Chapter 6

Governing Legislations on International Trade

CHAPTER 6

GOVERNING LEGISLATIONS ON INTERNATIONAL TRADE 199-313

CHAPTER 6

GOVERNING LEGISLATIONS ON INTERNATIONAL TRADE

We have seen that transaction of Trade is a in a way a contract and it is a well-known fact that all contracts are bound by some or the other law. Taking India, for instance we have The Indian Contract, 1872 which applies to all the contractual transactions taking place in India. Over and above this there is also the Alternative Dispute Resolution Mechanism under which dispute resolution can be undertaken without taking recourse to the courts. Even historically we have books and literature which talks about the legal system governing trade in those times. We shall look into how the legal system worked in ancient and medieval ages in India.

So far the transactions are taking place within a country or a place which has the same set of rules, problem of dispute resolution and remedies does not arise. But where the transaction crosses the boundaries of one country and enters into the boundaries of the other, the question arises as to which country's law shall apply in the event of a dispute. This happens in the case of international trade where two parties belonging to different States are concerned and where the laws of the land are not compatible with each other. Here arises the question of dispute resolution and remedies. This problem was resolved by and between nations by entering into treaties with each other for the commercial terms. These were Bi-lateral,

Multilateral or Regional Treaties which applied according to the States which had entered into and executed the same.

Still there was a need for a wholesome approach, a set of provisions which would apply to every nation or to most of the nations of the world. This situation led to the requirement of a specific legislation or legislations which apply to all the nations of the world and which is/are acceptable to everyone. The leading countries of the world together worked upon this situation and from time to time different sets of legislations were introduced and the nations that were ready to abide with the same became the members of that specific group. The domestic laws of all such nations were amended to that extent so that the latest development could be affectively introduced into the legislative system of the country. There are a series of conventions, agreements and treaties which have been introduced till date. These conventions, agreements and treaties govern International Trade between the member countries.

6.1 Governance and Organisation of Trade in the Ancient Times

6.1.1 Governance

In the beginning of the Vedic age people did not have a settled life and were nomads but with development in agriculture people started to settle down in groups. The organization was mainly tribal and the head of the tribe was supposed to be the raja or the King, though the concept of King had yet not developed. With the passage of time large

kingdoms started to grow and by the 6th century BC there were 16 Mahajanapadas (Kingdoms).

There were many small republics also in ancient India. These republics had some elements of democracy in their administration. The king (raja) was the supreme head of the legislative, executive and judiciary branches. He was assisted in administration by a number of officials. The members of the council of minister could give advice to the king, but final decisions were left to the king. The ministers and other officials were directly appointed by the king.

During the Mauryan period there existed both civil and military officials. They were paid a salary in cash. There were officials who maintained the records of population, income and expenditure of government. We find reference to officials and clerks who collected income tax and custom duties. Spy system was an important feature of Mauryan administration.

The royal agents and the spies could contact the king at any time and they reported to the king about various developments in his kingdom. The empire was divided into many provinces and each one of these provinces was governed by a governor and council of ministers. In the provinces there were local officials called rajukas, who became more powerful during the reign of Ashoka. There were certain departments which decided certain important matters of administration. There existed a standing army which was again controlled by certain committees.

Administration structure during the Gupta period was exceptionally good in spite of large empire. During the Gupta period also the administration was more or less like the Mauryas. The most important difference between the Gupta and Mauryan administration was centralization and decentralization of administration. In the Gupta administration, the governors of the provinces were more independent as compared to the Mauryans, where the administration was highly centralized.

6.1.2 Organisation

The Inland trade of a country may either be wholesale or retail, sometimes the middlemen also play an important role in the purchase and sale of goods and services. We learn from the authority of Kautilya that the relations between the retail and wholesale dealers were well governed; Retail dealers sold the merchandise according to prices prevailing at particular localities and times. We also learn about wholesale merchants who centralised commodities to be sold. The king helped them in clearing of their excessive supplies by fixing different prices or by restricting fresh stocks in the market.

Role of Middlemen: There were middlemen who acted as the connecting link between the vendor and the vendee it was expected from a trader to calculate his daily turnover and to pay the desirable amount to the middlemen. Patanjali also refers to a person known as Vasnika. It appears that Vasnika was about the deal between the vendor and the vendee and when the sale price was realized, he was entitled to his share which varied according to the proceeds of the sale. At another

reference patanjali refers to three parties in a transaction viz the giver of the commodity the person taking it, and finally, the person watching the transaction.

System of Exchange: Both money and barter systems of exchange prevailed during the period of our study. Barter system was especially prevalent in rural and backward areas where demands were few due to limited wants. Kautilya refers to a term parivardhana, which was defined as the profitable exchange of grains for grains. From this we can safely conclude that the ancient law-givers were in know of the fact that exchange is such transfer of goods and services between the two parties in which both the parties are put to a benefit. At several places, we learn that the village people exchanged commodities with each other in order to satisfy their wants village labour was paid in terms of kind. Patanjali throws light on some very important terms in this connection. The thing given in exchange was called nimana' and the one received for it nimeya'. Barter transactions at that time were not confined to ordinary things of human need, but the principle extended even to bigger transactions. Both panini and patanjali have referred to Vasanarnam and kamblarnam pointing to the loan for a cloth of standard size, or that for a blanket of standard quality. The transactions relating to purchse and sale of animals were also arranged through barter. Sometimes the commodities, thus availed of through barter, were named after the amount of the goods exchanged. To take for example a commodity purchased for surpas of grain was known as divsurpa. In rural areas barter dominated the scene. In Milinda-Panha, we learn that a farmer either hoards his

produce in the granary or disposes off the same in a barter. In urban areas although barter existed to some extent, yet money economy normally prevailed. Prices were fixed in terms of cash and various services were paid in monetary units. The availability of a large number of coins, as a result of excavations at a number of ancient urban sites in India, is a concrete proof of such a conclusion. The barter system of exchange was very speedily giving place to money system due to excessive belief of Mauryan kings in money economy and also due to the influx of alien tribes in India opening new venues for trade and commerce in the light of money system of dealings. Various punishments, taxes and fines levied and imposed by the state payable in terms of cash, naturally gave rise to the demand of money in markets or elsewhere. The references of terms like 'Dvisata' (commodity purchased for two-hundred coins), or Naiskika (commodity purchased for the Niska coin) supplied to us by Patanjali expressly indicate the popularity of money economy during the period as well. A surprising increase in the foreign trade gave rise to a number of demands resulting in a tremendous momentum to commerce and industry. In such circumstances, India had to shift itself rapidly from barter to money, which was in no way a new phenomenon for Indian people.

Thereafter with time trade evolved and along with that International trade came into being bringing in the need for certain binding principles over the boundaries of nations. This led to the creation of treaties, protocols and agreements or charters between different nations of the world. Over and above that charters and agreements between a number of

countries for regulation of international trade were drafted and brought into existence creating a system of law for the governance of international trade. Some of them have been discussed hereunder:

6.2 Treaties

A treaty is an agreement under international law entered into by two or more States and/or international organizations. In simple terms it is an understanding between the participating States or Organizations that the provisions mentioned in the treaty shall apply to the set of circumstances for which the treaty is entered into. Whenever the specific set of circumstances or instances occurs, the provisions in the treaty are to be adhered to by the participating States or Organizations. The participating States or Organizations willingly assume obligations among themselves, and a party to either that fails to live up to their obligations can be held liable under international law for that breach. The central principle of treaty law is expressed in the maxim *pacta sunt servanda*—"pacts must be respected".

Treaties can be of different types namely Bi-lateral, Multi-lateral or Regional Treaties. Bilateral treaties by contrast are negotiated between a limited number of states, most commonly only two, establishing legal rights and obligations between those two states only. It is possible however for a bilateral treaty to have more than two parties; consider for instance the bilateral treaties between Switzerland and the European Union (EU) following the Swiss rejection of the European Economic Area agreement. Each of these treaties has seventeen parties. These however are still bilateral, not multilateral, treaties. The parties are divided into two groups, the Swiss ("on the one part") and the EU and its member states ("on the other part"). The treaty establishes rights and

obligations between the Swiss and the EU and the member states severally; it does not establish any rights and obligations amongst the EU and its member states.

As opposed to the bi-lateral treaty is the multilateral treaty which has several differences with bi-lateral treaties, and establishes rights and obligations between each party and every other party. Multilateral treaties are often, but not always, open to any state. Such treaties can be entered into by more and more States and the provisions of that treaty shall be binding them *interse*. Multilateral treaties are in a way nearly same to the other regulative sets of rules which are in vogue today as such treaties embodies within itself all States which are agreeing to bind themselves to the provisions of the said treaty and same is the case with the other regulative sets of rules whether called conventions, agreements etc. Thus we can say that multilateral treaties are for all practical purposes the best manner of solving disputes relating to International Trade.

6.2.1 Modifications in Treaty

6.2.1.1 Reservations

Reservations are unilateral statements purporting to exclude or to modify the legal obligation and its effects on the reserving state upon a specific provision within the treaty. Reservations are essentially caveats to a state's acceptance of a treaty. These must be included at the time of signing or ratification.

Originally, international law was un-accepting of treaty reservations, rejecting them unless all parties to the treaty accepted the same reservations. However, in the interest of encouraging the largest number of states to join treaties, a more permissive rule regarding reservations has emerged. While some treaties still expressly forbid any reservations, they are now generally permitted to the extent that they are not inconsistent with the goals and purposes of the treaty.

When a State limits its treaty obligations through reservations, other states party to that treaty have the option to accept those reservations, object to them, or object and oppose them. If the state accepts them (or fails to act at all), both the reserving state and the accepting state are relieved of the reserved legal obligation as concerns their legal obligations to each other (accepting the reservation does not change the accepting state's legal obligations as concerns other parties to the treaty). If the state opposes, the parts of the treaty affected by the reservation drop out completely and no longer create any legal obligations on the reserving and accepting state, again only as concerns each other. Finally, if the state objects and opposes, there are no legal obligations under that treaty between those two state parties whatsoever. The objecting and opposing state essentially refuses to acknowledge the reserving state is a party to the treaty at all.

6.2.1.2 Amendments

There are three ways an existing treaty can be amended. First, formal amendment requires States to the treaty to go through the ratification process all over again. The re-negotiation of treaty provisions can be long and protracted, and often some parties to the original treaty will not become parties to the amended treaty. When determining the legal obligations of states, one party to the original treaty and one a party to the amended treaty, the states will only be bound by the terms they both agreed upon. Treaties can also be amended informally by the treaty executive council when the changes are only procedural, technical, or administrative (not principled changes). Finally, a change in customary international law (state behavior) can also amend a treaty, where state behavior evinces a new interpretation of the legal obligations under the treaty. Minor corrections to a treaty may be adopted by a procès-verbal; but a procès-verbal is generally reserved for changes to rectify obvious errors in the text adopted, i.e. where the text adopted does not correctly reflect the intention of the parties adopting it.

6.2.1.3 Protocols

In international law and international relations, a protocol is generally a treaty or international agreement that supplements a previous treaty or international agreement. A protocol can amend the previous treaty, or

add additional provisions. Parties to the earlier agreement are not required to adopt the protocol; sometimes this is made clearer by calling it an "optional protocol", especially where many parties to the first agreement do not support the protocol.

Some examples: the United Nations Framework Convention on Climate Change (UNFCCC) established a framework for the development of binding greenhouse gas emission limits, while the Kyoto Protocol contained the specific provisions and regulations later agreed upon.

6.2.2 Execution and implementation

Treaties may be seen as 'self-executing', in that merely becoming a party puts the treaty and all of its obligations in action. Other treaties may be non-self-executing and require 'implementing legislation'—a change in the domestic law of a state party that will direct or enable it to fulfill treaty obligations. An example of a treaty requiring such legislation would be one mandating local prosecution by a party for particular crimes.

The division between the two is often not clear and is often politicized in disagreements within a government over a treaty, as a non-self-executing treaty cannot be acted upon without the proper change in domestic law. If a treaty requires implementing legislation, a state may be in default of its obligations by the failure of its legislature to pass the necessary domestic laws.

6.2.3 Interpretation

The language of treaties, like that of any law or contract, must be interpreted when the wording does not seem clear or it is not immediately apparent how it should be applied in a perhaps unforeseen circumstance. The Vienna Convention states that treaties are to be interpreted "in good faith" according to the "ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose." International legal experts also often invoke the 'principle of maximum effectiveness,' which interprets treaty language as having the fullest force and effect possible to establish obligations between the parties.

No one party to a treaty can impose its particular interpretation of the treaty upon the other parties. Consent may be implied, however, if the other parties fail to explicitly disavow that initially unilateral interpretation, particularly if that state has acted upon its view of the treaty without complaint. Consent by all parties to the treaty to a particular interpretation has the legal effect of adding an additional clause to the treaty - this is commonly called an 'authentic interpretation'.

International tribunals and arbiters are often called upon to resolve substantial disputes over treaty interpretations. To establish the meaning in context, these judicial bodies may review the preparatory work from the negotiation and drafting of the treaty as well as the final, signed treaty itself.

6.2.4 Consequences of terminology

One significant part of treaty making is that signing a treaty implies recognition that the other side is a sovereign state and that the agreement being considered is enforceable under international law. Hence, nations can be very careful about terming an agreement to be a treaty. For example, within the United States agreements between states are compacts and agreements between states and the federal government or between agencies of the government are memoranda of understanding.

Another situation can occur when one party wishes to create an obligation under international law, but the other party does not. This factor has been at work with respect to discussions between North Korea and the United States over security guarantees and nuclear proliferation.

The terminology can also be confusing because a treaty may and usually is named something other than a treaty, such as a convention, protocol, or simply agreement. Conversely some legal documents such as the Treaty of Waitangi are internationally considered to be documents under domestic law.

6.2.5 Ending treaty obligations

6.2.5.1 Withdrawal

Treaties are not necessarily permanently binding upon the signatory parties. As obligations in international law

are traditionally viewed as arising only from the consent of states, many treaties expressly allow a state to withdraw as long as it follows certain procedures of notification. Many treaties expressly forbid withdrawal. Other treaties are silent on the issue, and so if a state attempts withdrawal through its own unilateral denunciation of the treaty, a determination must be made regarding whether permitting withdrawal is contrary to the original intent of the parties or to the nature of the treaty. Human rights treaties, for example, are generally interpreted to exclude the possibility of withdrawal, because of the importance and permanence of the obligations.

If a state party's withdrawal is successful, its obligations under that treaty are considered terminated, and withdrawal by one party from a bilateral treaty of course terminates the treaty. When a state withdraws from a multi-lateral treaty, that treaty will still otherwise remain in force between the other parties, unless, of course, otherwise should or could be interpreted as agreed upon between the remaining states parties to the treaty.

6.2.5.2 Suspension and termination

If a party has materially violated or breached its treaty obligations, the other parties may invoke this breach as grounds for temporarily suspending their obligations to that party under the treaty. A material breach may also

be invoked as grounds for permanently terminating the treaty itself.

A treaty breach does not automatically suspend or terminate treaty relations, however. The issue must be presented to an international tribunal or arbiter (usually specified in the treaty itself) to legally establish that a sufficiently serious breach has in fact occurred. Otherwise, a party that prematurely and perhaps wrongfully suspends or terminates its own obligations due to an alleged breach itself runs the risk of being held liable for breach. Additionally, parties may choose to overlook treaty breaches while still maintaining their own obligations towards the party in breach.

Treaties sometimes include provisions for self-termination, meaning that the treaty is automatically terminated if certain defined conditions are met. Some treaties are intended by the parties to be only temporarily binding and are set to expire on a given date. Other treaties may self-terminate if the treaty is meant to exist only under certain conditions.

A party may claim that a treaty should be terminated, even in absence of an express provision, if there has been a fundamental change in circumstances. Such a change is sufficient if unforeseen, if it undermined the "essential basis" of consent by a party, if it radically transforms the extent of obligations between the parties, and if the obligations are still to be performed. A party

cannot base this claim on change brought about by its own breach of the treaty. This claim also cannot be used to invalidate treaties that established or redrew political boundaries.

6.2.6 Role of the United Nations

The United Nations Charter states that treaties must be registered with the UN to be invoked before it or enforced in its judiciary organ, the International Court of Justice. This was done to prevent the proliferation of secret treaties that occurred in the 19th and 20th century. The Charter also states that its members' obligations under it outweigh any competing obligations under other treaties.

After their adoption, treaties as well as their amendments have to follow the official legal procedures of the United Nations, as applied by the Office of Legal Affairs, including signature, ratification and entry into force.

In function and effectiveness, the UN has been compared to the pre-Constitutional United States Federal government by some, giving a comparison between modern treaty law and the historical Articles of Confederation.

6.3 Regionalism

As pointed out by Wilcox, "The question of relative merits of regionalism and globism in international organization generated as much heat as any other issue at San Francisco in 1945 with the exception of the Veto." At one extreme are those staunch supporters of regionalism who are of the view that regional arrangements are natural outgrowth of international co-operation. They contend that a universal organization is too ambitious and cannot command an allegiance necessary to fulfill its objectives in a world still divided by sovereignty. At the other end of the spectrum are those who are of the view that regional agencies formant great military power, rivalries weaken the effectiveness of the UN and undermine the principle of collective security.

6.3.1 Regionalism under UN Charter

At the San Francisco conference, some formula had to be devised to bring out compatibility between regional and global organizations. A comprise formula was evolved and embodied in the Articles 52 to 54 of the charter. The charter does not define the term regionalism but provides certain guidelines and safeguards.

There is a separate chapter (chapter VIII) in the charter, entitled regional arrangements. It comprises of three Articles (Articles 52 to 54). Article 52 provides that, nothing in the present charter precludes the existence of regional arrangements or agencies for dealing with such

matters relating to maintenance of peace and security as are appropriate for regional action, provided that arrangements, agencies and their activities are consistent with their purposes and principles of the UN. Article 53 provides that, the Security Council shall, when appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. Lastly the Article 54 provides that the Security Council shall at all times, be kept fully informed of the activities undertaken or which are in contemplation under such regional arrangements or undertaken by regional agencies for the maintenance of international peace and security.

Thus it is quite obvious from the above provisions that although the charter permits the States to enter into regional arrangements, it lays down certain very important restrictions, in the first place such regional arrangements should be consistent with the purposes and the principles of the UN. Secondly they are subject to the authority and control of the Security Council. Thirdly the Security Council may utilize such regional arrangements or agencies for the enforcement of action under its authority. Fourthly it is required that the Security Council shall at all times be kept fully informed of not only the activities which have been undertaken but also those activities which are in contemplation under the regional arrangements. Last but not the least, under Article 102 all regional arrangements must be registered with the Secretariat and published by it.

6.3.2 Important Regional Agreements

Following are some of the Important Regional Agreements around the world.

6.3.2.1 Organisation of American States (OAS)

The OAS is a regional arrangement which was established in 1948. In accordance with Article 1 of the said organisation it is a regional agency as per the UN charter. So far the question of collective security is concerned Article 24 of the charter of the said organisation lays down the following "every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against other American States.

6.3.2.2 Arab League

The Arab League was established in 1945. The chief objective of the Arab League is to maintain and further unity, territorial integrity, political independence of the Arab States. Egypt, Iraq, Syria, South Arabia, Lebanon, Libya etc are its members.

6.3.2.3 Central Treaty Organisation (CENTO)

Central Treaty Organisation is also popularly known as Baghdad Pact, because it was established in 1955 at Baghdad. Iran, Turkey, Britain, Pakistan etc. are its members. Its charter makes it clear that it has been established in accordance with the provisions of the UN charter regarding individual or collective self defence contained in Article 51 of the charter.

6.3.2.4 Organisation of African States

It was established in 1963 at Addis Ababa in the conference of independent States of Africa. The chief objective of this organization is to encourage unity, development, territorial integrity and political independence of African States and to make joint efforts for ending colonialism in Africa.

6.3.2.5 North Atlantic Treaty Organisation (NATO)

North Atlantic Treaty Organisation (NATO) was established in 1949 at Washington in conference of 12 nations viz. Belgium, Canada, Denmark, France, Italy, Luxemburg, Netherlands, Britain and Pakistan. In accordance with Article 3 of the charter of the said treaty, if any party of the treaty is attacked or otherwise becomes a subject of

aggression the other parties are bound to help that member.

As a matter of fact western States had established it to arrest the expansion of communism. Greece and Western Germany also became its members in 1952 and 1955 respectively. This organisation however received a setback in 1966 when France left this organisation. In the beginning this organisation was chiefly of military importance but slowly and gradually it is becoming more and more an organisation or political rather than military importance. In one sense NATO has outlined its utility because its aim of arresting expansion of communism was almost being achieved with the breaking up of the Soviet Union. Now under "partnership for peace plan", former Soviet Republics and Russia have also joined it.

6.3.2.6 Warsaw Treaty

Warsaw Treaty was established in 1955 by Bulgaria, East Germany, Hungary, Poland, Romania and Russia for a period of 30 years. The headquarters of this organisation is in Moscow. It is clear from the preamble that this organization has been established to set up a system of collective security for East European States.

6.4 Global Conventions

6.4.1 Paris Convention for the Protection of Industrial Property

After a diplomatic conference in Paris in 1880, the Convention was signed in 1883 by 11 countries. The Convention now has 172 contracting member countries, [1] which makes it one of the most widely adopted treaties worldwide. Notably, Taiwan and Kuwait are not parties to the Convention. However, according to Article 27 of its Patent Act, Taiwan recognizes priority claims from contracting members. The Paris Convention entered into force in Thailand on August 2, 2008, bringing the total number of Nation States party to that Convention to 173.

This was one of the first intellectual property treaties. As a result of this treaty, intellectual property, including patents, of any contracting state are accessible to the nationals of other states party to the Convention.

The "*Convention priority right*", also called "*Paris Convention priority right*" or "*Union priority right*", was also established by this treaty. It provides that an applicant from one contracting State shall be able to use its first filing date (in one of the contracting State) as the effective filing date in another contracting State, provided that the applicant files another application within 6 months (for industrial designs and trademarks) or 12 months (for patents and utility models) from the

first filing. The Administration of this convention is done by World Intellectual Property Organization (WIPO).

6.4.2 General Agreement on Tariffs and Trade

The General Agreement on Tariffs and Trade (GATT) was the outcome of the failure of negotiating governments to create the International Trade Organization (ITO). GATT was formed in 1947 and lasted until 1994, when it was replaced by the World Trade Organization in 1995. The Bretton Woods Conference had introduced the idea for an organization to regulate trade as part of a larger plan for economic recovery after World War II. As governments negotiated the ITO, 15 negotiating states began parallel negotiations for the GATT as a way to attain early tariff reductions. Once the ITO failed in 1950, only the GATT agreement was left. The GATT's main objective was the reduction of barriers to international trade. This was achieved through the reduction of tariff barriers, quantitative restrictions and subsidies on trade through a series of agreements. The GATT was a treaty, not an organization although a small secretariat occupied what is today the Centre William Rappard in Geneva, Switzerland. The functions of the GATT were taken over by the World Trade Organization which was established during the final round of negotiations in early 1990s.

The history of the GATT can be divided into three phases: the first, from 1947 until the Torquay Round, largely concerned with which commodities would be

covered by the agreement and freezing existing tariff levels. A second phase, encompassing three rounds, from 1959 to 1979, focused on reducing tariffs. The third phase, consisting only of the Uruguay Round from 1986 to 1994, extended the agreement fully to new areas such as intellectual property, services, capital, and agriculture. Out of this round the WTO was born.

GATT signatories occasionally negotiated new trade agreements that all countries would enter into. Each set of agreements was called a *round.* In general, each agreement bound members to reduce certain tariffs. Usually this would include many special-case treatments of individual products, with exceptions or modifications for each country.

6.4.2.1 INCEPTION

The precursor organization to the GATT, called the International Trade Organization (ITO), was first proposed in February 1945 by the United Nations Economic and Social Council. The negotiating countries of the ITO began parallel negotiations for the GATT as a way to introduce early tariff cuts. The plan called for the ITO to take control over GATT, once the ITO was finalized. Owing to the United States failing to implement the ITO, GATT was the only organization left. On 1 January, 1948 the agreement was signed by 23 countries. According to GATT's own estimates, the negotiations created 123 agreements that covered

45,000 tariff items that related to approximately one-half of world trade or $10 billion in trade.[1]

6.4.2.2 GATT 1947 IN THE US

The GATT, as an international agreement, is a treaty. Under United States law it is classified as a congressional-executive agreement. Based on the Reciprocal Trade Agreements Act it allowed the executive branch negotiating power over trade agreements with temporary authority from Congress. At the time it functioned as a provisional, but promising trade system. The agreement is based on the "*unconditional most favored nation principle*" This means that the conditions applied to the most favored trading nation (i.e. the one with the fewest restrictions) apply to all trading nations. In the US, there was large opposition against the International Trade Organization (which had been ratified in several countries), and thus President Truman never even submitted it to the Congress.

6.4.2.3 ROUNDS

GATT held a total of 8 rounds.

[1] Irwin, Douglas A. - The GATT's contribution to economic recovery in post-war Western Europe

GATT and WTO trade rounds[2]

Name	Start	Duration	Countries	Subjects covered	Achievements
Geneva	April 1947	7 months	23	Tariffs	Signing of GATT, 45,000 tariff concessions affecting $10 billion of trade
Annecy	April 1949	5 months	13	Tariffs	Countries exchanged some 5,000 tariff concessions
Torquay	Sept. 1950	8 months	38	Tariffs	Countries exchanged some 8,700 tariff concessions, cutting the 1948 tariff levels by

[2] The GATT years: from Havana to Marrakesh, World Trade Organization as reported in Timeline

					25%
Geneva II	January 1956	5 months	26	Tariffs, admission of Japan	$2.5 billion in tariff reductions
Dillon	September 1960	11 months	26	Tariffs	Tariff concessions worth $4.9 billion of world trade
Kennedy	May 1964	37 months	62	Tariffs, Anti-dumping	Tariff concessions worth $40 billion of world trade
Tokyo	September 1973	74 months	102	Tariffs, non-tariff measures, "framework" agreements	Tariff reductions worth more than $300 billion dollars achieved
Uruguay	September 1986	87 months	123	Tariffs, non-tariff measures, rules, services, intellectual property,	The round led to the creation of WTO, and extended the range of trade negotiations, leading to major

				dispute settlement, textiles, agriculture, creation of WTO, etc	reductions in tariffs (about 40%) and agricultural subsidies, an agreement to allow full access for **textiles** and clothing from developing countries, and an extension of intellectual property rights.
Doha	November 2001	**?**	141	Tariffs, non-tariff measures, agriculture, labor standards, environment, competition, investment, transparency, patents etc	The round is not yet concluded.

6.4.2.3.1 Annecy Round - 1950

The second round took place in 1949 in Annecy, France. 13 countries took part in the round. The main focus of the talks was more tariff reductions, around 5000 total.

6.4.2.3.2 Torquay Round - 1951

The third round occurred in Torquay, England in 1951. 38 countries took part in the round. 8,700 tariff concessions were made totaling the remaining amount of tariffs to three-fourths of the tariffs which were in effect in 1948. The contemporaneous rejection by the United States of the Havana Charter signified the establishment of the GATT as a governing world body.[3]

6.4.2.3.3 Geneva Round - 1955-1956

The fourth round returned to Geneva in 1955 and lasted until May 1956. 26 countries took part in the round. $2.5 billion in tariffs were eliminated or reduced.

6.4.2.3.4 Dillon Round - 1960-1962

The fifth round occurred once more in Geneva and lasted from 1960 to 1962. The talks were named after U.S. Treasury Secretary and former Under Secretary of State, Douglas Dillon, who first proposed the talks. 26 countries took part in the round. Along with reducing over $4.9 billion in tariffs, it also yielded discussion

[3] Michael Hudson, Super Imperialism: The Origin and Fundamentals of U.S. World Dominance, 2nd ed. (London and Sterling, VA: Pluto Press, 2003), 258

relating to the creation of the European Economic Community (EEC).

6.4.2.3.5 KENNEDY ROUND - 1964-1967

The sixth round was the last to take place in Geneva from 1964 until 1967 and was named after the late US President Kennedy in his memory. 66 countries[4] took part in the round. Concessions were made on $40 billion worth of tariffs. Some of the GATT negotiation rules were also more clearly defined.

6.4.2.3.6 TOKYO ROUND - 1973-1979

Reduced tariffs and established new regulations aimed at controlling the proliferation of non-tariff barriers and voluntary export restrictions. 102 countries took part in the round. Concessions were made on $190 billion worth.

6.4.2.3.7 URUGUAY ROUND - 1986-1993

The Uruguay Round began in 1986. It was the most ambitious round to date, hoping to expand the competence of the GATT to important new areas such as services, capital, intellectual property, textiles, and agriculture. 123 countries took part in the round.

Agriculture was essentially exempted from previous agreements as it was given special status in the areas of

[4] http://www.wto.org - Official website of WTO

import quotas and export subsidies, with only mild caveats. However, by the time of the Uruguay round, many countries considered the exception of agriculture to be sufficiently glaring that they refused to sign a new deal without some movement on agricultural products. These fourteen countries came to be known as the "Cairns Group", and included mostly small and medium sized agricultural exporters such as Australia, Brazil, Canada, Indonesia, and New Zealand.

The Agreement on Agriculture of the Uruguay Round continues to be the most substantial trade liberalization agreement in agricultural products in the history of trade negotiations. The goals of the agreement were to improve market access for agricultural products, reduce domestic support of agriculture in the form of price-distorting subsidies and quotas, eliminate over time export subsidies on agricultural products and to harmonize to the extent possible sanitary measures between member countries.

6.4.2.4 GATT AND THE WORLD TRADE ORGANIZATION

In 1993 the GATT was updated (GATT 1994) to include new obligations upon its signatories. One of the most significant changes was the creation of the World Trade Organization (WTO). The 75 existing GATT members and the European Communities became the founding members of the WTO on 1 January 1995. The other 52 GATT members rejoined the WTO in the following two years (the last being Congo in

1997). Since the founding of the WTO, 21 new non-GATT members have joined and 29 are currently negotiating membership. There are a total of 153 member countries in the WTO.

Of the original GATT members, only the SFR Yugoslavia has not rejoined the WTO. Since FR Yugoslavia, (renamed to Serbia and Montenegro and with membership negotiations later split in two), is not recognised as a direct SFRY successor state; therefore, its application is considered a new (non-GATT) one. The contracting parties who founded the WTO ended official agreement of the "GATT 1947" terms on 31 December, 1995.

Whereas GATT was a set of rules agreed upon by nations, the WTO is an institutional body. The WTO expanded its scope from traded goods to trade within the service sector and intellectual property rights. Although it was designed to serve multilateral agreements, during several rounds of GATT negotiations (particularly the Tokyo Round) plurilateral agreements created selective trading and caused fragmentation among members. WTO arrangements are generally a multilateral agreement settlement mechanism of GATT.[5]

[5] http://www.wto.org - Official website of WTO

6.4.3. World Trade Organisation (WTO)

WTO Came into existence on 1-1-1995 with the conclusion of Uruguay Round Multilateral Trade Negotiations at Marrakesh on 15th April 1994

The World Trade Organization (WTO), the successor to GATT, is rapidly establishing itself as the third pillar of the Bretton Woods institutions alongside the World Bank and the IMF. The prolonged international negotiations which led to its establishment have produced a complex set of agreements which not only constitute the most profound revision of the rules governing world trade, but extend these rules into a range of issues and economic sectors not hitherto regarded as falling within its ambit.

The WTO is headed by a ministerial conference of all members that meets at least once every two years. The frequent participation by trade ministers under the WTO was intended to strengthen the political guidance of the WTO and enhance the prominence and credibility of its rules in domestic political arenas. Article II of the Marrakesh Agreement that established the WTO charges the organization with providing a common institutional framework for the conduct of trade relations among its members in matters to which agreements and associated legal obligations apply.

Functions and Basic Principles

Transparency at both the multilateral (WTO) level and the national level is essential to ensure ownership of

commitments, reduce uncertainty, and enforce agreements. Efforts to increase the transparency of members' trade policies take up a good portion of WTO resources. The WTO requires that all trade laws and regulations be published. The WTO also has important surveillance activities, since it has a mandate to periodically review the trade policy and foreign trade regimes of members. The WTO's Trade Policy Review Mechanism (TPRM), established during the Uruguay Round, builds on a 1979 Understanding on Notification, Consultation, Dispute Settlement, and Surveillance under which contracting parties agreed to conduct a regular and systematic review of developments in the trading system.

WTO rules apply to all members, who are subject to binding dispute settlement procedures. This is attractive to groups seeking to introduce multilateral disciplines on a variety of subjects, ranging from the environment and labor standards to competition and investment policies to animal rights. But it is a source of concern to groups that perceive the (proposed) multilateral rules to be inappropriate or worry that the adoption of specific rules may affect detrimentally the ability of governments to regulate domestic activities and deal with market failures.

The main function of the WTO is as a forum for international cooperation on trade-related policies— the creation of codes of conduct for member governments. These codes emerge from the exchange of trade policy commitments in periodic negotiations. The WTO can be seen as a market in the sense that countries come together to exchange market access

commitments on a reciprocal basis. It is, in fact, a barter market. In contrast to the markets one finds in city squares, countries do not have access to a medium of exchange: they do not have money with which to buy, and against which to sell, trade policies. Instead they have to exchange apples for oranges: for example, tariff reductions on iron for foreign market access commitments regarding cloth. This makes the trade policy market less efficient than one in which money can be used, and it is one of the reasons that WTO negotiations can be a tortuous process.

One result of the market exchange is the development of codes of conduct. The WTO contains a set of specific legal obligations regulating trade policies of member states, and these are embodied in the GATT, the GATS, and the TRIPS agreement.

The WTO functions with the following aims, objectives and principles.

6.4.3.1 Main objects

i. Transparent, free and rule-based trading system

ii. Provide common institutional framework for conduct of trade relations among members

iii. Facilitate the implementation, administration and operation of Multilateral Trade Agreements

iv. Rules and Procedures Governing Dispute Settlement

v. Trade Policy Review Mechanism

vi. Concern on Non-trade issues such as Food Security, environment, health, etc.

6.4.3.2 Basic Principles

The WTO establishes a framework for trade policies; it does not define or specify outcomes. That is, it is concerned with setting the rules of the trade policy game, not with the results of the game. Five principles are of particular importance in understanding both the pre-1994 GATT and the WTO: nondiscrimination, reciprocity, enforceable commitments, transparency, and safety valves.[6] The other important principles of WTO are market access by reduction of tariffs and General elimination of quantitative restrictions on imports and exports (exceptions Article XX, XXI of GATT).

6.4.3.3 Aims

- Fair and market oriented trading system
- Commitments on support and protection
- Operationally effective GATT Rules & Disciplines
- Equitable Trade Reform process
- Greater opportunities and Terms of Access to developing countries

---

[6] BERNARD HOEKMAN: The WTO: Functions and Basic Principles

- Concern on Non-trade issues such as Food Security, environment, health, etc.

6.4.4 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), negotiated during the Uruguay Round, introduced intellectual property rules for the first time into the multilateral trading system. The Agreement, while recognizing that intellectual property rights (IPRs) are private rights, establishes minimum standards of protection that each government has to give to the intellectual property right in each of the WTO Member countries. The Member countries are, however, free to provide higher standards of intellectual property rights protection.

The Agreement is based on and supplements, with additional obligations, the Paris, Berne, Rome and Washington conventions in their respective fields. Thus, the Agreement does not constitute a fully independent convention, but rather an integrative instrument which provides "Convention-plus" protection for IPRs.

The TRIPS Agreement is, by its coverage, the most comprehensive international instrument on IPRs, dealing with all types of IPRs, with the sole exception of breeders' rights. IPRs covered under the TRIPS agreement are:

The TRIPS agreement is based on the basic principles of

the other WTO Agreements, like non-discrimination clauses - National Treatment and Most Favoured Nation Treatment, and are intended to promote "technological innovation" and "transfer and dissemination" of technology. It also recognizes the special needs of the least-developed country Members in respect of providing maximum flexibility in the domestic implementation of laws and regulations.

Part V of the TRIPS Agreement provides an institutionalized, multilateral means for the prevention of disputes relating to IPRs and settlement thereof. It is aimed at preventing unilateral actions on:

i. Copyrights and related rights;
ii. Trademarks;
iii. Geographical Indications;
iv. Industrial Designs;
v. Patents;
vi. Layout designs of integrated circuits; and
vii. Protection of undisclosed information (trade secrets).

6.4.4.1 Copyrights and related rights

Part II Section 1 (Article 9 to Article 14) of the TRIPS agreement deals with the minimum standard in respect of copyrights.

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and

producers of cinematograph films and sound recordings. It is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work. There could be slight variations in the composition of the rights depending on the work.

The Copyright Act, 1957 protects original literary, dramatic, musical and artistic works and cinematograph films and sound recordings from unauthorized use. Unlike the case with patents, copyright protects the expressions and not the ideas. There is no copyright in an idea. The general rule is that a copyright lasts for 60 years. In the case of original literary, dramatic, musical and artistic works the 60-year period is counted from the year following the death of the author. In the case of cinematograph films, sound recordings, photographs, posthumous publications, anonymous and pseudonymous publications, works of government and works of international organizations, the 60-year period is counted from the date of publication.

The Copyright Act, 1957 came into effect from January 1958. This Act has been amended five times since then, i.e., in 1983, 1984, 1992, 1994 and 1999, with the amendment of 1994 being the most substantial. The Copyright Act, 1957 continues with the common law traditions. Developments elsewhere have brought about a certain degree of convergence in copyright regimes in

the developed world.

The Copyright Act is compliant with most international conventions and treaties in the field of copyrights. India is a member of the Berne Convention for the Protection of Literary and Artistic Works of 1886 (as modified at Paris in 1971), and the Universal Copyright Convention of 1951. Though India is not a member of the Rome Convention of 1961, the Copyright Act, 1957 is fully compliant with the Rome Convention provisions.

Two new treaties, collectively termed as Internet Treaties, were negotiated in 1996 under the auspices of the World Intellectual Property Organization (WIPO). These treaties are called the 'WIPO Copyrights Treaty (WCT)' and the 'WIPO Performances and Phonograms Treaty (WPPT)'. These treaties were negotiated essentially to provide for the protection of the rights of copyright holders, performers and producers of phonograms in the Internet and digital era. India is not a member of these treaties as yet.

Copyrights in the TRIPS Agreement

- Protection of works covered by Berne Convention. **(Art.9)**
- Protection of computer programs as literary works and of compilations of data. **(Art. 10)**
- Recognition of rental rights, at least for phonograms,

computer programs, and for cinematographic works. **(Art. 11)**

- Recognition of a 50 years' minimum term for works owned by juridical persons, and for performers and phonogram producers. **(Art 12)**

- Exceptions to exclusive rights must be limited to special cases, which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights-holder. **(Art 13)**

- Recognition of rights of performers, producers, of phonograms and broadcasting organizations. **(Art. 14)**

6.4.4.2 Trademarks

Part II Section 2 (Article 15 to Article 21) of the TRIPS agreement contains the provisions for minimum standards in respect of Trademarks.

A trademark is a distinctive sign which identifies certain goods or services as those produced or provided by a specific person or enterprise. Its origin dates back to ancient times, when craftsmen reproduced their signatures, or "marks" on their artistic or utilitarian products. Over the years these marks evolved into today's system of trademark registration and protection. The system helps consumers identify and purchase a product or service because its nature and quality,

indicated by its unique trademark, meets their needs.

A trademark provides protection to the owner of the mark by ensuring the exclusive right to use it to identify goods or services, or to authorize another to use it in return for a payment. The period of protection varies, but a trademark can be renewed indefinitely beyond the time limit on payment of additional fees. Trademark protection is enforced by the courts, which in most systems have the authority to block trademark infringement.

There are two international treaties governing Trademarks -the Madrid Agreement Concerning the International Registration of Marks and the Madrid Protocol.

In India, the Trade Marks Act, 1999 was passed on 30th December 1999 and came into force on 15th September 2003. Before commencement of this Act, the Trade & Merchandise Marks Act governed the protection of trademarks in India, which has now been replaced by the Trade Marks Act. The Trade Marks Act, 1999 is in coherence with the provisions of the TRIPS Agreement. The new Act provides for registration of trademarks for services in addition to goods, and has increased the period of registration and renewal from 7yrs to 10yrs.

Trademarks in the TRIPS Agreement:

- Protectable subject matter includes any sign, combination of signs capable of distinguishing the goods or services from others. Registration depends on distinctiveness end use. **(Art 15)**
- Rights on the owners of registered trademark conferred to prevent third party not having his consent, from using in course of trade relating to identical goods/ services. **(Art. 16)**
- Exception to exclusive rights must be limited and take into account the legitimate interest of the trademark owner and of third parties. **(Art. 17)**
- The minimum term of protection is seven years, indefinitely renewable. **(Art. 18)**
- Requirements for use are to be limited in terms of both the minimum period of non-use and the admissibility of reasons for non-use. **(Art. 19)**

- Special requirements for use are limited, as well as the conditions of licensing and assignment of trademarks. **(Art 20)**
- A trademark may be assigned without transfer of the business to which it belongs. **(Art. 21)**

6.4.4.3 Geographical Indications (GI)

Section 3 Part II (Article 22 to Article 24) of the TRIPS Agreement contains the provisions for minimum standards in respect of geographical indications.

Geographical Indications of Goods are defined as that aspect of intellectual property which refers to the geographical indication referring to a country or to a place situated therein as being the country or place of origin of that product. Typically, such a name conveys an assurance of quality and distinctiveness which is essentially attributable to the fact of its origin in that defined geographical locality, region or country. Under Articles 1 (2) and 10 of the Paris Convention for the Protection of Industrial Property, geographical indications are covered as an element of IPRs.

In India, the Geographical Indications of Goods (Registration and Protection) Act, 1999 came into force w.e.f. 15th Sept 2003. It seeks to provide for registration and protection of Geographical Indications relating to goods in India. The Controller General of Patents, Designs and Trade Marks is also the registrar for the Geographical Indications, and the Geographical Indications Registry is located at Chennai.

Geographical Indications in the TRIPS agreement:

- Legal means shall be provided to prevent use of an indication in a manner that misleads the public or

when it constitutes unfair competition, and to invalidate a trademark if the public is misled as to the true place of origin. **(Art.22)**

- Additional protection is conferred on geographical indications for wines and spirits, including ways of protecting homonymous indications. **(Art.23)**
- Negotiations shall be undertaken to establish a multilateral system of notification and registration, aimed at increasing the protection of indications for wines and spirits.**(Art.24)**
- Exceptions to the required protection may be based on prior and continuous use of an indication, prior application or registration in good faith of a trademark, or on the customary use of the indication. **(Art.24)**
- Obligations only relate to geographical indications that are protected in their country of origin. **(Art 24)**

6.4.4.4 Industrial Designs (ID)

Section 4, Part II (Article 25 and Article 26) of the TRIPS Agreement contains the provisions for minimum standards in respect of Industrial designs.

Industrial designs are an element of intellectual property. Industrial designs refer to creative activity, which result in the ornamental or formal appearance of a product. Design rights refer to a novel or original

design that is accorded to the proprietor of a validly registered design. But it does not include any mode or principle or construction or anything which is in substance a mere mechanical device.

India has already amended its national legislation to provide for these minimal standards. The essential purpose of the Designs Act, 2000 is to promote and protect the design element of industrial production. It is also intended to promote innovative activity in the field of industries. The present legislation is aligned with the changed technical and commercial scenario and conforms to the international trends in design administration.

Under the Designs Act, the designs would not include any trade mark, as defines in the Trade Marks Act or property mark or artistic works as defined in the Copyright Act.

The duration of the registration of a design is initially ten years from the date of registration, but in cases where claim to priority has been allowed the duration is ten years from the priority date. This initial period of registration may be extended by further period of 5 years on an application before the expiry of the said initial period of Copyright. The proprietor of a design may make an application for such an extension as soon as the design is registered.

Industrial Design in the TRIPS Agreement:

- Protection to new or original designs. **(Art.25)**
- Protection for textile designs through industrial design or copyright law. **(Art 25)**.
- Exclusive rights can be exercised against acts for commercial purposes, including importation. **(Art 26)**
- Minimum Term of Protection is ten years. **(Art 26)**

6.4.4.5 Patents

Section 5 Part II of the TRIPS Agreement (Article 27 to Article 34) contains the provisions for standards in respect of the Patents.

A Patent is an exclusive right granted by a country to the inventor to make, use, manufacture and market the invention that satisfies the conditions of novelty, innovativeness and usefulness Members are required to comply with the Paris Convention for the Protection of Industrial Property.

Introduction of Patent Law in India took place in 1856 whereby certain exclusive privileges to the inventors of new inventions were granted for a period of 14 years. Presently, the patent provisions in India are governed by the Patents Act, 1970. The Indian Patents Act is fully compatible with the TRIPS Agreement, following amendments to it; the last amendment being in 2005 by

the Patents (Amendment) Act, 2005.

Product patents in the field of pharmaceuticals and agro-chemicals have been introduced by deleting Section 5 of the Patents Act. Those inventions which are considered a mere discovery of a new form of a known substance or mere discovery of a new property or new use will not be considered patentable. A provision for patenting of software that is embedded in hardware has also been introduced in the Patents Act.

The term of every patent is now for 20 years from the date of filing. Provisions for the pre-grant opposition to the grant of patents have also been incorporated in the Act. Earlier such provisions were available only for post-grant opposition. The filing date of a patent application and its complete specification will now be the international date of filing for the patent as per the provisions of the Patent Cooperation Treaty.

A provision has also been introduced in the Patents Act to enable the grant of compulsory licenses for the export of medicines to countries with limited or no manufacturing capacities to meet emergent public health situations. The law effectively balances and calibrates intellectual property protection with public health concerns and national security. This provision is in line with the Decision of the WTO of 30 August 2003 on the Implementation of Paragraph 6 of the Doha

Declaration on the TRIPS Agreement and Public Health.

Patents in the TRIPS Agreement:

- Patents shall be granted for any inventions, whether products or processes, in all field of technology, provided they are new, involve an inventive step and are capable of industrial application. No discrimination in respect to place of invention. Exception available for diagnostic, therapeutic and surgical methods of treatment for humans or animals, as well as plants and animals and essentially biological processes for the production thereof. **(Art.27)**

- Exclusive right to owners against third party for using subject matter including process of patent, without his consent. (Art 28) Inventions shall be disclosed in a manner, which is \sufficiently clear and complete for a skilled person in the art to carry out the invention. **(Art. 29)**

- Limited exceptions to the exclusive rights provided such exception do not conflict with normal exploitation of the patent. **(Art.30)**

- Revocation/forfeiture is subject to judicial review. **(Art 32)**

- The term of protection shall be at least 20 years

from the date of application. **(Art.33)**

- Reversal off the burden of proof in civil proceedings relating to infringement of process patents is to be established in certain cases. **(Art.34)**

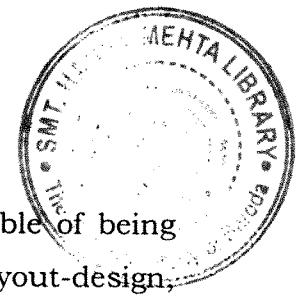
6.4.4.6 Layout Designs of Integrated Circuits

Art. 35 to 38 of Section 6/Part II of the TRIPS agreement contains the provisions for protection of rights in respect of Layout Designs of Integrated Circuits.

The basis for protecting integrated circuit designs (Topographies) in the TRIPS Agreement is the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, 1989. India is a signatory to this international agreement.

In India, the IPRs on the layout designs of integrated circuits are governed by the Semiconductor Integrated Circuits Layout-Design Act, 2000.

Under this Act, a layout-design shall be considered original if it is the result of its creator's own intellectual efforts and is not commonly known to the creators of layout-designs and manufacturers of semiconductor integrated circuits at the time of its creation. But a layout-design, which is not original, or which has been commercially exploited anywhere in India or in a convention country; or which is not inherently



distinctive; or which is not inherently capable of being distinguishable from any other registered layout-design, shall not be registered as a layout-design. But if a layout-design which has been commercially exploited for not more than two years from the date on which an application for its registration has been filed either in India or in a convention country shall be treated as not having been commercially exploited.

The registration of a layout-design shall be only for a period of ten years counted from the date of filing an application for registration or from the date of first commercial exploitation anywhere in India or in any country whichever is earlier. No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered layout-design.

Lay out Design in the TRIPS Agreement:

- Protection in accordance with Treaty on Intellectual Property in Respect of Integrated Circuit. (Art.35)
- Protection shall extend to layout designs as such and to the industrial articles that incorporate them. (Art.36)
- Bona fide purchasers of products involving infringing layout designs shall be liable to pay compensation to the rights- holder after. (Art.37)

- Term of protection is a minimum of 10 years notification. (Art 38)

6.4.4.7 Protection of undisclosed information

Article 39 of Section 7 Part II of the TRIPS agreement elaborates on the protections of trade secrets.

A Trade Secret or undisclosed information is any information that has been intentionally treated as secret and is capable of commercial application with an economic interest. It protects information that confers a competitive advantage to those who possess such information, provided such information is not readily available with or discernible by the competitors. They include technical data, internal processes, methodologies, survey methods used by professional pollsters, recipes, a new invention for which a patent application has not yet been filed, list of customers, process of manufacture, techniques, formulae, drawings, training material, source code, etc. Trade Secrets can be used to protect valuable "know how" that gives an enterprise a competitive advantage over its competitors.

The Agreement provides that natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by or used by others without their consent in a manner contrary to honest commercial practices.

Further, parties are required to protect against unfair commercial uses, undisclosed or other data obtained as a condition of approving the marketing of pharmaceutical or of agricultural chemical products.

There is no specific legislation regulating the protection of trade secrets. India follows common law approach of protection based on contract laws.

Trade Secrets in the TRIPS Agreement:

- Undisclosed information is to be protected against unfair commercial practices, if the information is secret, has commercial value and is subject to steps to keep it secret.
- Secret data submitted for the approval of new chemical entities for pharmaceutical and agrochemical products should be protected against unfair commercial use and disclosure by Govts.

6.4.5 The General Agreement on Trade in Services (GATS):

6.4.5.1 Aims, objects and scope:

GATS came into force in January 1995 and is considered as one of the landmark achievements of the Uruguay Round. The creation of GATS was inspired by essentially the same objectives as its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT):

i. creating a credible and reliable system of international trade rules;
ii. ensuring fair and equitable treatment of all participants (principle of non-discrimination);
iii. stimulating economic activity through guaranteed policy bindings;
iv. promoting trade and development through progressive liberalization.

Services currently account for over 60 percent of global production and employment but they represent only 20 per cent of total trade. However this share cannot be underestimated. Many services, which have long been considered genuine domestic activities, have increasingly become internationally mobile. This trend is likely to continue, owing to the introduction of new transmission technologies (e.g. electronic banking, tele-health or tele-education services), the opening up in many countries of long-entrenched monopolies (e.g. voice telephony and postal services), and regulatory reforms in hitherto tightly regulated sectors such as transport. Combined with changing consumer preferences,

such technical and regulatory innovations have enhanced the "tradability" of services and, thus, created a need for multilateral disciplines.

6.4.5.2 Participating countries

All WTO Members, some 140 economies at present, are at the same time Members of the GATS and, to varying degrees, have assumed commitments in individual service sectors.

6.4.5.3 Basic obligations under the GATS

Obligations contained in the GATS may be categorized into two broad groups: General obligations, which apply directly and automatically to all Members and services sectors, as well as commitments concerning market access and national treatment in specifically designated sectors. Such commitments are laid down in individual country schedules whose scope may vary widely between Members. The relevant terms and concepts are similar, but not necessarily identical to those used in the GATT; for example, national treatment is a general obligation in goods trade and not negotiable as under the GATS.

(a) General obligations

MFN Treatment: Under Article II of the GATS, Members are held to extend immediately and unconditionally to services or services suppliers of all other Members "treatment no less favourable than that accorded to like services and services suppliers of any other country". This amounts to a prohibition,

in principle, of preferential arrangements among groups of Members in individual sectors or of reciprocity provisions which confine access benefits to trading partners granting similar treatment.

Derogations are possible in the form of so-called Article II-Exemptions. Members were allowed to seek such exemptions before the Agreement entered into force. New exemptions can only be granted to new Members at the time of accession or, in the case of current Members, by way of a waiver under Article IX:3 of the WTO Agreement. All exemptions are subject to review; they should in principle not last longer than 10 years. Further, the GATS allows groups of Members to enter into economic integration agreements or to mutually recognize regulatory standards, certificates and the like if certain conditions are met.

Transparency: GATS Members are required, *inter alia*, to publish all measures of general application and establish national enquiry points mandated to respond to other Member's information requests.

Other generally applicable obligations include the establishment of administrative review and appeals procedures and disciplines on the operation of monopolies and exclusive suppliers.

(b) Specific Commitments

Market Access: Market access is a negotiated commitment in specified sectors. It may be made subject to various types of

limitations that are enumerated in Article XVI(2). For example, limitations may be imposed on the number of services suppliers, service operations or employees in the sector; the value of transactions; the legal form of the service supplier; or the participation of foreign capital.

National Treatment: A commitment to national treatment implies that the Member concerned does not operate discriminatory measures benefiting domestic services or service suppliers. The key requirement is not to modify, in law or in fact, the conditions of competition in favour of the Member's own service industry. Again, the extension of national treatment in any particular sector may be made subject to conditions and qualifications.

Members are free to tailor the sector coverage and substantive content of such commitments as they see fit. The commitments thus tend to reflect national policy objectives and constraints, overall and in individual sectors. While some Members have scheduled less than a handful of services, others have assumed market access and national treatment disciplines in over 120 out of a total of 160-odd services.

The existence of specific commitments triggers further obligations concerning, *inter alia*, the notification of new measures that have a significant impact on trade and the avoidance of restrictions on international payments and transfers.

6.4.5.5 Services "schedules"

Each WTO Member is required to have a Schedule of Specific Commitments which identifies the services for which the Member guarantees market access and national treatment and any limitations that may be attached. The Schedule may also be used to assume additional commitments regarding, for example, the implementation of specified standards or regulatory principles. Commitments are undertaken with respect to each of the four different modes of service supply.

Most schedules consist of both sectoral and horizontal sections. The "Horizontal Section" contains entries that apply across all sectors subsequently listed in the schedule. Horizontal limitations often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. The "Sector-Specific Sections" contain entries that apply only to the particular service.

6.4.5.5 Date of commitments:

The majority of current commitments entered into force on 1 January 1995, i.e. the date of entry into force of the WTO. New commitments have since been scheduled by participants in extended negotiations (see below) and by new Members that have joined the WTO.

Any Member is free to expand or upgrade its existing commitments at any time.

Pursuant to Article XXI, specific commitments may be modified subject to certain procedures. Countries which may be affected by such modifications can request the modifying Member to negotiate compensatory adjustments; these are to be granted on an MFN basis.

6.4.5.6 Services covered

The GATS applies in principle to all service sectors, with two exceptions.

Article I(3) of the GATS excludes "services supplied in the exercise of governmental authority". These are services that are supplied neither on a commercial basis nor in competition with other suppliers. Cases in point are social security schemes and any other public service, such as health or education, that is provided at non-market conditions.

Further, the Annex on Air Transport Services exempts from coverage measures affecting air traffic rights and services directly related to the exercise of such rights.

The GATS distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons.

Cross-border supply is defined to cover services flows from the territory of one Member into the territory of another Member (e.g. banking or architectural services transmitted via telecommunications or mail);

Consumption abroad refers to situations where a service consumer (e.g. tourist or patient) moves into another Member's territory to obtain a service;

Commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains); and

Presence of natural persons consists of persons of one Member entering the territory of another Member to supply a service (e.g. accountants, doctors or teachers). The Annex on Movement of Natural Persons specifies, however, that Members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.

The supply of many services is possible only through the simultaneous physical presence of both producer and consumer. There are thus many instances in which, in order to be commercially meaningful, trade commitments must extend to cross-border movements of the consumer, the establishment of a commercial presence within a market, or the temporary movement of the service provider himself.

The GATS expressly recognizes the right of Members to regulate the supply of services in pursuit of their own policy objectives, and does not seek to influence these objectives. Rather, the Agreement establishes a framework of rules to ensure that services regulations are administered in a

reasonable, objective and impartial manner and do not constitute unnecessary barriers to trade.

6.4.5.7 Specific exemptions in the GATS to cater for important national policy interests

The GATS permits Members in specified circumstances to introduce or maintain measures in contravention of their obligations under the Agreement, including the MFN requirement or specific commitments. The relevant Article provides cover, *inter alia*, for measures necessary to:

i. protect public morals or maintain public order;
ii. protect human, animal or plant life or health; or
iii. secure compliance with laws or regulations not inconsistent with the -Agreement including, among others, measures necessary to prevent deceptive or fraudulent practices.

Moreover, the Annex on Financial Services entitles Members, regardless of other provisions of the GATS, to take measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.

Finally, in the event of serious balance-of-payments difficulties Members are allowed to temporarily restrict trade, on a non-discriminatory basis, despite the existence of specific commitments.

6.4.5.8 Special provisions for developing countries

Developing country interests have inspired both the general structure of the Agreement as well as individual Articles. In particular, the objective of facilitating the increasing participation of developing countries in services trade has been enshrined in the Preamble to the Agreement and underlies the provisions of Article IV. This Article requires Members, *inter alia,* to negotiate specific commitments relating to the strengthening of developing countries' domestic services capacity; the improvement of developing countries' access to distribution channels and information networks; and the liberalization of market access in areas of export interest to these countries.

While the notion of progressive liberalization is one of the basic tenets of the GATS, Article XIX provides that liberalization takes place with due respect for national policy objectives and Members' development levels, both overall and in individual sectors. Developing countries are thus given flexibility for opening fewer sectors, liberalizing fewer types of transactions, and progressively extending market access in line with their development situation. Other provisions ensure that developing countries have more flexibility in pursuing economic integration policies, maintaining restrictions on balance of payments grounds, and determining access to and use of their telecommunications transport networks and services. In addition, developing countries are entitled to receive technical assistance from the WTO Secretariat.

6.4.5.9 "Built-in agenda" of the GATS

The GATS, including its Annexes and Related Instruments, sets out a work programme which is normally referred to as the "built-in" agenda. The programme reflects both the fact that not all services-related negotiations could be concluded within the time frame of the Uruguay Round, and that Members have already committed themselves, in Article XIX, to successive rounds aimed at achieving a progressively higher level of liberalization (see below). In addition, various GATS Articles provide for issue-specific negotiations intended to define rules and disciplines for domestic regulation (Article VI), emergency safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV). These negotiations are currently under way.

At the sectoral level, negotiations on basic telecommunications were successfully concluded in February 1997 and negotiations in the area of financial services in mid-December 1997. In these negotiations, Members achieved significantly improved commitments with a broader level of participation.

The results of sectoral negotiations are new specific commitments and/or MFN exemptions related to the sector concerned. Thus, they are neither legally independent from other sector-specific commitments nor constitute agreements different from the GATS. The new commitments and MFN exemptions have been incorporated into the existing Schedules and Exemption Lists by way of separate Protocols to the GATS.

6.4.6 World Intellectual Property Organisation (WIPO)

Intellectual property (IP), once seen as a technical matter for legal experts, has today become a central concern for governments, for businesses, for civil society, for scientists and for individual creators. In a world where the economic growth of nations is driven increasingly by the creativity and knowledge of their people, effective IP systems – which create incentives for innovation and structures for sharing the results – are key to unlocking this human potential.

6.4.6.1 Introduction

As awareness of the importance of the IP system has increased, so too has debate as to how it should be applied and regulated. Challenges facing policy makers today include establishing the right levels of protection in international agreements, so as to ensure that IP serves to bridge rather than widen the divide between developed and developing countries. Of equal importance is striking an optimum balance between the rights of IP-owners and the public interest in accessing new technology and creations.
The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations, located in Geneva, Switzerland. It is dedicated to developing a balanced and accessible international IP system, which rewards creativity, stimulates innovation and contributes to the

economic, social and cultural development of all countries, while safeguarding the public interest.

6.4.6.2 Core Tasks

WIPO carries out a wide variety of tasks related to the protection of IP rights. These include assisting governments and organizations to develop the policies, structures and skills needed to harness the potential of IP for economic development; working with Member States to develop international IP law; administering treaties; running global registration systems for trademarks, industrial designs and appellations of origin and a filing system for patents; delivering dispute resolution services; and providing a forum for informed debate and for the exchange of expertise. Rapid technological change, combined with intensified international debate about IP, has greatly increased the scope, significance and scrutiny of WIPO's work. In rising to meet the new challenges, WIPO aims for transparency and inclusiveness, encouraging all stakeholders to participate in the international dialogue.

6.4.6.3 Working of WIPO

WIPO was established in 1970, following the entry into force of the 1967 *WIPO Convention*, with a mandate from its Member States to promote the protection of IP throughout the world, through cooperation among states and in

collaboration with other international organizations. WIPO's Member States determine the strategic direction and approve the activities of the Organization.
Delegates from the Member States meet in the Assemblies, committees and working groups. The main decision-making bodies of the Member States are: The WIPO General Assembly; the WIPO Conference; the WIPO Coordination Committee; and the Assemblies of the Member States of each of the Unions. Over 250 non-governmental organizations and intergovernmental organizations are accredited as observers at WIPO meetings.

WIPO's mission to promote the effective use and protection of IP worldwide is translated into strategic goals, and into the programs and activities through which WIPO works to achieve these goals.

Intellectual property refers to the creations of the mind and is divided into two categories:

1. **Industrial property:** includes patents for inventions, trademarks, industrial designs and geographical indications.
2. **Copyright and related rights:** cover literary and artistic expressions (e.g. books, films, music, architecture, art), plus the rights of performing artists in their performances, producers of phonograms in their recordings, and broadcasters in their radio and television broadcasts.

Intellectual property rights allow the creator – or the owner of a patent, trademark, or copyright – to benefit from his or her own work or investment in a creation.

The WIPO secretariat is based in Geneva. The staff of the secretariat, drawn from more than 90 countries, includes experts in all fields of IP law and practice, as well as specialists in, for example, public policy, economics, administration, and information technology. The respective divisions of the secretariat are responsible for coordinating the meetings of Member States and implementing their decisions; for administering the international registration systems; for developing and executing the programs designed to achieve WIPO's goals; and for providing a repository of IP expertise to assist its members. Promoting a balanced IP system and realizing its development potential; Strengthening IP infrastructure, institutions and human resources; Progressive development of international IP law; Delivery of quality services in global IP protection systems; Greater efficiency of management and support processes.

6.4.6.4 The Estblishment Of WIPO

The need for a system to protect IP internationally became evident when foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna in 1873 because they were afraid that their ideas would be stolen and exploited commercially in other countries.

The 1883 Paris Convention for the Protection of Industrial Property was the first major international treaty designed to help the people of one country obtain protection in other countries for their intellectual creations, in the form of industrial property rights. The *Paris Convention* entered into force in 1884 with 14 Member States. In 1886, copyright entered the international arena with the Berne Convention for the Protection of Literary and Artistic Works. The aim of this Convention was to help nationals of its Member States obtain international protection of their right to control, and receive payment for, the use of literary and artistic works.

Both the Paris Convention and the Berne Convention set up International Bureaus to carry out administrative tasks, such as organizing meetings of the Member States. In 1893, these two small bureaus united to form an international organization called the United International Bureaus for the Protection of Intellectual Property – best known by its French acronym, BIRPI. Based in Berne, Switzerland, with a staff of seven, BIRPI was the predecessor of the WIPO of today. In 1960, BIRPI moved to Geneva to be closer to the United Nations (UN) and other international organizations. In 1970, following the entry into force of the Convention Establishing the World Intellectual Property Organization, BIRPI became WIPO, undergoing structural and administrative reforms and acquiring a secretariat answerable to the Member States. In 1974, WIPO became a

specialized agency of the UN, with a mandate to administer IP matters recognized by the UN Member States.

The World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which came into force in 1995, brought with it a new era in the multilateral protection and enforcement of IP rights. Provisions in the TRIPS Agreement concerning copyright and related rights, patents, trademarks, geographical indications, industrial designs, and layout designs of integrated circuits, directly complement the international treaties administered by the WIPO secretariat.

An Agreement between WIPO and the WTO since 1996 provides for cooperation concerning the implementation of the TRIPS Agreement, such as notification of laws and regulations, and legislative assistance to member countries. Assistance continues to be provided to many developing countries, with a special focus on those least developed countries (LDCs) which need to meet their TRIPS obligations by 2013.

6.4.6.5 WIPO Promotes:

6.4.6.5.1 Understanding of IP and Realizing its Development Potential

While IP is no longer the obscure subject it was once considered, practical understanding of its use, impact and relevance remains uneven. Countries or enterprises that

are not yet capitalizing on their intellectual potential are trailing behind, while those that do are soaring ahead in the global market-place. Moreover, for policy makers as well as for the public, separating facts from polemics – which too often color the presentation of IP – is not always easy.

6.4.6.5.2 Public Outreach And Communication

The more widely IP is understood by different sectors of society, the more effectively it can be used to contribute to economic and cultural prosperity. For this reason, public outreach activities, which aim to increase awareness of how IP works, have become a priority for many Member States. Outreach, communication, and the sharing of knowledge are an essential element of every area of WIPO's work. WIPO produces a wide variety of information materials to cater to the general public, while also tailoring many outreach activities to the needs of specific target audiences, such as small businesses, artists, research institutions and young people. To reach this diverse public, WIPO uses diverse means, from the web, film and television, to publicity events, seminars and written publications. Cooperative projects with Member States and stakeholder organizations are key to extending this reach and ensuring that messages and materials are adapted to suit audiences in different cultures across the world. Heightened public interest in topical issues – such as copyright in the digital environment, efforts to reform the international patent system, and the impact of IP on development – has led to

broader press coverage of WIPO's role. By working with the international news media, WIPO helps to disseminate factual information on new developments and to encourage accurate, objective coverage of IP issues.

6.4.6.5.3 The Strategic Use Of IP For Development

1. **Economic analysis.** Policy makers need empirical evidence of how different IP strategies can affect innovation and GDP growth. WIPO is helping to address the lack of reliable economic research on IP by developing methodologies and commissioning economic studies to assist policy makers in their decision-making.
2. **Creative industries.** The music, film, publishing and other cultural industries, which are largely built on copyright protection, are major drivers in the knowledge economy.

6.4.6.5.4 Life Sciences

WIPO undertakes studies and produces factual information materials to assist policy makers in monitoring developments and assessing policy options. WIPO also seeks to facilitate inclusive and informed debate on the strengths and weaknesses of the IP system in meeting public health challenges.

6.4.6.5.5 Copyright In The Digital Environment

Together with public and private sector partners, WIPO is involved in various activities aimed at increasing understanding of the impact of emerging technologies on the creation of, access to, and use of copyright content. These explore legal and policy questions relating to, for example: new licensing models; technological protection measures and rights management information (RMI); copyright and the public domain; and exceptions/limitations to copyright in the digital environment. WIPO programs also seek to raise awareness in developing countries of the opportunities provided by the copyright system in order to bridge the "digital divide" with more technologically-advanced countries.

6.4.6.5.6 Technological Innovation to Improve Life

In South Africa, the Council for Scientific and Industrial Research (CSIR) aims to foster research and technological innovation, through the private and public sector, in order to improve the quality of life for those in need.

6.4.6.6 Developing IP Law

Three WIPO Standing Committees deal with specific legal matters – one with patents, one with copyright and the third with trademarks, industrial designs and geographical

indications. Another intergovernmental committee deals with issues relating to genetic resources, traditional knowledge and folklore. The Committees are made up of delegates from the governments of member countries, with representatives from intergovernmental and nongovernmental organizations participating as accredited observers. WIPO administers a group of treaties which set out internationally agreed rights and obligations, and common standards for protecting IP rights. States which ratify the treaties undertake to recognize these rights and to apply the standards within their own territories. WIPO actively encourages States to accede to these treaties and to enforce their provisions. Widespread accession and consistent enforcement help maintain a stable international environment, inspire confidence that IP rights will be respected around the world, encourage investment, and contribute to economic development and social well-being.

A fundamental and enduring part of WIPO's activities is the progressive development of international norms and standards. The process of developing international IP law, standards and practices is driven by the Member States and involves extensive consultations with the wide spectrum of stakeholders in the IP system. The WIPO secretariat coordinates this work with Member States in the Standing Committees.

The most important recent achievement of the Standing Committee on the Law of Patents (SCP), created in 1998,

was the successful negotiation of the Patent Law Treaty (PLT) and its Regulations on the harmonization of patent formalities and procedures. The PLT was adopted in June 2000 and entered into force on April 28, 2005.

Meanwhile, discussions on a draft Substantive Patent Law Treaty (SPLT) started in May 2001 and focused on issues of direct relevance to the grant of patents, in particular: the definition of prior art, novelty, inventive step/non-obviousness, industrial applicability/utility, the drafting and interpretation of claims and the requirement of sufficient disclosure of an invention. The SCP agreed that other issues related to substantive patent law harmonization, such as first-to-file versus first-to-invent systems, 18-month publication of applications and a post-grant opposition system, would be considered at a later stage.

During the subsequent SCP meetings, proposals from a number of delegations led to the progressive broadening of the contents of the draft. While delegates agreed in principle on a number of issues, agreement on other topics proved more difficult. In 2006, Member States agreed that the time was not ripe to agree on a workplan for the SCP, and so put the SPLT discussions on hold. Delegations were divided broadly into those pressing to fast-track a limited number of technical issues, and those advocating a broader approach including a larger number of issues. Directed by its Member States, WIPO is now exploring potential areas of common interest.

6.4.6.7 The Standing Committee On Trademarks, Industrial Designs And Geographical Indications (SCT)

Years of negotiation in the SCT concluded with the adoption on March 27, 2006, of a Revised Trademark Law Treaty, known as the Singapore Treaty on the Law of Trademarks in recognition of the country that hosted the final negotiations. The new Treaty provides simplified and internationally harmonized administrative rules for trademark registration. Among its provisions, the Treaty explicitly recognizes that trademarks are no longer limited to two-dimensional labels on a product. It expressly mentions new types of marks, such as hologram marks, motion marks, color marks and marks consisting of non-visible signs, and creates a framework for defining the reproduction of non-visible marks, such as sound and smell marks. The Singapore Treaty takes into account the advantages of electronic filing and communication facilities, while recognizing the different needs of developing and developed nations. Concerns expressed during negotiations by some developing and least developed states about their ability to fully benefit from the Treaty resulted in a commitment by industrialized countries to provide technical assistance and other support to strengthen the institutional capacity of those countries so as to enable them to take full advantage of the Treaty. Promotional activities throughout the 2008/09 biennium will focus on widespread implementation of the Singapore Treaty.

The SCT has defined areas for further development of the international law of trademarks, industrial designs and geographical indications. In its current sessions, amongst others topics, the SCT is taking an in depth look at Member State's legislation and trademark office practice in relation to the registration of three dimensional marks, color marks and sound marks and other types of marks, such as motion marks, position marks, hologram marks, slogans, smell, feel and taste marks. This is expected to result in a set of practices for Member States relating to the representation of those types of marks in trademark office procedures.

6.4.6.8 Industrial Designs

WIPO's work on industrial design focuses on creating and maintaining an international legal framework conducive to protecting the rights of designers and rights holders. This is a complex area, with different options for protecting designs ranging from *sui generis* design laws, unregistered designs, and design patents, through to copyright and trademarks. Hardly any other subject matter within the realm of IP is as difficult to categorize as industrial design. And this has significant implications for the means and terms of its protection. If the design of a given object can be categorized as a work of applied art, for example, then it may be eligible for protection under copyright law, with a much longer term of protection than the standard 10 or 15 years under registered design law.

6.4.6.9 Geographical Indications

Geographical indications (GIs) protect products with distinctive characteristics due to their place of origin – such as these peaches from Pinggu district in China. While the value of GIs as a marketing tool is not in dispute, international opinion is divided as to the best way to protect them. WIPO's regional and international symposia help promote mutual understanding among stakeholders of the differing perspectives in the debate.

6.4.6.10 The Standing Committee On Copyright And Related Rights (SCCR)

Copyright and related rights are legal instruments which protect the rights of creators in their works and thereby contribute to the cultural and economic development of nations. Copyright law fulfills a decisive role in safeguarding the contributions and rights of the different stakeholders in the cultural industries, and the relation between them and the public. WIPO works with Member States in the Standing Committee on Copyright and Related Rights (SCCR) to develop international norms and standards in the area of copyright. Recent discussions in the SCCR have focused on proposals to update the international protection of broadcasting organizations. Among other issues under consideration are a study on

automated rights management systems, and limitations and exceptions to copyright in relation to visually impaired users.

6.4.6.11 Protecting Broadcasting Organizations

Discussions in the SCCR to update the international protection of broadcasting organizations have been ongoing since 1998. In June 2007, the SCCR concluded that further discussions were necessary on various aspects of a proposed treaty on the protection of broadcasting organizations before it would be possible to move to final negotiations in a diplomatic conference. Member States agreed that a diplomatic conference should be convened only after agreement on the objectives, specific scope and object of protection has been achieved.

WIPO also promotes the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT), known together as the WIPO Internet Treaties. These are becoming general international standards for protection of copyright and related rights. With the expected accession to these treaties of the European Community and its member states, the number of states party to each treaty will increase to more than 80.

However, additional efforts will be required to support the effective implementation and use of the treaties. The SCCR will need to work on the implementation aspects of the WCT

and the WPPT, particularly regarding the provisions on technological measures of protection. The SCCR has also initiated discussions regarding limitations and exceptions for the benefit of libraries and archives and the education sector.

6.4.6.12 The Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore (IGC)

IP policy issues and legal measures in the area of traditional knowledge (TK), traditional cultural heritage, and genetic resources touch upon a broad spectrum of issues. These include fundamental human rights, as well as the rights of indigenous peoples, cultural diversity, environmental protection and biodiversity. For WIPO, this has led to a special focus on the principles that determine what constitutes, on the one hand, the misuse, misappropriation and illicit exploitation or reproduction of such intangible materials; and on the other hand, the legitimate boundaries of the public domain.

It is essential, however, to reconcile global issues and a comprehensive international debate with the perspectives and needs expressed by local and indigenous communities. This means that community-based capacity-building efforts and the policy agenda must be carefully coordinated. A key challenge, therefore, is to fashion from such general principles the practical tools which enable indigenous and

local communities to protect their TK, traditional cultural expressions (TCEs) and genetic resources in such a way that is consistent with the interests, needs and value systems which they identify for themselves. In the IGC, WIPO's Member States are currently consolidating ongoing work on two sets of draft provisions which outline policy objectives and core principles relating to the protection of TK and TCEs against misappropriation. And they have turned to a systematic review of the core policy issues posed by efforts to strengthen such protection at the international level. The close involvement of indigenous and local communities has been essential to this process.

6.4.6.13 Arbitration And Mediation

The WIPO Arbitration and Mediation Center offers Alternative Dispute Resolution options, in particular arbitration, mediation and expert determination, for the resolution of international commercial disputes between private parties. The Center's procedures are designed as efficient and inexpensive alternatives to court proceedings between parties from various jurisdictions with different IP legislation. The Center maintains an extensive list of specialized mediators, arbitrators and experts from over 100 countries who conduct dispute resolution procedures according to the WIPO rules. These procedures may take place in any country, in any language, and under any law, allowing a great deal of flexibility for the parties. Parties may elect to use the WIPO Electronic Case Facility (WIPO

ECAF) to manage disputes filed under the WIPO Rules. With the WIPO ECAF, parties, neutrals and the Center may securely file, store, search and retrieve case-related submissions in an electronic case file from anywhere in the world and at any time.

When a submission is made, all parties receive an e-mail alert and may view the case file. The Center is also the leading dispute resolution service for challenges filed by trademark owners in relation to abusive registration and use of Internet domain names, commonly known as cyber-squatting. This entire procedure is conducted online and results in enforceable decisions within two months.

6.4.7 Agreement on Trade Related Investment Measures (TRIMS)

The Agreement on Trade Related Investment Measures (TRIMs) are rules that apply to the domestic regulations a country applies to foreign investors, often as part of an industrial policy. The agreement was agreed upon by all members of the World Trade Organization. Policies such as local content requirements and trade balancing rules that have traditionally been used to both promote the interests of domestic industries and combat restrictive business practices are now banned. Trade Related Investment Measures is the name of one of the four principal legal agreements of the WTO trade treaty. TRIMs are rules, which restrict preference of domestic firms and thereby enable international firms to operate more easily within foreign markets.

In the late 1980s, there was a significant increase in foreign direct investment throughout the world. However, some of the countries receiving foreign investment imposed numerous restrictions on that investment designed to protect and foster domestic industries, and to prevent the outflow of foreign exchange reserves. Examples of these restrictions include local content requirements (which require that locally-produced goods be purchased or used), manufacturing requirements (which require the domestic manufacturing of certain components), trade balancing requirements, domestic sales requirements, technology transfer requirements, export

performance requirements (which require the export of a specified percentage of production volume), local equity restrictions, foreign exchange restrictions, remittance restrictions, licensing requirements, and employment restrictions. These measures can also be used in connection with fiscal incentives as opposed to requirement. Some of these investment measures distort trade in violation of GATT Article III and XI, and are therefore prohibited. Until the completion of the Uruguay Round negotiations, which produced a well-rounded Agreement on Trade-Related Investment Measures (hereinafter the "TRIMs Agreement"), the few international agreements providing disciplines for measures restricting foreign investment provided only limited guidance in terms of content and country coverage. The OECD (Organization for economic cooperation and development) Code on Liberalization of Capital Movements, for example, requires members to liberalize restrictions on direct investment in a broad range of areas. The OECD Code's efficacy, however, is limited by the numerous reservations made by each of the members. In addition, there are other international treaties, bilateral and multilateral, under which signatories extend most-favoured-nation treatment to direct investment. Only a few such treaties, however, provide national treatment for direct investment. Moreover, although the APEC (Asia Pacific Economic Cooperation) Investment Principles adopted in November 1994 provide rules for investment as a whole, including non-discrimination and national treatment, they have no binding force.

Legal Framework

GATT 1947 prohibited investment measures that violated the principles of national treatment and the general elimination of quantitative restrictions, but the extent of the prohibitions was never clear. The TRIMs Agreement, however, contains statements prohibiting any TRIMs that are inconsistent with the provisions of Articles III or XI of GATT 1994. In addition, it provides an illustrative list that explicitly prohibits local content requirements, trade balancing requirements, foreign exchange restrictions and export restrictions (domestic sales requirements) that would violate Article III:4 or XI:1 of GATT 1994. TRIMs prohibited by the Agreement include those which are mandatory or enforceable under domestic law or administrative rulings, or those with which compliance is necessary to obtain an advantage (such as subsidies or tax breaks). Indeed, the TRIMs Agreement is not intended to impose new obligations, but to clarify the pre-existing GATT 1947 obligations. Under the WTO TRIMs Agreement, countries are required to rectify any measures inconsistent with the Agreement, within a set period of time, with a few exceptions.

6.4.8 UNCITRAL Model Law on International Commercial Arbitration1985 as amended and adopted in 2006

The UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the end of the eighteenth session of the Commission. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice". The Model Law was amended by UNCITRAL on 7 July 2006, at the thirty-ninth session of the Commission. The General Assembly, in its resolution 61/33 of 4 December 2006, recommended "that all States give favourable consideration to the enactment of the revised articles of the UNCITRAL Model Law on International Commercial Arbitration, or the revised UNCITRAL Model Law on International Commercial Arbitration, when they enact or revise their laws (...)".

The Model Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is

acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law.

The form of a model law was chosen as the vehicle for harmonization and modernization in view of the flexibility it gives to States in preparing new arbitration laws. Notwithstanding that flexibility, and in order to increase the likelihood of achieving a satisfactory degree of harmonization, States are encouraged to make as few changes as possible when incorporating the Model Law into their legal systems. Efforts to minimize variation from the text adopted by UNCITRAL are also expected to increase the visibility of harmonization, thus enhancing the confidence of foreign parties, as the primary users of international arbitration, in the reliability of arbitration law in the enacting State.

The revision of the Model Law adopted in 2006 includes article 2 A, which is designed to facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Law. Other substantive amendments to the Model Law relate to the form of the arbitration agreement and to interim measures. The original 1985 version of the provision on the form of the arbitration agreement (article 7) was modeled on the language used in article II (2) of the Convention on the Recognition and

Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention"). The revision of article 7 is intended to address evolving practice in international trade and technological developments. The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures. The new provisions are contained in a new chapter of the Model Law on interim measures and preliminary orders (chapter IV A).

6.4.8.1 Background to the Model Law

The Model Law was developed to address considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often particularly inappropriate for international cases.

6.4.8.1.1. Inadequacy of domestic laws

Recurrent inadequacies to be found in outdated national laws include provisions that equate the arbitral process with court litigation and fragmentary provisions that fail to address all relevant substantive law issues. Even most of those laws that appear to be up-to-date and comprehensive were drafted with

domestic arbitration primarily, if not exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

The expectations of the parties as expressed in a chosen set of arbitration rules or a "one-off" arbitration agreement may be frustrated, especially by mandatory provisions of applicable law.

Unexpected and undesired restrictions found in national laws may prevent the parties, for example, from submitting future disputes to arbitration, from selecting the arbitrator freely, or from having the arbitral proceedings conducted according to agreed rules of procedure and with no more court involvement than appropriate. Frustration may also ensue from non-mandatory provisions that may impose undesired requirements on unwary parties who may not think about the need to provide otherwise when drafting the arbitration agreement. Even the absence of any legislative provision may cause difficulties simply by leaving unanswered some of the many procedural issues relevant in arbitration and not always settled in the arbitration agreement. The Model Law is intended to reduce the risk of such possible frustration, difficulties or surprise.

6.4.8.1.2. Disparity between national laws

Problems stemming from inadequate arbitration laws or from the absence of specific legislation governing arbitration are aggravated by the fact that national laws differ widely. Such differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. Obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances often expensive, impractical or impossible.

Uncertainty about the local law with the inherent risk of frustration may adversely affect the functioning of the arbitral process and also impact on the selection of the place of arbitration. Due to such uncertainty, a party may hesitate or refuse to agree to a place, which for practical reasons would otherwise be appropriate.

The range of places of arbitration acceptable to parties is thus widened and the smooth functioning of the arbitral proceedings is enhanced where States adopt the Model Law, which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard based on solutions acceptable to parties from different legal systems.

6.4.8.2. Salient features of the Model Law

6.4.8.2.1. Special procedural regime for international commercial arbitration

The principles and solutions adopted in the Model Law aim at reducing or eliminating the above-mentioned concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime tailored to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration.

States may thus consider extending their enactment of the Model Law to cover also domestic disputes, as a number of enacting States already have.

(a) Substantive and territorial scope of application

Article 1 defines the scope of application of the Model Law by reference to the notion of "international commercial arbitration". The Model Law defines arbitration as international if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States" (article 1 (3)). The vast majority of situations commonly regarded as international will meet this criterion. In addition, article 1 (3) broadens the notion of

internationality so that the Model Law also covers cases where the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. Article 1 thus recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Law.

In respect of the term "commercial", the Model Law provides no strict definition. The footnote to article 1 (1) calls for "a wide interpretation" and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, "whether contractual or not". The purpose of the footnote is to circumvent any technical difficulty that may arise, for example, in determining which transactions should be governed by a specific body of "commercial law" that may exist in some legal systems.

Another aspect of applicability is the territorial scope of application. The principle embodied in article 1(2) is that the Model Law, as enacted in a given State applies only if the place of arbitration is in the territory of that State. However, article 1(2) also contains important exceptions to that principle, to the effect that certain articles apply, irrespective of whether the place of arbitration is in the enacting State or elsewhere (or, as the case may be, even before the place of arbitration is determined). These articles are the following: articles 8(1) and

9, which deal with the recognition of arbitration agreements, including their compatibility with interim measures ordered by a court, article 17J on court-ordered interim measures, articles 17H and 17I on the recognition and enforcement of interim measures ordered by an arbitral tribunal, and articles 35 and 36 on the recognition and enforcement of arbitral awards.

The territorial criterion governing most of the provisions of the Model Law has been adopted for the sake of certainty and in view of the following facts. In most legal systems, the place of arbitration is the exclusive criterion for determining the applicability of national law and, where the national law allows parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties rarely make use of that possibility. Incidentally, enactment of the Model Law reduces any need for the parties to choose a "foreign" law, since the Model Law grants the parties wide freedom in shaping the rules of the arbitral proceedings. In addition to designating the law governing the arbitral procedure, the territorial criterion is of considerable practical importance in respect of articles 11, 13, 14, 16, 27 and 34, which entrust State courts at the place of arbitration with functions of supervision and assistance to arbitration. It should be noted that the territorial criterion legally triggered by the parties' choice regarding the place of arbitration does not limit the arbitral tribunal's ability to meet at any place it considers appropriate for the conduct of the proceedings, as provided by article 20(2).

(b) Delimitation of court assistance and supervision

Recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.

In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises issues of appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to articles 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce). A second group comprises issues of court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9), court-ordered interim measures (article 17 J), and recognition and enforcement of interim measures (articles 17 H and 17 I) and of arbitral awards (articles 35 and 36).

Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". Article 5 thus

guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it (for example, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties).

6.4.8.2.2. Arbitration agreement

Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts.

(a) Definition and form of arbitration agreement

The original 1985 version of the provision on the definition and form of arbitration agreement (article 7) closely followed article II (2) of the New York *28 UNCITRAL Model Law on International Commercial Arbitration* Convention, which requires that an arbitration agreement be in writing. If the parties have agreed to arbitrate, but they entered into the arbitration agreement in a manner that does not meet the form requirement, any party may have grounds to object to the jurisdiction of the arbitral tribunal. It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that

reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement.

The first approach follows the detailed structure of the original 1985 text. It confirms the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("*compromise*") or a future dispute ("*clause compromissoire*"). It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the "contents" of the agreement "in any form" as equivalent to traditional "writing". The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. It covers the situation of "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another". It also states that "the reference in a contract to any document" (for example, general conditions) "containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract". It thus clarifies that

applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made "by reference". The second approach defines the arbitration agreement in a manner that omits any form requirement. No preference was expressed by the Commission in favour of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting State. Both options are intended to preserve the enforceability of arbitration agreements under the New York Convention.

In that respect, the Commission also adopted, at its thirty-ninth session in 2006, a "Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958". The General Assembly, in its resolution 61/33 of 4 December 2006 noted that "in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Reproduced in Part Three hereafter.

Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, is particularly timely". The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York

Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II (2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive". In addition, the Recommendation encourages States to adopt the revised article 7 of the Model Law. Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the "more favourable law provision" contained in article VII (1) of the New York Convention, the Recommendation clarifies that "any interested party" should be allowed "to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".

(b) Arbitration agreement and the courts

Articles 8 and 9 deal with two important aspects of the complex relationship between the arbitration agreement and the resort to courts. Modeled on article II (3) of the New York Convention, article 8 (1) of the Model Law places any court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request, which a party may make not later than when submitting its first statement on the substance of

the dispute. This provision, where adopted by a State enacting the Model Law, is by its nature binding only on the courts of that State. However, since article 8 is not limited in scope to agreements providing for arbitration to take place in the enacting State, it promotes the universal recognition and effect of international commercial arbitration agreements.

Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (for example, pre-award attachments) are compatible with an arbitration agreement. That provision is ultimately addressed to the courts of any State, insofar as it establishes the compatibility between interim measures possibly issued by any court and an arbitration agreement, irrespective of the place of arbitration. Wherever a request for interim measures may be made to a court, it may not be relied upon, under the Model Law, as a waiver or an objection against the existence or effect of the arbitration agreement.

6.4.8.2.3. Composition of arbitral tribunal

Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the general approach taken by the Model Law in eliminating difficulties that arise from inappropriate or fragmentary laws or rules. First, the approach recognizes the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to

be followed, subject to the fundamental requirements of fairness and justice. Secondly, where the parties have not exercised their freedom to lay down the rules of procedure or they have failed to cover a particular issue, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively until the dispute is resolved.

Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, articles 11, 13 and 14 provide for assistance by courts or other competent authorities designated by the enacting State. In view of the urgency of matters relating to the composition of the arbitral tribunal or its ability to function, and in order to reduce the risk and effect of any dilatory tactics, short time-periods are set and decisions rendered by courts or other authorities on such matters are not appealable.

6.4.8.2.4. Jurisdiction of arbitral tribunal

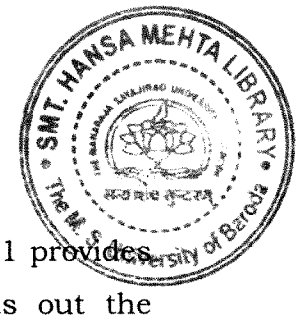
(a) Competence to rule on own jurisdiction

Article 16 (1) adopts the two important (not yet generally recognized) principles of "*Kompetenz-Kompetenz*" and of separability or autonomy of the arbitration clause. "*Kompetenz-Kompetenz*" means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the

existence or validity of the arbitration agreement, without having to resort to a court. Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time. The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16 (3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

(b) Power to order interim measures and preliminary orders

Chapter IV A on interim measures and preliminary orders was adopted by the Commission in 2006. It replaces article 17 of



the original 1985 version of the Model Law. Section 1 provides a generic definition of interim measures and sets out the conditions for granting such measures. An important innovation of the revision lies in the establishment (in section 4) of a regime for the recognition and enforcement of interim measures, which was modeled, as appropriate, on the regime for the recognition and enforcement of arbitral awards under articles 35 and 36 of the Model Law.

Section 2 of chapter IV A deals with the application for, and conditions for the granting of, preliminary orders. Preliminary orders provide a means for preserving the status quo until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order. Article 17 B (1) provides that "a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested". Article 17 B (2) permits an arbitral tribunal to grant a preliminary order if "it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure". Article 17 C contains carefully drafted safeguards for the party against whom the preliminary order is directed, such as prompt notification of the application for the preliminary order and of the preliminary order itself (if any), and an opportunity for that party to present its case "at the earliest practicable time". In any event, a preliminary order has a maximum duration of twenty days and, while binding on the parties, is not subject to court

enforcement and does not constitute an award. The term "preliminary order" is used to emphasize its limited nature.

Section 3 sets out rules applicable to both preliminary orders and interim measures.

Section 5 includes article 17 J on interim measures ordered by courts in support of arbitration, and provides that "a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in courts". That article has been added in 2006 to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures.

6.4.8.2.5. Conduct of arbitral proceedings

Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. Article 18, which sets out fundamental requirements of procedural justice, and article 19 on the rights and powers to determine the rules of procedure, express principles that are central to the Model Law.

(a) Fundamental procedural rights of a party

Article 18 embodies the principles that the parties shall be treated with equality and given a full opportunity of presenting

their case. A number of provisions illustrate those principles. For example, article 24 (1) provides that, unless the parties have agreed that no oral hearings be held for the presentation of evidence or for oral argument, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24 (1) deals only with the general entitlement of a party to oral hearings (as an alternative to proceedings conducted on the basis of documents and other materials) and not with the procedural aspects, such as the length, number or timing of hearings.

Another illustration of those principles relates to evidence by an expert appointed by the arbitral tribunal. Article 26 (2) requires the expert, after delivering his or her written or oral report, to participate in a hearing where the parties may put questions to the expert and present expert witnesses to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24 (3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24 (2)).

(b) Determination of rules of procedure

Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts, thus obviating the earlier mentioned risk of frustration or surprise. The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without being hindered by any restraint that may stem from traditional local law, including any domestic rule on evidence. Moreover, it provides grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the Model Law. In addition to the general provisions of article 19, other provisions in the Model Law recognize party autonomy and, failing agreement, empower the arbitral tribunal to decide on certain matters. Examples of particular practical importance in international cases are article 20 on

the place of arbitration and article 22 on the language to be used in the proceedings.

(c) Default of a party

The arbitral proceedings may be continued in the absence of a party, provided that due notice has been given. This applies, in particular, to the failure of the respondent to communicate its statement of defence (article 25 *(b)*). The arbitral tribunal may also continue the proceedings where a party fails to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25 *(c)*). However, if the claimant fails to submit its statement of claim, the arbitral tribunal is obliged to terminate the proceedings (article 25 *(a)*).

Provisions that empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in cooperating or expediting matters. Such provisions therefore provide international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

6.4.8.2.6. Making of award and termination of proceedings

(a) Rules applicable to substance of dispute

Article 28 deals with the determination of the rules of law governing the substance of the dispute. Under paragraph (1),

the arbitral tribunal decides the dispute in accordance with the rules of law chosen by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of "rules of law" instead of "law", the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the United Nations Convention on Contracts for the International Sale of Goods as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to that Convention. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not chosen the applicable law, the arbitral tribunal shall apply the law (i.e., the national law) determined by the conflict-of-laws rules that it considers applicable.

Article 28 (3) recognizes that the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeur*. This type of arbitration (where the arbitral tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The Model Law does not intend to regulate this

area. It simply calls the attention of the parties on the need to provide clarification in the arbitration agreement and specifically to empower the arbitral tribunal. However, paragraph (4) makes it clear that in all cases where the dispute relates to a contract (including arbitration *ex aequo et bono*) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

(b) Making of award and other decisions

In its rules on the making of the award (articles 29-31), the Model Law focuses on the situation where the arbitral tribunal consists of more than one arbitrator. In such a situation, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

Article 31 (3) provides that the award shall state the place of arbitration and shall be deemed to have been made at that place. The effect of the deeming provision is to emphasize that the final making of the award constitutes a legal act, which in practice does not necessarily coincide with one factual event. For the same reason that the arbitral proceedings need not be carried out at the place designated as the legal "place of arbitration", the making of the award may be completed through deliberations held at various places, by telephone or correspondence. In addition, the award does not have to be

signed by the arbitrators physically gathering at the same place.

The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is "on agreed terms" (i.e., an award that records the terms of an amicable settlement by the parties). It may be added that the Model Law neither requires nor prohibits "dissenting opinions".

6.4.8.2.7. Recourse against award

The disparity found in national laws as regards the types of recourse against an arbitral award available to the parties presents a major difficulty in harmonizing international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time periods for exercising the recourse, and extensive lists of grounds on which recourse may be based. That situation (of considerable concern to those involved in international commercial arbitration) is greatly improved by the Model Law, which provides uniform grounds upon which (and clear time periods within which) recourse against an arbitral award may be made.

(a) Application for setting aside as exclusive recourse

The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in

any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34 (3)). In regulating "recourse" (i.e., the means through which a party may actively "attack" the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).

(b) Grounds for setting aside

As a further measure of improvement, the Model Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36 (1), which is taken from article V of the New York Convention. The grounds provided in article 34 (2) are set out in two categories. Grounds which are to be proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law. Grounds that a court may consider of its own initiative are as follows:

non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

The approach under which the grounds for setting aside an award under the Model Law parallel the grounds for refusing recognition and enforcement of the award under article V of the New York Convention is reminiscent of the approach taken in the European Convention on International Commercial Arbitration (Geneva, 1961). Under article IX of the latter Convention, the decision of a foreign court to set aside an award for a reason other than the ones listed in article V of the New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside. Although the grounds for setting aside as set out in article 34 (2) are almost identical to those for refusing recognition or enforcement as set out in article 36 (1), a practical difference should be noted. An application for setting aside under article 34 (2) may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State. For that reason, the grounds relating to public policy and non-arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement).

6.4.8.2.8. Recognition and enforcement of awards

The eighth and last chapter of the Model Law deals with the recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the New York Convention.

(a) Towards uniform treatment of all awards irrespective of country of origin

By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law distinguishes between "international" and "non-international" awards instead of relying on the traditional distinction between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions.

By modeling the recognition and enforcement rules on the relevant provisions of the New York Convention, the Model Law supplements, without conflicting with, the regime of

recognition and enforcement created by that successful Convention.

(b) Procedural conditions of recognition and enforcement

Under article 35 (1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35 (2) and of article 36 (the latter of which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement. The Model Law does not lay down procedural details of recognition and enforcement, which are left to national procedural laws and practices. The Model Law merely sets certain conditions for obtaining enforcement under article 35 (2). It was amended in 2006 to liberalize formal requirements and reflect the amendment made to article 7 on the form of the arbitration agreement. Presentation of a copy of the arbitration agreement is no longer required under article 35 (2).

(c) Grounds for refusing recognition or enforcement

Although the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in Art. V of the New York Convention, the grounds listed in the Model Law are relevant not only to foreign awards but to all awards rendered in the sphere of application of the piece of legislation enacting the Model Law. Generally, it was deemed desirable to adopt, for the sake of harmony, the same

approach and wording as this important Convention. However, the first ground on the list as contained in the New York Convention (which provides that recognition and enforcement may be refused if "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity") was modified since it was viewed as containing an incomplete and potentially misleading conflict-of-laws rule.