2. Explain the nature of Customs Duty

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3. Examine import and export procedures under Customs Act

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4. Write a note on Customs Tariff Act

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5. Write a note on Classification of Goods

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19.10 REFERENCES

1. Evin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade

UNIT – 20: FOREIGN INVESTMENT

Structure:

20.0 Objectives

20.1 Introduction

20.2 Objectives of FDI Policy

20.3 FDI and FII

20.4 Who can invest in India?

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20.0 OBJECTIVES

1. To explain the significance of Foreign Investment in India
2. To describe FDI policy of India
3. To understand the role of Foreign Investment Board

20.1 INTRODUCTION

With the opening up of the economies world over, each country has been trying to attract foreign capital through liberalised investment policies. In such a scenario, all investors are seeking those investment destinations which provide most protective, hospitable and profitable climate for their investments. Hence, many countries have entered into bilateral investment treaties or agreements which not only encourage capital flows into their own countries but also provide safe business environment for their own investors abroad. Department of Ministry of Commerce and Industry (Department of Industrial Policy and Promotion) in its consolidated FDI Policy outlines the options for foreign nationals as well as NRIs to invest in India.

20.2 OBJECTIVES OF FDI POLICY

It is the intent and objective of the Government of India to attract and promote foreign direct investment in order to supplement domestic capital, technology and skills, for Accelerated economic growth. Foreign Direct Investment, as distinguished from portfolio investment, has the connotation of establishing a 'lasting interest' in an enterprise that is resident in an economy other than that of the investor. The Government has put in place a policy framework on Foreign Direct Investment, which is transparent, predictable and easily comprehensible. This framework is embodied in the Circular on Consolidated FDI Policy, which may be updated every year, to capture and keep pace with the regulatory changes, effected in the interregnum

The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India makes policy pronouncements on FDI through Press Notes/Press Releases which are notified by the Reserve Bank of India as amendments to the Foreign Exchange Management (Transfer or Issue of Security by Persons Resident Outside India) Regulations, 2000 (notification No. FEMA 20/2000-RB dated May 3, 2000). These notifications take effect from the date of issue of Press Notes/ Press Releases, unless specified otherwise therein. In case of any conflict, the relevant FEMA Notification will prevail. The procedural instructions are issued by the Reserve Bank of India vide A.P.(DIR

Series) Circulars. The regulatory framework, over a period of time, thus, consists of Acts, Regulations, Press Notes, Press Releases, Clarifications, etc.

20.3 FDI AND FII

FDI' means investment by non-resident entity/person resident outside India in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations,2000 Foreign Institutional Investor' (FII) means an entity established or incorporated outside India which proposes to make investment in India and which is registered as a FII in accordance with the Securities and Exchange Board of India (SEBI)(Foreign Institutional Investor) Regulations 1995. Foreign Portfolio Investor'(FPI) means a person registered in accordance with the provisions of Securities and Exchange Board of India (SEBI) (Foreign Portfolio Investors) Regulations, 2014, as amended from time to time.

'Non-Resident Indian' (NRI) means an individual resident outside India who is a citizen of India or is a person of Indian origin.

20.4 WHO CAN INVEST IN INDIA?

A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/ activities which are prohibited. However, a citizen of Bangladesh or an entity incorporated in Bangladesh can invest only under the Government route. Further , a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space and atomic energy and sectors/activities prohibited for foreign investment. NRIs resident in Nepal and Bhutan as well as citizens of Nepal and Bhutan are permitted to invest in the capital of Indian companies on repatriation basis, subject to the condition that the amount of consideration for such investment shall be paid only by way of inward remittance in free foreign exchange through normal banking channels.

An FII/FPI may invest in the capital of an Indian company under the ortfolio Investment Scheme which limits the individual holding of an FII/FPI below 10% of the capital of the company and the aggregate limit for FII/FPI/QFI investment to 24% of the capital of the company. This aggregate limit of 24% can be increased to the sectoral cap/statutory ceiling, as applicable, by the Indian company concerned through a resolution by its Board of Directors followed by a special resolution to that effect by its General Body and subject to prior intimation to RBI.The aggregate FII/FPI/QFI investment, in the FDI and Portfolio Investment Scheme, should be within the above caps. An Indian company which

has issued shares to FIIs/FPIs under the FDI Policy for which the payment has been received directly into company's account should be reported. A daily statement in respect of all transactions (except derivative trade) has to be submitted by the custodian bank in floppy/soft copy in the prescribed format directly to RBI and also uploaded directly on the web site .

Only registered FIIs/FPIs and NRIs as per Schedules 2,2 A and 3 respectively of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations,2000 , can invest/trade through a registered broker in the capital of Indian Companies on recognised Indian Stock Exchanges. A SEBI registered Foreign Venture Capital Investor (FVCI) may contribute up to 100% of the capital of an Indian Venture Capital Undertaking (IVCU) and may also set up a domestic asset management company to manage the fund. All such investments can be made under the automatic route in terms of Schedule 6 to Notification No. FEMA 20.

A SEBI registered FVCI can invest in a domestic venture capital fund registered under the SEBI (Venture Capital Fund) Regulations, 1996. Such investments would also be subject to the extant FEMA regulations and extant FDI policy including sectoral caps, etc. SEBI registered FVCIs are also allowed to invest under the FDI Scheme, as non-resident entities, in other companies, subject to FDI Policy and FEMA regulations.

20.5 FOREIGN INVESTMENT PROMOTION BOARD (FIPB)

The Foreign Investment Promotion Board (FIPB) is a government body that offers a single window clearance for proposals on Foreign Direct Investment (FDI) in India that are not allowed access through the automatic route. FIPB comprises of Secretaries drawn from different ministries with Secretary, Department of Economic Affairs, MoF in the chair. This inter-ministerial body examines and discusses proposals for foreign investments in the country for sectors with caps, sources and instruments that require approval under the extant FDI Policy on a regular basis. The Minister of Finance, considers the recommendations of the FIPB on proposals for foreign investment up to ₹1200 crore. Proposals involving foreign investment of more than ₹1200 crore require the approval of the Cabinet Committee on Economic Affairs (CCEA).

History

Proposals for foreign investment were considered by the Foreign Investment Promotion Board (FIPB), initially under the PMO. The recommendations of the FIPB were approved through a 3-tier approval mechanism viz. FIPB as a committee of senior officials to examine and make recommendations; Empowered Committee on Foreign Investment (ECFI)

chaired by the Finance Minister for deciding on the recommendations of the FIPB for projects in which the total investment in the project was up to Rs. 300 Crore and the Cabinet Committee on Foreign Investment (CCFI) for deciding on the recommendations of the FIPB for projects in which the total investment was more than Rs. 300 Crore. With the transfer of FIPB to Department of Industrial Policy & Promotion in 1996, the Board was reconstituted with the approval of the Cabinet. A copy of the constitution of the FIPB was notified on 11.07.1996.The constitution of the FIPB also laid down the Approval levels as under:

i. Recommendations of FIPB in respect of the project proposals each involving a total investment of Rs. 600 Crore or less would be considered and approved by the Industry Minister.

ii. The recommendations in respect of the projects each with a total investment of above Rs. 600 Crore would be submitted to the Cabinet Committee on Foreign Investment (CCFI) for decision.

iii. The CCFI would also consider the proposals which may be referred to it or which had been rejected by the Industry Minister.

The FIPB was transferred to the Department of Economic Affairs; Ministry of Finance in terms of the Presidential Order dated 30.01.2003. The levels of approval, notified vide Order dated 11.07.1996 were essentially retained, except to the extent that recommendations of FIPB for project-proposals involving a total investment of less than Rs. 600 Crore would be considered and approved by the Finance and Company Affairs Minister and those with a total investment beyond Rs. 600 Crore would be submitted to the Cabinet Committee on Economic Affairs for decision.

The Foreign Investment Promotion Board (FIPB) was reconstituted vide OM No. 1/3/2003-FIU dated 18.02.2003 and transferred to the Department of Economic Affairs (DEA), Ministry of Finance. The FIPB considers proposals for Foreign Direct Investment (FDI) within approved policy parameters. The members of the Board are: Secretary to the Government of India, DEA, Ministry of Finance - Chairman Secretary to the Government of India, Department of Industrial Policy and Promotion (DIPP). Secretary to the Government of India, Department of Commerce (DoC). Secretary to the Government of India (Economic Relations), Ministry of External Affairs (MEA).

Secretary to the Government of India, Ministry of Overseas Indian Affairs (MOIA).

The Board may co-opt other Secretaries to the Government of India and officials of financial institutions, banks and professional experts in industry and commerce, when required. The Secretary to the Government of India, Ministry of Small, Medium and Micro Enterprises and the Secretary to the Government of India, Department of Revenue have been co-opted on the Board

As per the Allocation of Business Rules, (i) the administration and implementation of the FEMA Act, Rules and regulations, other than enforcement work mentioned under the Department of Revenue, and all matters relating to combating financing of terrorist acts; (ii) Foreign and Non-Resident Indian Investment excluding functions entrusted to the Ministry of Overseas Indian Affairs and Direct Foreign and Non-Resident Indian Investment in Industrial and Service projects; and (iii) Foreign Investment Promotion Board are allocated to Department of Economic Affairs, Ministry of Finance. However, the subject of 'Direct Foreign and Non-Resident Indian Investment in Industrial and Service projects' has been allocated to Department of Industrial Policy and Promotion (DIPP). Hence, the policy related to direct foreign investment is looked after by DIPP.

20.6 CURRENT ISSUES RELATING TO FDI IN INDIA

In addition to India's poor performance in terms of competitiveness, quality of infrastructure, and skills and productivity of labor, there are several other factors that make India a far less attractive ground for direct investment than the potential she has. Given that India has a huge domestic market and a fast growing one, there is every reason to believe that with continued reforms that improve institutions and economic policies, and thereby create an environment conducive for private investment and economic growth that substantially large volumes of FDI will flow to India. Some of the major deterrents are listed below:

1. Restrictive FDI regime

The FDI regime in India is still quite restrictive. As a consequence, with regard to crossborder ventures, India ranks 57th in the GCR 1999(**The Global Competitiveness Report, 1999**). Foreign ownership of between 51 and 100 percent of equity still requires a long procedure of governmental approval. There does not seem to be any justification for continuing with this rule. This rule should be scrapped in favor of automatic approval for 100-percent foreign ownership except on a small list of sectors that may continue to require government authorization.

The banking sector, for example, would be an area where India would like to

negotiate reciprocal investment rights. Besides, the government also needs to ease the restrictions on FDI outflows by non-financial Indian enterprises so as to allow these enterprises to enter into joint ventures and FDI arrangements in other countries. Further deregulation of FDI in industry and simplification of FDI procedures in infrastructure is called for.

2. Lack of clear cut and transparent sectoral policies for FDI

Expeditious translation of approved FDI into actual investment would require more transparent sectoral policies, and a drastic reduction in time-consuming red-tapism

3. High tariff rates by international standards

India's tariff rates are still among the highest in the world, and continue to block India's attractiveness as an export platform for labor-intensive manufacturing production. On tariffs and quotas, India is ranked 52nd in the 1999 GCR, and on average tariff rate, India is ranked 59th out of 59 countries being ranked. Much greater openness is required which among other things would include further reductions of tariff rates to averages in East Asia (between zero and 20 percent). Most importantly, tariff rates on imported capital goods used for export, and on imported inputs into export production, should be duty free, as has been true for decades in the successful exporting countries of East Asia.

4. Lack of decision-making authority with the state governments

The reform process so far has mainly concentrated at the central level. India has yet to free up its state governments sufficiently so that they can add much greater dynamism to the reforms. In most key infrastructure areas, the central government remains in control, or at least with veto over state actions. Greater freedom to the states will help foster greater competition among themselves. The state governments in India need to be viewed as potential agents of rapid and salutary change. Brazil, China, and Russia are examples where regional governments take the lead in pushing reforms and prompting further actions by the central government.

5. Limited scale of export processing zones

The very modest contributions of India's export processing zones to attracting FDI and overall export development call for a revision of policy. India's export processing zones have lacked dynamism because of several reasons, such as their relatively limited scale, the Government's general ambivalence about attracting FDI; the unclear and changing incentive packages attached to the zones; and the power of the central government in the regulation of the zones, in comparison with the major responsibility of local and provincial government in

China. Ironically, while India established her first EPZ in 19654 compared with China's initial efforts in 1980, the Indian EPZs never seemed to take off -- either in attracting investment or in promoting exports.

6. No liberalization in exit barriers

While the reforms implemented so far have helped remove the entry barriers, the liberalization of exit barriers has yet to take place. This is a major deterrent to large volumes of FDI flowing to India. An exit policy needs to be formulated such that firms can enter and exit freely from the market. While it would be incorrect to ignore the need and potential merit of certain safeguards, it is also important to recognize that safeguards if wrongly designed and/or poorly enforced would turn into barriers that may adversely affect the health of the firm. The regulatory framework, which is in place, does not allow the firms to undertake restructuring.

7. Stringent labor laws

Large firms in India are not allowed to retrench or layoff any workers, or close down the unit without the permission of the state government. While the law was enacted with a view to monitor unfair retrenchment and layoff, in effect it has turned out to be a provision for job security in privately owned large firms. This is very much in line with the job security provided to public sector employees. Most importantly, the continuing barrier to the dismissal of unwanted workers in Indian establishments with 100 or more employees paralyzes firms in hiring new workers. With regard to labor regulations and hiring and firing practices, India is ranked 55th and 56th respectively in the GCR 1999. Labor-intensive manufacturing exports require competitive and flexible enterprises that can vary their employment according to changes in market demand and changes in technology, so India remains an unattractive base for such production in part because of the continuing obstacles to flexible management of the labor force.

8. Financial sector reforms

Reform of India's financial sector is crucial for large FDI flows into India. However, only some partial steps have been undertaken and these are by no means going to make any meaningful changes to the existing system. India's banking and insurance companies were nationalized more than two decades ago. India still continues to rely on a state-owned, state-run banking system and the insurance sector till very recently remained a government monopoly. This as one would expect has had highly adverse results, both in terms of availability of funds for investment and a negligible presence of foreign banks and no

presence of foreign insurance companies in the country

9. High corporate tax rates

Corporate tax rates in East Asia are generally in the range of 15 to 30 percent, compared with a rate of 48 percent for foreign companies in India. High corporate tax rate is definitely a major disincentive to foreign corporate investment in India. With respect to tax evasion, India is ranked 48th in the GCR 1999.

20.7 SUMMARY

Investment in Indian joint ventures by foreign investors is also a growing area, but FDI India is not permitted in certain industrial sectors such as arms and ammunition, railways, iron mining and coal mining etc.. India needs to try and attract globally investors in future. In terms of investment India previously treated FDI India and FDI as a whole as a necessary evil. These days, because of new industrial policies in India, foreign investment in India is no longer seen as "taboo" by westerners, and more and more westerns are likely to begin to invest India and enjoy the lessening of operational constraints that used to plague foreign investors who first began westernised breakthrough investment in India. India now boasts a bustling and vibrant private sector of business that is continuing to pique the interest of foreigners who have been researching the most lucrative investment India can offer. A new policy in India also permits ease of approval for equity investment in India with the proviso that such transactions are made in priority industries.

20.8 KEYWORDS

1. Corporate Tax
2. FDI
3. FII
4. Labour standards

20.9 SELF ASSESSMENT QUESTIONS

1.Explain FDI policy of India

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2.Examine the role of FIPB

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3. Write a note on FII

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20.10 REFERENCES

1. Kevin Buterbaugh and Richard Fulton, The WTO Primer
2. Indira Carr, International Trade law, 2009
3. CArole Murray & David Holloway , Schnitthoff's Export Trade : The Law & Practice of International trade
4. Michael k Levine, Inside International Trade Policy Formulation
5. Rao M B, WTO & International Trade 2/edn
6. Chauh J C T, Law of International Trade. 3/edn
7. Bhagirath Lal Das, The WTO: A Guide to framework for International trade.