International Trade Law

# Introduction to the International Trade Regime

Approaching a Problem

- Did the government make an international commitment regarding this action?

- Did the action violate the commitment?

- Is there an exception (specific/general) that applies?

- Are the requirements for exercising that exception met?

## Globalization and Trade Liberalization

### Emergence of the Global Economy

* Concept of Economic Globalization
  + Gradual integration of national economies into one borderless global economy.
  + Encompasses free international trade and unrestricted foreign direct investment (FDA).
  + Not unprecedented – 50 years before First World War there were large cross-border flows of goods and capital and, more than now, of people.
* Forces Driving Economic Globalization
  + Technology – decrease costs
  + Liberalization of Trade and FDA
    - Over last 60 years, most developed countries have significantly lowered barriers to foreign trade and investment.
    - Over the last 20 years, has become a worldwide trend, including developing countries.
* Changing Nature of International Trade in the Global Economy – increasingly trade in tasks and in value-added

### Pros/Cons of Globalization

* Pros
  + Economic growth – export-led growth
  + Fall in global poverty rates – better standard of living
  + People live longer.
  + Income inequality worldwide has been falling (a lot of people pulled out of poverty – mostly in east and southeast asia and mostly in China)
* Cons
  + Greater inequality within developed countries
  + Some countries have seen little economic growth. E.g. Eurozone
  + Offshoring problem for developed countries
    - Widening array of services is becoming electronically deliverable from afar.
      * Including high skill services such as radiology and architecture
    - 1.5 billion “new” workers – people from countries that have entered world economy
    - Lengthy problem that won’t lead to economic balancing in short-term. Skilled workers in U.S. will lose jobs to skilled workers in other countries for a long time.
    - Large problem – 30-40 million U.S. jobs are offshorable
    - Benefits of free trade recognized by some but not others – great income inequality within U.S.
    - Solutions for U.S.
      * Better unemployment benefits in U.S.
    - Trade protection won’t work, because can’t block internet services from crossing borders effectively
    - Focus on R&D, science and engineering, capital markets
  + Bad things cross borders. E.g. drugs, weapons, terrorism, criminals, terrorists, etc.
  + Open countries to external shocks – need safety nets
  + Environmental Impact – scarcity of energy resources, deterioration of environment.

### Free Trade versus Restricted Trade

* Arguments for Free Trade
  + Comparative advantage – nations benefit by specializing in the tasks they do best and trading with other nations for the rest (David Ricardo).
  + Promotes mutually profitable division of labor.
  + Higher standards or living.
  + Greater economic growth.
* Arguments for Trade Restrictions
  + Protect a domestic industry and jobs threatened by import competition.
    - Public choice theory – when the majority of the voters are unconcerned with the (per capita small) losses they suffer, the vote-maximizing political decision-makers will ignore the interests of the many, and support the interests of the vocal and well-organized few.
  + Infant Industry Protection: to assist the establishment of a new industry
  + Strategic Trade Policy: to support a domestic industry to establish itself on the world market.
  + Generate government revenue – taxing trade is an easy way to collect revenues.
  + Protect national security and/or ensure self-sufficiency.
  + Protect and promote non-economic societal values and interests, such a public morals, public health, a sustainable environment, human rights, minimum labor standards, consumer safety, and cultural identity and diversity.

## Overview of the WTO Regime

### Need for International Rules on International Trade

* Countries must be restrained from adopting trade-restrictive measures both in their own interest and in the interest of the world economy.
* The need of traders for a degree of security and predictability.
* As a result of the greatly increased levels of trade in goods and services, the protection and promotion of important societal values and interests such as public health, a sustainable environment, consumer safety, cultural identity and minimum labour standards is no longer a purely national matter.
* Need to achieve a greater measure of equity in international economic relations.

### Multilateral Trading System Principles

* Trade without Discrimination
  + Most-favoured-nation (MFN): treating other people equally
  + National treatment: treating foreigners and locals equally
* Freer trade: gradually, through negotiation
* Predictability: through binding and transparency
* Promoting Fair Competition
* Encouraging Development and Economic Reform

### Multilateral Trading System – Basic Rules of WTO Law

* Rules of non-discrimination
  + Most favoured-nation (MFN) Treatment Obligation
  + National Treatment Obligation
* Rules on market access
  + Rules on customs duties (i.e. tariffs)
  + Rules on other duties and financial charges
  + Rules on quantitative restrictions
  + Rules on other non-tariff barriers
* Rules on unfair trade – dumping and subsidized trade
* Rules on the conflict between trade liberalization and other societal values and interests
  + Exceptions that allow WTO Members to deviate under specific conditions from basic WTO rules in order to take account of economic and non-economic values and interests that compete or conflict with free trade.
* Institutional and procedural rules, including those relating to WTO decision-making, trade policy review and dispute settlement.

### Origins of the WTO

* GATT 1947
  + Still guides the WTO - WTO Agreement Art. VXI:1: “…the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947.
  + DeFacto international organization for trade
    - ITO never entered into force
* Negotiating Rounds:
  + Focused on Reduction of Tariffs – very successful
    - Geneva: 1947
    - Annecy: 1949
    - Torquay: 1950
    - Geneva: 1956
    - Dillon: 1960-61
  + Focused on Non-Tariff Barriers – less successful
    - Kennedy: 1962-67
    - Tokyo: 1973-79 – plurilateral agreements so didn’t bind everyone
  + Very broad agenda – Uruguay: 1986-94
    - GATT wasn’t working before this round.
      * GATT didn’t cover services, which were becoming more of an important part of the economy.
      * Japan was manipulating currency but people felt they couldn’t discriminate against Japan because it was part of GATT.
      * Could bring case against other party but there were a lot of loopholes. All members had to unanimously approve judgments, even losing parties.
    - Agreement Establishing the World Trade Organization (WTO Agreement) signed in Marrakesh in April 1994
  + Current: Doha Round (Development Round): stalled 🡪 US wants to abort and start all over again

### Functions – WTO Agreement Art. III

* Facilitation of the implementation of the WTO agreements
* Forum for negotiations on new trade rules
* Settlement of disputes
* Administration of the Trade Policy Review Mechanism (TPRM)
* Cooperation with other organizations, particularly IMF and World Bank
* Technical assistance to developing countries (not in WTO Agreement but in Doha Rounds)

### Members

* Current
  + Full list: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>
  + Includes all developed countries, many developing countries (self-designated but can be challenged), and some least-developed countries (designated by UN)
  + European Union – EU is a member and so are all EU Member States; typically European Commission will act and speak for the EU and all EU Member States in WTO meetings and negotiations.
* Becoming a Member
  + Original membership – WTO Agreement Art. XI:1 allowed Contracting Parties to the GATT 1947 (and European Communities) to join the WTO
  + Accession – WTO Agreement Art. XII
    - Application submitted to WTO Director General
    - General Council forms Working Party
    - Working Party members engage in bilateral accession negotiations with applicant
    - Draft Working Party Report submitted to WTO Membership, along with draft Protocol of Accession (including Schedule of Concession)
    - Protocol of Accession enters into force if Draft Decision approved by 2/3 of Membership
    - Note: Must accept terms of the WTO Agreement and all Multilateral Trade Agreements
* Waivers
  + Members can request the WTO to waive “problematic” obligations
  + WTO Agreement Art. IX:3 – “exceptional circumstances” may justify such a waiver
  + WTO Agreement Art. IX:4 – any waiver granted for a period of more than one year is reviewed annually
* Opt Outs – WTO Agreement Art. XIII
  + Member may prevent WTO rules from applying to its trade relations with another Member
  + Has to be invoked at the time that this Member, or the other, joins the WTO.
* Withdrawal, Suspension and Expulsion
  + WTO Agreement Art. XV:1
  + WTO Members may unilaterally withdraw at any time.
  + Withdrawal takes place six months after notification.
  + No provision for suspension or expulsion except in case of non-acceptance of certain amendments to WTO agreements.

### Institutional Structure

* WTO Agreement Art. IV – sets out basic institutional structure
* Ministerial Conference – WTO Agreement IV:1
  + Supreme body of WTO
  + Has decision-making power on all matters under any of the multilateral WTO agreements.
  + Decisions are binding on members.

### Voting Rules

* Consensus generally required, including for amending: (GATT X:2)
  + Decision-making rules
  + MFN – GATT, GATS, TRIPS
  + GATT Schedule of Concessions
* Consensus not required for:
  + Interpretation of WTO Agreement: ¾ (GATT IX:2)
  + Waiver: ¾ (GATT IX:3)
  + Accession to WTO: 2/3 (GATT XII:2)
  + Amendment of WTO Agreement: 2/3 (GATT X)

## WTO Dispute Settlement

* Dispute Settlement Understanding (DSU) - <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm>

### Interpretation of Treaties - Vienna Convention on the Law of Treaties Section 3

* Article 31. General Rule of Interpretation
  + 31.1 – Good faith, ordinary meaning, in context, in light of object and purpose. 🡪 in practice, tend to look at ordinary meaning/the text first, if no confusion, then that’s it.
  + 31.2 – Ordinary meaning and context which includes, (1) preamble, (2) annexes, (3) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and (4) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
  + 31.3 – (1) Subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions; (2) subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation; (3) relevant rules of international law applicable in the relations between the parties
* Article 32. Supplementary means of interpretation – preparatory work of treaty and circumstances of its conclusion when Art. 31 rules leave meaning ambiguous, obscure, or leads to absurd or unreasonable result.
* Article 33. Interpretation of Treaty authenticated in two or more languages
  + Authenticated languages equally authoritative
  + Unauthenticated is authoritative only if the treaty provides or the parties agree
  + Terms presumed to have same meaning in each authentic text
  + When authenticated texted disclose a difference in meaning which the application of arts. 31 and 32 do not remove, the meaning which best reconciles the texts, having regard to object and purpose, shall be adopted.

### Jurisdiction of the WTO Dispute Settlement System

#### Nature of Jurisdiction

* Compulsory
  + Membership of the WTO constitutes consent to, and acceptance of, the jurisdiction of the WTO dispute settlement system.
  + DSU 6.1 – “if the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB’s agenda, unless at that meeting the DSB decides by consensus not to establish a panel.”
* Exclusive
  + A complaining Member is obliged to bring any dispute arising under the covered agreements to the WTO dispute settlement system. See DSU 23.1.
  + Note that WTO dispute settlement system provides for several methods to resolve disputes:
    - Consultations – DSU 4
    - Adjudication – DSU 6-20
    - Other: arbitration, good offices, conciliation and mediation
* Only Contentious (i.e. not advisory)

#### Scope of the Jurisdiction

* Disputes Subject to WTO Dispute Settlement
  + DSU 1.1 – disputes arising under agreements listed in Appendix 1 of DSU, which include TWO Agreement, GATT 1994, GATS, TRIPS, etc.
  + Does not need to defer to a WTO Committee for reasons of institutional balance (India – QR)
  + May not put into question a law, even if its shortcomings are obvious, if it has not been raised.
  + May exercise judicial economy (US-Wool Shirts & Blouse; Australia – Salmon), so long as it makes clear the issue(s) that it is not addressing on account of judicial economy (Canada – Autos). Unclear to what extent it is obligated to do so.
* Measures Subject to WTO Dispute Settlement – look at atypical measures
  + Policies or actions of governments, not those of private individuals. DSU 26.1.
    - Private actions may sometimes be attributable to the government.
  + Measures that are no longer in force – depends on circumstances
  + Legislation as such, i.e. independent from its application in specific cases
  + Discretionary legislation, i.e. legislation that leaves authorities leeway as to what action (WTO-consistent or WTO-inconsistent) to take
  + Unwritten norms or rules
  + Ongoing conduct
  + Measures by regional or local authorities

### Access to the WTO Dispute Settlement System

* Limited to WTO Members
* Right of Recourse to WTO Dispute Settlement
  + GATT XXII and XXIII
  + Most other covered agreements incorporate, by reference, Articles XXII and XXIII.
* Access of Members other than the Parties
  + Third Party – any Member having a “substantial interest” in a matter before the panel and having notified of its interest to the DSB shall have the opportunity to be heard by the panel and to make written submissions to the panel. DSU 10.
    - Enhanced substantive rights may be conferred by the panel
    - Panels cannot rule on claims brought forward only by third parties
    - Third Parties cannot appeal panel decisions
  + Third Participants – any Member, who was a third party in the panel proceedings, may be a third participant in the AB proceedings.
  + Passive Observer

### Key Features of WTO Dispute Settlement

* Prime Object and Purpose
  + Prompt settlement of disputes. DSU 3.3.
  + Provide security and predictability to the multilateral trading system. DSU 3.3.
* Single, Comprehensive and Integrated System
  + The special and additional rules and procedures of a particular covered agreement combine with the generally applicable rules and procedures of the DSU to form a comprehensive, integrated dispute settlement system for the WTO Agreement.
  + Special and additional rules in some of the covered agreements prevail over DSU rules and procedures to the extent that there is a difference between them. DSU 1.2.
* Different Methods of Dispute Settlement
  + Consultations, i.e. negotiations. DSU 4
  + Adjudication. DSU 6-20.
  + Arbitration. DSU 25.
  + Good offices, conciliation, and mediation. DSU 5.

### Institutions of WTO Dispute Settlement

* Dispute Settlement Body
  + Administered by General Council
  + Composed of diplomats representing all WTO Members
  + Administers dispute settlement system
  + Decisions
    - By consensus
    - Reverse consensus (consensus among WTO Members not to take that decision 🡪 so practically automatic) for some key decisions: establishment of panels, adoption of panel and AB reports, and authorization of suspension of concession and other obligations
* Panels
  + Establishment of Panel – Ad hoc. DSU 6.2.
  + Composition of Panels – DSU 8.5.
  + Mandate of Panels
    - Terms of reference – Claim falls within the panel’s terms of reference, i.e. within the jurisdiction of the panel, only if that claim is identified in the panel request. DSU 7.1.
  + Panel Reports – DSU 12.7.
* The Appellate Body (AB)
  + Established working procedure under DSU
  + Completing the Analysis
    - Factual record before it is sufficient to do so
    - Logical continuum between the claims
  + Membership and Structure of the Appellate Body
    - Permanent international tribunal, seven judges
    - Qualification. DSU 17.3.
  + Participants
    - Third parties limited to those that appeared before panel
    - Passive observer status (so long as no objection by parties)
  + Scope of Appellate Review
    - Only parties to the dispute, not third parties, can appeal. DSU 17.4.
    - Appeal limited to issues of law covered in panel report and legal interpretations developed by the panel. DSU 17.6.
  + Mandate
    - Address issues raised and uphold, modify, or reverse legal findings and conclusions of panel. DSU 17.12 and 17.13
  + No remand authority
  + Collegiality (DSU XXXII) - division (3 AB Members on each case) responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report
* Compliance Panel
  + - Composition: can be members of the original panel, but not obligated (subject to Director General’s discretion)
    - Claim must comply with DSU 6.2
      * Identify measures taken to date
        + Taken place during RPT, or
        + Bear a particularly close relationship with compliance
      * Make legal argument as to why insufficient
    - Burden of Proof: Defendant

### Process of WTO Dispute Settlement

* For details: Van den Bossche p. 245/ <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm> and <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm>
* Major Stages
  + Consultations (DSU 4)
    - Confidential
    - Last, on average, 200+ days
    - Lead to **Mutually Agreed Solutions** (i.e. settlement) in approximately 2/3 of all disputes
  + Panel established & composed by Dispute Settlement Body (DSU 6)
  + Panel decision issued
  + DSB adopts panel//appellate reports (DSU 16.1, 16.4, 17.14)
  + Decision appealed to Appellate Body
  + AB issued & adopted
  + Reasonable period of time (DSU 21.3)
  + Compliance panel (DSU 21.5)
  + Compensation or Suspension of concessions (DSU 22.6)

#### Mutually Agreed Solutions

* May be for part or all of the dispute
* May be reached at any point
* Must be WTO consistent (DSU 3.5)
  + Often involve withdrawal or modification of defendant’s action
  + Any concessions given must be on a MFN basis, unless an exception (e.g., PTA, special & differential treatment) applies
* Must be notified to the DSB (DSU 3.6)

#### Panel Discovery

* May seek information and technical advice from any individual or body which it deems appropriate (DSU 13), including:
  + Expert groups
  + Seeking info from parties
  + Questionnaires
* Is not obliged to seek information
* May not use discovery powers to alter claims
* May not compel delivery of info. (although may draw inferences from a party’s non-delivery)

#### Rulings

* Two Parts: Factual part & legal part
* Panels retain discretion as to how much they should rule (Mexico - Corn Syrup (DSU 21.5))
* Recommendations. DSU 19.1
  + Required to be issued and binding
  + Wording: losing defendant is recommended to bring its measures into compliance
* Suggestions. DSU 19.1
  + Requests should be given at panel stage and be precise
  + Up to panel’s discretion to decide whether to issue
    - Majority have declined
  + Advisory, rather than binding

#### Appeal

* DSU 17.6 – an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel
* DSU 17.13 – the AB may uphold, modify, or reverse and legal findings and conclusions of the panel.
* Common reasons for appeal: egregious error (i.e., action beyond limits of a panel’s discretion); denial of due process; improper factual examination of the record; improper reliance on ex post fact justifications; improper standard of review (i.e., de novo); inconsistent reasoning; absence of reasoning; ruling extends beyond the scope of the claims brought forth; dales judicial economy

#### Remedies for Breach

* Final Remedy – Withdrawal of the WTO-Inconsistent Measure
  + Should normally be immediate. DSU 3.7 and 21.1.
  + If impracticable to comply immediately with the recommendations and rulings, the Member has a reasonable period of time. DSU 21.3.
    - Agreed on by the parties. DSU 21.3(b); or
    - Determined through binding arbitration at the request of either party. DSU 21.3(c)
* Temporary Remedies (for non-compliance) – if a Member has not withdrawn or modified the WTO-inconsistent measure by the end of the reasonable period of time for implementation, the DSU provides for the possibility of recourse to temporary remedies: choice between: Compensation and Suspension of Concessions
  + Compensation – DSU 22
    - Voluntary, i.e. the complainant is free to accept or reject compensation
    - Appropriate amount must be by mutual agreement
    - Forward looking, i.e. the compensation concerns only the nullification or impairment (i.e. the harm) that will be suffered in the future.
  + Suspension of Concessions / “Retaliation”
    - Measure of last resort. DSU 3.7.
    - Concessions or other obligations that may be suspended – DSU 22.3
      * Complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which a violation was found, i.e. goods for goods (some argue that it has to be interpreted more narrowly), service for service, IP for IP.
      * if that is not practicable or effective, the complaining party may seek to suspend concessions or other obligations in other sectors under the same agreement.
      * If also that is not practicable or effective, the complaining party may seek to suspend concessions or other obligations under another covered agreement.
    - Level of retaliation – level authorized by DSB “shall be equivalent to the level of the nullification or impairment.” DSU 22.4.
      * Purpose – induce compliance, NOT punitive
      * Disputes between parties on the level of retaliation are to be resolved through arbitration by the original panel. DSU 22.6.
        + Composition: determined by the DG, but usually members of the original panel
        + Third party participation depends on the agreement of the parties involved
        + Discovery powers
* Other Remedies – under customary international law, a breach of an international obligation leads to legal consequences under the International Law Commission’s *Articles on Responsibility of States for Internationally Wrongful Acts*:
  + Cease illegal conduct
  + Restitution in kind
  + Compensation
  + Satisfaction
  + Assurances and guarantees of non-repetition
  + Note: these could conflict with WTO law, particularly rule on compensation for damage suffered

### Example Dispute – ***China Rare Earths (DS 431)***

* Background: In 2010, China blocked shipment of so-called rare earth minerals, used to make many high-tech products for five weeks. China denied that the embargo existed. China has instituted other export controls (e.g. limited exports to 30K tons a year while countries outside China at the time consumed 60K tons a year) and high taxes (e.g. as much as 25% on top of value-added taxes of 17%) on rare earth minerals. For most industrial products that are manufactured in China using rare earths and then exported, China imposes no quotas or export taxes, and frequently no value-added taxes, either. Companies do that math, and many decide it is more cost-effective to move to China to get cheaper access to the metals. China controls most the of the world’s supply of such minerals partly due to geologic good fortune and partly because it has been willing to do the dirty, toxic, and often radioactive work that the rest of the world has shunned. Governments and business groups around the world assert that China’s tactics on rare earths probably violate global trade rules. China’s legal position is that its policies qualify for an exception to international trade rules that allows countries to limit exports for environmental protection and to conserve scarce supplies.
* Relevant GATT Articles:
  + GATT Article XI. General Elimination of Quantitative Restrictions

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

* + GATT Article XX. General Exceptions

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

. . .

b) necessary to protect human, animal or plant life or health

. . .

g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

* Outcome: WTO ruled against China on this case.

## WTO Covered Agreements and Tariff Schedules

### Sources of WTO Law

* Basic Structure of WTO Agreement (See WTO Agreement Annex I)

|  |  |  |  |
| --- | --- | --- | --- |
| Umbrella | **Marrakesh Agreement Establishing the WTO** | | |
|  | Goods | Services | Intellectual Property |
| Basic Principles | GATT | GATS | TRIPS |
| Additional Details | Other goods agreements and annexes, including ADA, SCM, Safeguards | Services annexes |  |
| Market Access Commitments | Countries’ schedules of commitments | Countries’ schedules of commitments (and MFN exemptions) |  |
| Dispute Settlement | Understanding on Rules and Procedures Governing the Settlement of Disputes | | |
| Transparency | Trade Policy Review Mechanisms | | |
| Plurilateral Agreements (optional) | Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement; International Bovine Meat Agreement | | |

* Instruments used to impede trade include: ban/embargo; quotas/quantitative restrictions; tariffs; subsidies/taxes; licensing; domestic content requirements (geographic, JV, tech transfer); labeling; standards; government procurement

### Tariffs

* Types: ad valorem duties; specific duties (e.g., based on weight, volume, surface); compound duties; alternative or mixed duties; technical duties

#### Tariff Concessions / Tariff Bindings

* Definition – a commitment not to raise the customs duty on a certain product above an agreed level
  + Bound rate – agreed upon ceiling tariff rate
  + Unbound – no ceiling tariff rate
  + Applied rate – actual tariff rate
* Uruguay Round
  + Developed countries agreed to cut tariffs.
  + “Tariffication” – a lot of import restrictions that did not take the form of tariffs, such as quotas, were converted to tariffs.
    - Translates everything into a number – easy to compare
    - Makes market more predictable?
  + Increased the Number of Bindings

|  |  |  |
| --- | --- | --- |
|  | **Before** | **After** |
| **Developed Countries** | 78 | 99 |
| **Developing Countries** | 21 | 73 |
| **Transition Economies** | 73 | 98 |

#### Schedules of Concessions

* Tariff concessions/bindings are set out in that Member’s Schedule of Concessions (also referred to as Goods Schedule).
* Each Member of the WTO has a schedule, except when the Member is part of a customs union, in which case the Member has a common schedule with the other members of the customs union.
* Schedule of Concessions resulting from the Uruguay Round negotiations are all annexed to the Marrakesh Protocol to the GATT 1994. GATT 1947 Art.II:7 adopts schedules as part of agreement. All WTO Members have a schedule of concessions which is either annexed to the “Marrakesh Protocol to the GATT 1994” or to a “Protocol of Accession”.
* Each schedule consists of four parts:
  + Part I : Most-favoured-nation or MFN concessions, maximum tariffs to goods from other WTO members. Part I is further divided into:
    - Section 1A — tariffs on agricultural products
    - Section 1B — tariff quotas on agricultural products
    - Section II — Other products
  + Part II: Preferential concessions (tariffs relating to trade arrangements listed in GATT Article I)
  + Part III: Concessions on non-tariff measures (NTMs)
  + Part IV: Specific commitments on domestic support and export subsidies on agricultural products
* Harmonized System
  + The tariff schedules follow the format called the Harmonized Commodity Description and Coding System (“Harmonized System”) for classifying goods trade internationally
  + Maintained by World Custom Organization (WCO), through its Harmonized System Committee
  + Periodically revised (latest was in 2012)
  + Governed by the “International Convention on the Harmonized Commodity Description and Coding System” with official explanation published by WCO in Explanatory Notes
  + Used by over 200 countries; 98% of global trade
  + Classifications:
    - Standardized by WCO:
      * Section Headings (I-XXI)
      * Chapters (1-97)
      * Four digit classifications (appx. 1,250)
      * Six-digit classifications (appx. 5,000)
    - Up to each WTO Member (to reflect national administrative and statistical requirements):
      * Eight digit classifications
      * Ten-digit classifications
  + Schedules that follow the Harmonized System contain the following information:
    - Tariff item number
    - Description of the product
    - Rate of duty
    - Present concession established
    - Initial Negotiation Rights (or INR, such as main suppliers of product)
    - Concession first incorporated in a GATT Schedule
    - INR on earlier occasions
    - Other duties and charges
    - For agricultural products special safeguards may also be defined
  + Disputes over HS Classification – Applied Biosystem v. United States (US Court of Int’l Trade 03-00251) US Customs said it was 8419.89 (4.2-4.7% a.v.) – “machinery, plant or laboratory equipment…for treatment of materials by a process involving a change in temperature” as well as “parts thereof.” Applied Biosystem says it’s 9032.89 (1.7% a.v.) – “automatic regulating or controlling insturments and apparatus” as well as “parts and accessories thereof.” Firm doesn’t have standing to go before WTO so sues in US court. Not big enough company to convince company to sue on its behalf in WTO. US court of int’l trade ruled in favor of Biosystems.

#### Protection of Concessions

* GATT II:1
  + (a) prohibits according treatment less favorable to imports than that provided for in a Member’s Schedule.
  + (b) prohibits the application of ordinary customs duties in excess of those provided for in the Schedule. Also, prohibits the application of “other duties and charges of any kind imposed on or in connection with the importation in excess of those” imposed or those required to be imposed by legislation in effect on the date of this Agreement.
* GATT II:1 obliges a WTO Member to commit to the bound tariff rates to which it has committed in its Schedule of Concessions. Makes reference to two terms when discussing tariffs:
  + Ordinary Customs Duty (OCD)
    - Ad valorem duties – percentage of the value of the imported product
    - Specific duties – related to weight, volume, surface, etc. of good at hand
    - Compound duties – ad valorem duty plus/minus specific duty
    - Alternative duties (or mixed duties) – ensures max/min through choice between ad valorem or specific duty; and
    - Technical duties – determined by technical factors, such as alcohol or sugar content
  + Other Duties and Charges (ODC)
    - Additional surcharge on imports
    - Statistical tax imposed to finance the collection of trade statistics
    - Customs processing fee
    - Charge associated with the cost of public health controls on imports
* GATT II:2 permits a series of exceptions to Schedule of Concessions:
  + Charge equivalent to an internal tax imposed on a “like” domestic product
    - Has to be consistent with GATT III:2
  + Anti-dumping duties
  + Countervailing duties
  + Fees or other charges commensurate with the cost of services rendered
    - Must be consistent with GATT III
* *EC – Chicken Cuts (2005)*
  + Background: EC reclassified a certain type of chicken under a different heading (heading 02.07 ‘Meat and edible offal, of the poultry of heading No. 0105, fresh, chilled, or frozen). Under that particular heading, the customs duty imposed was higher than under the heading that applied according to the complainants in the case (heading 02.10 ‘Meat and edible meat offal, slated, in brine, dried, smoked…’). According the EC, the term “salted” implied that the meat should be impregnated with salt sufficient to ensure long-term preservation. The complainants, Thailand and Brazil, contended that “salted” did not imply long-term preservation and that the salted chicken cuts at issue thus fell within heading 02.10.
  + Holding: Panel and AB concluded that “salted” did not imply long-term preservation in any way and that therefore the chicken cuts did fall under the more favorable tariff heading 02.10. Textualist reading.

#### Renegotiating Tariffs

* GATT XXVIII
* Wu p. 103

# Core Principles: An Overview of the GATT

* GATT 1947: <https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm>
* GATT 1994: <https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm>

## Quantitative Restrictions

### Rules on Quantitative Restrictions

* General prohibition on quantitative restrictions – GATT XI:1

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

* + Extends “to restrictions of a de facto nature.”
    - *India-Autos* – the government measure at issue was a “trade balancing condition.” Any automobile manufacturer in India wishing to import parts was required to sign an MOU that stipulated that the manufacturer’s exports be equivalent in value to its imports over a certain period. In other words, the ability to import was conditioned on the manufacturer’s balancing of its trade. The MOU did not specify a particular numerical target for imports, and the Panel was faced with the question as to whether it amounted to a QR. After first noting that “it is clear that a restriction need not be blanket prohibition or a precise numerical limit,” the Panel then added, “With regard to the trade balancing condition, the Panel finds that…there would necessarily have been a practical threshold to the amount of exports that each manufacturer could expect to make, which in turn would determine the amount of imports that could be made. This amounts to an import restriction…The Panel therefore finds that he trade balancing condition contained in Public Notice No. 60 and in the MOUs signed thereunder, by limiting the amount of imports through linking them to an export commitment, act as a restriction on importation, contrary to terms of Article XI:1.”
    - *Argentina – Hides and Leather (2001)* (regarding whether Argentina’s authorizing the presence of domestic tanners’ representatives in the customs inspection procedures for hides destined for export operations imposed a de facto restriction on the exportation of hides inconsistent with Article XI:1. Panel concluded that there was insufficient evidence that this regulation actually operated as an export restriction inconsistent with Article XI:1. “The European Communities has stated the matter to us in the form of a rhetorical question – what other purpose could these downstream industry representatives have in this government process of export clearance than restricting exports? However, it is up to the European Communities to provide evidence sufficient to convince us of that. IN this instance, we do not find that the evidence is sufficient to prove that there is an export restriction made effective by the mere presence of tanners’ representatives within the meaning of Article XI.”)
  + No effect on imports/exports necessary
    - *Columbia – Ports of Entry (2009)* (“to the extent Panama was able to demonstrate a violation of Article XI:1 based on the measure’s design, structure, and architecture, the Panel is of the view that it would not be necessary to consider trade volumes or a causal link between the measure and its effects on trade volumes.”)
    - *China-Raw Materials* – “The Panel considered the very potential to limit trade sufficient to constitute a restriction…on the exportation or sale for export of any product within the meaning of Article XI:1 of the GATT 1994. The Panel considers this view is consistent with the panel on Colombia-Ports of Entry that any measure that creates uncertainty as to the ability to import/export and otherwise compete in the marketplace violates Article XI:1.”
* Necessary Government Involvement
  + QR has to be attributable to WTO Member
  + Providing incentives to private parties to act in a particular manner suffices for a measure to be attributed to government. *Japan – Semiconductors*.
  + Measure attributable to Chinese government because the government had delegated authority to CCMC. *China – Raw Materials*.
* Exceptions Include (Wu p. 68 for more detail on each):
  + GATT XX. General Exceptions
  + GATT XXI. Security Exceptions, Economic Emergency Exceptions
  + Balance of Payments (GATT XII and XVIII)
  + Exchange Restrictions (GATT XV:9)
  + Infant Industry Protection (GATT XVIII(c))
  + Safeguards (GATT XIX)
  + GATT XI:2

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

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

(b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

(c) Import restrictions on any agricultural or fisheries product, imported in any form,\* necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible. Refers not to just laws or regulations, but more broadly to measures.

* Rules on voluntary export restraints (VERs)
  + Self-imposed quantitative restriction of exports.
  + WTO Agreement of Safeguards prohibits VERs.
* QRs **cannot** be imposed by an exporting country to counter the follow unfair trade practices:
  + Dumping
  + Subsidies
* Rationale behind GATT preference for customs duties (tariffs) over quantitative restrictions
  + Customs duties are more transparent.
  + It is easier to negotiate, in successive rounds of negotiations, the gradual reduction of customs duties than the elimination of quantitative restrictions.
  + Price increase resulting from customs duties goes to the government as revenue, while price increase resulting from customs duties ordinarily benefits importers, because they will be able to sell at higher prices because of the limits on the supply of the product.
  + Administration of quantitative restrictions is more open to corruption, because usually administered through an import-licensing system – procedures not as transparent and decisions by government officials not necessarily based on the general interest.
  + Quantitative restrictions impose absolute limits on imports.

### Types of Quantitative Restrictions

* Types:
  + Prohibition – ban, may be absolute or conditional.
  + Quota – indicating the quantity, may be global or bilateral.
  + A requirement for a license to import/export a good
  + Other – made effective through State trading operations; mixing regulation; minimum price, triggering a quantitative restriction; voluntary export restraint.
* Export Taxes
  + GATT II deals with disciplining import duties but no provision that deals with export duties.
  + In general, export taxes are NOT to be treated as QRs. See Note prepared by GATT Secretariat.
* Minimum Export Prices
  + May be inconsistent with GATT XI.
  + In *China-Raw Materials*, China established a minimum floor price for the exports of certain raw materials. Chinese producers that hoped to export a raw material below this price were prohibited from doing so. The Panel held that such a restriction violated GATT XI:1.
* Minimum Import Prices
  + Violation of GATT XI. *EEC-Minimum Import Prices* (importers of tomato concentrates into the EC were required to provide additional security to guarantee that their product’s price would equal or exceed a determined minimum import price.)
* Production Quotas
  + Do production quotas fall under the auspices of GATT XI or are they purely domestic policies, and as such, governed by GATT III?
  + Domestic measures, even if applicable at the border, are governed by GATT III and evade the purview of GATT XI.
* Covers situations where products are technically allowed into the market without an express formal quantitative restriction, but yet subject to certain conditions which create a disincentive to import. *India – Autos (2002)*.
* In *India-Quantitative Restrictions*, the Panel made clear that a licensing scheme that is not automatically granted falls under the auspices of GATT XI:1.

### Administration of Quantitative Restrictions

* Rules apply when QRs are allowed via exceptions.
* Should be administered in a non-discriminatory manner. GATT XIII:1

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

* In applying an import restriction, the WTO Member must aim for a distribution of trade that approximates, as loosely as possible, the shares which various trading partners would obtain in the absence of such restrictions. GATT XIII:2

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

(a) [whenever practicable, quota shall be fixed and notice given] . . .

(d) In cases where a quota is allocated among supplying countries the contracting party applying the restriction may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have been affected or may be affecting the total trade in the product.

* Import-Licensing Procedures found in *Agreement on Import Licensing Procedures*.
  + Article 1.3 – import-licensing procedures shall be neutral in application and administered in a fair and equitable manner.

## GATT General Exceptions

### Article XX. General Exceptions

* Exception to ALL GATT provisions.

#### Two Tiered Test (See US-Shrimp)

* First, does it fall under one of these provisions?
  + **(a) Necessary to protect public morals**
  + **(b) Necessary to protect human, animal or plant life or health**
  + (c) Relating to the import or export of gold or silver
  + **(d) Necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement**
  + (e) Relating to the products of prison labor
  + (f) Imposed for the protection of national treasures
  + **(g) Relating to the conservation of exhaustible natural resources**
  + (h) Undertaken in pursuance of obligations under an intergovernmental commodity agreement
  + (i) For government stabilization plan (essential material for processing)
  + (j) Essential to acquire/distribution of product in short supply
* Second, Chapeau Test – is the measure either (Wu p. 311):
  + Arbitrary or unjustifiable discrimination between countries where the same conditions prevail, OR
  + Disguised restriction on international trade

#### Necessity/Relating To Test

* Necessity Test: 3-step burden of proof (EC - Asbestos):
  + (a) Party claiming XX (resp.) carries initial burden to prove that measure is necessary (Korea – Beef) and must weigh and balance:
    - (1) Contribution of compliance measure to enforcement of law/reg, (ends pursued)
    - (2) Importance of common interest/values protected by law/reg,
    - (3) Impact of the measure on import or exports.
  + (b) Assuming prima facie case established, other party (complainant) will have burden to show less restrictive option to achieve reg. objective, Does an alternative exist which is:
    - Less trade restrictive
    - Preserves the right of the member to achieve its desired level of protection
    - Reasonably available and not unduly burdensome
* “Necessity” test same for XX (a), (b), and (d)
  + Does not mean indispensable (Korea – Beef)
* Relating To Test:
  + “relating to” = “rational connection” between measure and policy objective (means/ends). AB, US – Shrimp

#### Specific Provisions (Wu p. 292)

* XX(a) Public morals
  + For a long time – Not clearly defined in case law. Divergent definitions:
    - Originalist (GATT) v. in-practice (food, books, gambling, etc.) v. dynamic, customary intl law approach v. each country defines for itself.
  + Why countries do not challenge national security exceptions/public moral:
    - They themselves also benefit from the same QR subject to the same exception
    - Countries have a lot and different national security interests and may want to constrain themselves to avoid retaliation; intentionally left unclear to protect systematic interests
    - There may be a self-imposing limit on how many challenges to bring to WTO
    - Textualist or purposist interpretation may influence decisions to challenge
  + *China – AV Products*: no public moral test (WTO didn’t want to go there), but assessed under necessity test.
  + Others: PPMs, human/labor rights.
    - Note: labor standards not integrated into WTO (in public morals, PPMs).
    - Only successes: Enabling Clause, PTAs. \*\* Liberal Westerners want more robust interpretation of “public morals.” Developing countries fear Western protectionism.
* XX(b) Human, animal, plant life and/or health:
  + Environmental protection (\*\*applicable ONLY to extent that TBT, SPS agreements not applicable).
* XX(d) Compliance w/ laws not inconsistent w/ GATT:
  + E.g. measures governing customs, monopolies, trademark/patent/IP protection, deceptive practices. \*\* XX(d) covers only domestic measures, not int’l retaliation (*Mexico – Taxes on Soft Drinks*, AB). So you can’t break WTO rules to enforce treaties. The way to do it is to seek a waiver.
* XX(g): Conservation of “exhaustible natural resources.”
  + Definition
    - (1) Can be living, as long as animal (e.g. sea turtle) has sufficient nexus to country. *US – Shrimp*
    - (2) Can have a qualifier (e.g. clean air, *US – Gasoline*).
  + Structure of test:
    - (1) “relating to” test, (2) presence of measures restricting domestic consumption/production (*US – Gasoline*).
  + Notes: NO effects test (*US – Gasoline*, AB). No decision yet on jurisdictional limit (whether protection can extend beyond borders), *US – Shrimp*.

### Art. XXI. Security Exceptions

* + Party doesn’t have to do anything or reveal any information contrary to its essential security interests.

### US – Shrimp (DS58)

* Synopsis: Under the US Endangered Species Act of 1973, the US required that US shrimp trawlers use “turtle excluder devices” (TEDs) in their nets. Section 609 of US Public Law 101–102 said that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the US — unless the harvesting nation was certified to have a regulatory programme and an incidental take-rate comparable to that of the US, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles. India, Malaysia, Pakistan and Thailand brought a joint complaint against the ban.
* Holding: The Panel considered that the ban imposed by the US was inconsistent with GATT Article XI (which limits the use of import prohibitions or restrictions mostly to tariffs/duties), and could not be justified under GATT Article XX (which deals with general exceptions to the rules, including for certain environmental reasons). Following an appeal, the Appellate Body found that the measure at stake did qualify for provisional justification under Article XX(g), but failed to meet the requirements of the chapeau (the introductory paragraph) of Article XX (which defines when the general exceptions can be cited) by engaging in arbitrary and unjustifiable discrimination, by providing countries in the western hemisphere – mainly in the Caribbean – technical and financial assistance and longer transition periods for their fishermen to start using TEDs. It did not give the same advantages, however, to the four Asian countries (India, Malaysia, Pakistan and Thailand) that filed the complaint with the WTO. The Appellate Body therefore concluded that the US measure was not justified under Article XX of GATT
* Tool:
  + See two-tier analysis for GATT XX above
  + (g) Is not limited to conservation of mineral or non-living natural resources

## National Treatment Obligation

* Prohibits a country to discriminate against other countries
* Applies to de jure and de facto discrimination
  + *Korea – Various Measures on Beef (2001)* (disputed measure was an origin-based dual retail distribution system for the sale of beef. Under this system, imported beef was to be sold in specialist stores selling only imported beef or in separate sections of supermarkets.)
  + *Japan –Alcoholic Beverages II (1996)* (disputed measure was tax legislation that provided for higher taxes on, for example, whisky, brandy and vodka (whether domestic or imported) than on shochu (whether domestic or imported). On its face, this Japanese tax legislation was origin-neutral. However, in fact, it discriminated against imported alcoholic beverages).
* GATT Art. III:1 *The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions,* ***should not be applied to*** *imported or domestic* ***products******so as to afford protection******to domestic production****.*
* Measures Covered/Excluded
  + GATT III includes:
    - internal taxes and other internal charges (GATT III:1)
      * direct sales tax, excise tax levied on a specific product
      * Processing fee
    - laws, regulations, and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products (GATT III:1);
    - internal QRs requiring the mixture, processing or use of products in specified amounts or proportions (GATT III:1)
      * Anything that amounts to a requirement to use a designated volume or percentage of locally-produced product (i.e. a local content requirement)
    - Mixing Requirements (GATT III:5) fall **within** scope of coverage
  + Interpretative Note and GATT III Note: even if the measure is applied at the border at the time of importation, it is to be considered an “internal” measure if it applies to imports and domestic goods alike.
  + EXCLUDED:
    - Customs Duties – not internal
    - Taxes not applied on a product – income taxes, SS taxes, Payroll taxes
    - Subsidies (GATT III:8)
    - Government Procurement (GATT III:8)
    - Film Quotas (GATT IV)
* General Exceptions to NT: GATT XX (general) and GATT XXI (national security)
* Articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. “This general principle informs the rest of Article III.” *Japan – Alcoholic Beverages II (1996)*.

### Fiscal Measures

#### National Treatment Test for Internal Taxation on Like Products

* GATT III:2, first sentence – *The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to* ***internal*** *taxes or other* ***internal*** *charges of any kind* ***in excess*** *of those applied, directly or indirectly, to* ***like*** *domestic* ***products****.*
* Three-tier test
  + (1) The measure at issue is an internal tax or other internal charge which is applied directly or indirectly on products;
    - Internal
      * NOT customs duties or other border charges
    - On Products
      * Value added taxes, sales taxes and excise duties
      * NOT income taxes since they are not taxes on products.
  + (2) The imported and domestic products are like products (Wu p. 232); and
    - The concept of “like products” in III:2, first sentence, should be construed narrowly because of the existence of the concept of “directly competitive or substitutable products” used in the second sentence of III:2. Appellate Body, *Japan – Alcoholic Beverages II (1996)*.
    - Criteria for determining, on a case-by-base basis, whether a product is similar: the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature and quality;classification under the same HS tariff heading or sub-heading (only if tariff heading is sufficiently detailed) *Japan – Alcoholic Beverages II (1996)*.
  + (3) The imported products are taxed in excess of the domestic products.
    - No *de minimis* standard – even the smallest amount of excess is too much. *Japan – Alcoholic Beverages II (1996)*.
    - Not conditional on a “trade effects test” – “it is irrelevant that the ‘trade effects’ of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent…” *Japan – Alcoholic Beverages II (1996)*.
  + Note: GATT III:1 provides that internal taxation must not be applied so as to afford protection to domestic production. However, according to AB in *Japan – Alcoholic Beverages II (1996)*, the presence of a protective application need not be established separately from the specific requirements of GATT III:2, first sentence.

#### National Treatment Test for Internal Taxation on Directly Competitive or Substitutable Products

* GATT III:2, second sentence – *Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.\**
* \*Ad Article III, paragraph 2 – *A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a* ***directly competitive or substitutable product*** *which was not similarly taxed.*
* Four-Tier Test (*Japan – Alcoholic Beverages II (1996)*)
  + (1) Measure at issue is an internal tax or other internal charge on products;
    - Internal
      * NOT customs duties or other border charges
    - On Products
      * Value added taxes, sales taxes and excise duties
      * NOT income taxes since they are not taxes on products.
  + (2) Imported and domestic products are directly competitive or substitutable;
    - “Directly competitive or substitutable product” (DCS) Test (Wu p. 225)
      * Factors to consider: physical characteristics, common end-uses, tariff classifications, and “market place” (including looking at cross-price elasticity).
  + (3) The imported and domestic products are dissimilarly taxed; and
    - Domestic and Foreign: Not similarly taxed?
    - Is the differential:
      * De minimis 🡪 no violation (*Japan – Alcoholic Beverages II (1996)*)
      * In between 🡪 Consider other factors (see (4) below)
      * Significant 🡪 violation
  + (4) The dissimilar taxation is applied so as to afford protection to domestic production (Wu p. 228).
    - Separate issue from dissimilarly taxed. *Japan – Alcoholic Beverages II (1996)*.
    - Criteria: structure and application of the measure – look at design, architecture, and revealing structure of a measure. *Japan – Alcoholic Beverages II (1996)*.
    - *Chile – Alcoholic Beverages (2000)* – 75% of the domestically produced products fell in the lower tax bracket and 95% of the imported products fell in the higher tax bracket, but at the same time the majority of the products falling in that higher tax bracket were domestically produced products. AB found that this did not exclude that the tax measure was inconsistent with III:2, second sentence.
    - The magnitude of the tax differential may be evidence of the protective application of a tax measure. *Japan – Alcoholic Beverages II (1996)*.
    - The subjective intent of the legislator or regulator is irrelevant. *Japan – Alcoholic Beverages II (1996)*.

#### Japan – Alcoholic Beverages II (DS8, DS10, DS11)

* Parties
  + Complainants: US, European Communities, Canada
  + Respondent: Japan
* Agreement: GATT Art. III
* Measure and Product at Issue: Japanese Liquor Tax Law established a system of internal taxes applicable to all liquors at different tax rates depending on which alcoholic content category they fell within. The tax law at issue taxed shochu at a lower rate than the other products. Other products included vodka, liquers, gin, genever, rum, whiskey, and brandy.
* Key Panel/AB Findings
  + GATT Art. III:2 (national treatment – taxes and charges), first sentence (like products):
    - AB upheld the Panel’s finding that vodka and shochu are like products and vodka was taxed in excess of shochu, in violation of Art. III:2, first sentence
    - Accepted the Panel’s interpretation that measure is inconsistent with Art. III:2 first sentence if: (i) the taxed imported and domestic products are like; and (ii) the taxes applied to the imported products are in excess of those applied to the like domestic products.
      * Like products:
        + Should be construed narrowly.
        + Determined on a case-by-base basis looking at product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature and quality.
        + Uniform tariff classification can be relevant in determining what are “like products.” However this is different from “tariff bindings” which can be too broad. Many least-developed countries have bindings in their schedules which include broad ranges of products that cut across several different HS tariff headings.
      * In Excess of: not conditional on a trade effects test nor is it qualified by a de minimis standard.
  + GATT Art. III:2 (national treatment – taxes and charges), second sentence (directly competitive or substitutable products):
    - AB upheld the Panel’s finding that shochu and whiskey, brandy, etc. were not similarly taxed so as to afford protection to domestic production, in violation of Art. III:2, second sentence.
    - Modifying some of the Panel’s reasoning, AB clarified three separate issues that must be addressed to determine whether a certain measure is inconsistent with Art. III:2, second sentence:
      * (i) whether imported and domestic products are directly competitive or substitutable products;
        + Products may not be “like” under first sentence but could still fall into this broader category.
        + Factors to consider: physical characteristics, common end-uses, tariff classifications, and “market place” (including looking at cross-price elasticity).
      * (ii) whether the directly competitive or substitutable imported and domestic products are not similarly taxed; and
        + Not the same as “in excess of” in the first sentence.
        + Tax burden on imported products must be heavier than on directly competitive or substitutable domestic products, and that burden must be more than de minimis in any given case.
      * (iii) whether the dissimilar taxation of the directly competitive or substitutable imported and domestic products is applied so as to afford protection to domestic production.
        + Not an issue of intent.
        + Examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.
  + GATT Art. III:1 (national treatment – general principles): AB agreed with the Panel that Art. III:1, as a provision containing general principles, informs the rest of Art. III, and further elaborated that, because of the textual differences in the two sentences, Art. III:1 informs the first and second sentences of Art. III:2 in different ways.
  + Status of prior panel reports:
    - AB reversed Panel’s finding that adopted GATT and WTO panel reports constitute subsequent practice under VCLT Art. 31(3)(b). a/k/a adopted panel reports are not binding!
    - AB found, however, that such reports create “legitimate expectations” that should be taken into account where they are relevant to a dispute.
    - AB found that unadopted panel reports have no legal status in the GATT or WTO system since they have not been endorsed by contracting parties.

#### Chile – Alcoholic Beverages (DS87 & DS110)

* Parties
  + Complainant – European Communities
  + Respondent – Chile
* Agreement – GATT Art. III:2
* Measure and Product at Issue. Chile’s tax measures that imposed an excise tax at different rates – depending on the type of product (pisco, whisky, etc.) under the “Transitional System” and according to the degree of alcohol content under the “New Chilean System.” Pisco (domestically produced in Chile) falls under lower taxed category.
* Key Panel/AB Findings: GATT Art. III:2 (national treatment – taxes and charges), second sentence (directly competitive or substitutable products)
  + AB upheld the Panel’s finding that Chile’s new tax regime for alcoholic beverages violated the national treatment principle under Art. III:2, second sentence (Chile’s appeal was only in regard to the new regime.) The Panel found both Chile’s transitional and new tax regimes inconsistent with Art. III:2, second sentence.
  + “not similarly taxed:” AB agreed with the Panel that imported distilled spirits and Chilean pisco, as directly competitive and substitutable products, were not similarly taxed since the tax burden (47 per cent) on most of imported products (95% of imports) would be heavier than the tax burden (27 per cent) on most of the domestic products (75 per cent of domestic production). AB took the view that the relevant comparison between imported and domestic products had to be made based on a comparison of the taxation on all imported and domestic products over the entire range of categories (all alcohol despite alcoholic content), not simply a comparison of the products within each category (based on alcoholic content). This is because the Panel found, and Chile did not appeal, that the imported beverages of a specific alcohol content are directly competitive or substitutable with other domestic distilled alcoholic beverages of a different alcohol content.
    - Must be more than de minimis.
    - Should look at all directly competitive or substitutable domestic and imported products
  + “applied so as to afford protection: AB states that an examination of the design, architecture and structure of the New Chilean System “tended to reveal” that the application of dissimilar taxation of directly competitive or substitutable products would “afford protection to domestic production”, as the magnitude of difference (20 per cent) between the tax rates – 27 per cent ad valorem for alcohol content of 35º or less (75 per cent of domestic production) and 47 per cent ad valorem for alcohol content of over 39º (95 per cent of imports) – was considerable. Also, the AB stated that a measure’s purpose, objectively manifested in the design, architecture and structure of the measure, was pertinent to the task of evaluating whether that measure was applied so as to afford protection to domestic production. However, the AB rejected the Panel’s consideration of the relationship (logical connection) between Chile’s new measure and de jure discrimination (against imports) found under its traditional system. In this regard, it further said that “Members of the WTO should not be assumed, in any way, to have continued previous protection or discrimination through the adoption of a new measure, as this would come close to a ‘presumption of bad faith’”.
    - Subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry.
    - A measure’s purposes, objectively manifested in the design, architecture and structure of the measure, are intensely pertinent to the task of evaluating whether or not that measure is applied so as to afford protection to domestic production.

### Non-Fiscal Measures

#### National Treatment Test for Internal Regulation

* GATT Art. III:4 - *The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment* ***no less favourable*** *than that accorded to* ***like******products*** *of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.*
* Three-tier test (*Korea – Various Measures on Beef (2001)*)
  + The measure is a law, regulation and requirement affecting their internal sale, offering for sale, purchase, transportation, distribution or use of products;
    - Applies to domestic regulations affecting the sale and use of products
    - “Requirement” may include voluntary private action, if, and only if, there is such a nexus, i.e. a close link, between that action and the action of a government, that the government must be held responsible for that private action. *Panel, Canada – Autos (2000).*
  + The imported and domestic products are like products (Wu p. 237); and
    - Different from “like products” in Article III:2
      * Broader than the first sentence of Article III:2 but certainly not broader than the combined product scope of the two sentences of Article III:2. *EC – Asbestos (2001)*.
    - “Determination of likeness…is fundamentally, a determination about the nature and extent of a competitive relationship between and among products.” *EC – Asbestos (2001)*.
      * Nature – cross-price elasticity (qualitative)
      * Extent – quantitative
    - Criteria: (i) physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes. However, these are not a closed list of criteria. *EC – Asbestos (2001)*.
  + The imported products are accorded less favourable treatment (Wu p. 240).
    - *Korea – Various Measures on Beef (2001)*
      * “whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.”
      * A measure which does not legally require certain treatment of imports, may still be considered to accord treatment less favorable. This may be so when such measure creates incentives for market participants to behave in certain ways, and thereby has the practical effect of treating imported products less favourably.
    - *Dominican Republic – Import and Sales of Cigarettes (2005)* – panel found with respect to the tax stamp to be affixed to al cigarette packets marketed in the Dominican Republic that “although the tax stamp requirement is applied in a formally equal manner to domestic and imported cigarettes, it does modify the conditions of competition in the marketplace to the detriment of imports. The tax stamp requirement imposes additional processes and costs on imported products. It also leads to imported cigarettes being presented to final consumers in a less appealing manner.”
  + Note: Article III:4 does not specifically refer to Article III:1. Therefore, while Article III:1 has particular contextual significance in interpreting Article III:4, as it sets forth the general principle pursued by that provision, a determination of whether there has been a violation of Article III:4 does not require a separate consideration of whether a measure affords protection to domestic production.

#### EC – Asbestos (DS135)

* Parties
  + Complainant – Canada (APPELLANT)
  + Respondent – European Communities
  + Third Parties – Brazil, Zimbabwe, US
* Agreements
  + Agreement on Technical Barriers to Trade (TBT) Art. 2
  + GATT Arts. III:4, XX and XXIII:1(b)
* Measure at Issue – France’s ban on asbestos and products containing asbestos (Decree No. 96-1133).
* Product at issue – Imported asbestos (and products containing asbestos) vs certain domestic substitutes such as PVA, cellulose and glass (“PCG”) fibres (and products containing such substitutes).
* Key Panel/AB Findings
  + GATT Art. III:4 (national treatment – domestic laws and regulations): As the Appellate Body found the Panel's likeness analysis between asbestos and PCG fibres and between cement-based products containing asbestos and those containing PCG fibres insufficient, it reversed the Panel's findings that the products at issue were like and that the measure was inconsistent with Art.  III:4. The Appellate Body emphasized a competitive relationship between products as an important factor in determining likeness in the context of Art. III:4 (c.f. separate concurring opinion by one Appellate Body Member.) The Appellate Body ruled, in particular, that the Panel erred in excluding the health risks associated with asbestos from its examination of “likeness”. Then, having completed the like product analysis, the Appellate Body concluded that Canada had failed to demonstrate the likeness between either set of products, and, thus, to prove that the measure was inconsistent with Art. III:4.
    - Likeness criteria: (i) physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.
    - Note: this likeness test is essentially the same as likeness test in III:2.
    - Doesn’t say which factors carry more weight, says should do test on case-by-case basis.
  + GATT Art. XX(b) (general exceptions – necessary to protect human life or health): Having agreed with the Panel that the measure “protects human life or health” and that “no reasonably available alternative measure” existed, the Appellate Body upheld the Panel's finding that the ban was justified as an exception under Art. XX(b). The Panel also found that the measure satisfied the conditions of the Art. XX chapeau, as the measure neither led to arbitrary or unjustifiable discrimination, nor constituted a disguised restriction on international trade.
    - “Necessity” test same for XX (a), (b), and (d)
      * Does not mean indispensable (Korea – Beef)
      * Instead, must weigh and balance:
        + Contribution of the measure to the ends pursued
        + Importance of the common interests or values protected
        + Impact of the measure on imports or exports
      * Does an alternative exist which is:
        + Less trade restrictive
        + Preserves the right of the member to achieve its desired level of protection
        + Reasonably available and not unduly burdensome
  + Scope of non-violation claim (Art. XXIII:1(b)): The Appellate Body, rejecting the EC appeal, agreed with the Panel that Art. XXIII:1(b) (the non-violation provision) applied to the measure at issue, as (i) even a measure that conflicts with a substantive provision of the GATT falls within the scope of Art. XXIII:1(b); and (ii) a health measure justified under Art. XX also falls within the scope of Art. XXIII:1(b). The Panel, having applied Art. XXIII:1(b) to the measure at issue, ultimately rejected Canada's claim and found that the measure did not result in non-violation nullification or impairment under Art. XXIII:1(b), because Canada had had reason to anticipate a ban on asbestos. (Canada did not appeal the Panel's ultimate finding.)

## Most Favored Nation (MFN) and Its Exceptions

### Key Provision: GATT I:1

* GATT I:1 (goods) (GATS II:1 (services))
* “…any **advantage**, favour, privilege, or immunity granted by any contracting party to any product **originating** in or destined for any other country shall be accorded **immediately and unconditionally** to the **like product** **originating in** or destined for the territories of all other contracting parties.”
* Prohibits a country to discriminate between other countries. – **Any advantage granted to ANY other country has to be granted to all WTO Members but not all other countries.**
* Applies to *de jure* (in law) and *de facto* (in fact) discrimination. *Canada – Autos (2000)*
  + De Jure – origin-based discrimination (discriminatory by definition)
    - Reciprocal conduct test (*Panel, Canada – Autos*)
    - E.g. imposing 10% a.v. customs duty on chocolate from Newland while imposing a 20% a.v. customs duty on chocolate from other WTO Members.
  + De Facto – on their face appear origin-neutral but are in fact discriminatory. General term describing the legal conclusion that an ostensibly neutral measure transgresses a non-discrimination norm because its actual effect is to impose differentially disadvantageous consequences on certain parties, and because those differential effects are found to be wrong or unjustifiable.
    - E.g. imposing 10% a.v. customs duty on chocolate made from milk of cows that are at an altitude of more than 1,500m while imposing a 20% a.v. customs duty on chocolate made from milk of cows on other milk. Newland cows are at an altitude of more than 1,500m. while the highest point in Oldland, a major chocolate producer and exporter, is 300m above sea level.
    - E.g. *Canada – Autos (2000)* measure at issue was a customs duty exemption accorded by Canada to imports of motor vehicles by certain manufacturers. Formally speaking, there were no restrictions on the origin of the motor vehicles that were eligible for this exemption. In practice, however, the manufacturers imports only their own make of motor vehicles and those of related companies. As a result, only motor vehicles originating in a small number of countries benefited de facto from the exemption.
    - Identical Treatment Test (*EEC – Imports of Beef (1981)*) found that EC regulations, making the suspension of an import levy on beef conditional on the production of a certificate of authenticity, were inconsistent with the MFN treatment obligation under GATT Art. I:1 after it was established that the only certifying agency authorized to produce a certificate of authenticity was an agency in the U.S. Thus, it was clear that these regulations de facto discriminated against beef from Canada, the complainant in this this case.
* Rules of Origin – determine phrase “originate”
  + No WTO standard - Each country lays out its own rules or origin
  + Most common – transformation test
    - When it came in, and where it leaves, was it transformed? Was the HS code that it came on, when it leaves, is it still the same HS code? Same 6 digit? Or 4 digits? Some say it has to happen at 2 digit level.
  + Value-based test
    - Require importer to break down value
    - Base origin on how the amount is broken out
  + Net-cost approach
* Four-Tier Test of Consistency
  + Measure at issue is a measure covered by Art. I:1
    - Border measures
      * Customs duties
      * Charges of any kind imposed on or in connection with importation or exportation (e.g. import surcharges, export duties, customs fees, or quality inspection fees)
      * Charges imposed on the international transfer of payments for imports or exports
      * The method of levying such duties and charges, such as the method of assessing the base value on which the duty or charge is levied
      * All rules and formalities in connection with importation and exportation
    - Internal measures
      * Internal taxes or other internal charges (i.e. the matters referred to in Art. III:2
      * Laws, regulations, and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use of any product (i.e. the matters referred to in Art. III:4)
    - Questionable measures?
      * Applies to safeguard measures although the Agreement on Safeguards does allow, under certain conditions, the discriminatory use of safeguard measures.
      * Applies to countervailing duties
      * Applies to anti-dumping duties
    - Not within scope of Art. I:1
      * To the extent that measured covered by Art. III:8(b) (i.e. subsidies to domestic producers) fall outside the scope of application of Art. III:2 and 4, these measures also fall outside the scope of application of Art. I:1.
      * The same logic would seem to apply to laws, regulations and requirements governing government procurement, which – as discussed below – are excluded from the scope of application of Art. III:4 pursuant to Art. III:8(a)
      * Pursuant to Art. XIV:3(a), a measure that grants an advantage to adjacent countries in order to facilitate frontier traffic, is not subject to Art. I:1
  + Measure grants an ‘advantage’ – p. 323
    - “any advantage, favour, privilege, or immunity granted by any [Member]”
    - Given broad meaning in the case law.
    - EC – Bananas III (1997) – measure that creates “more favourable competitive opportunities” or affects the commercial relationship between products of different origins.
    - *Canada – Autos (2000)* – stressed “any”
    - *US – MFN Footwear* (1992) – Art. I:1 does not permit balancing less advantageous treatment with more advantageous treatment.
  + Products concerned are ‘like products’
    - *Spain – Unroasted Coffee (1981)* – In examining whether the various types of unroasted coffee were like products under Art. I:1, the panel considered: (1) the physical characteristics of the products; (2) their end-use; and (3) tariff regimes of other Members. Panel found they were like products given that they are generally regarded as single product and other Members don’t apply different tariff rates to different types of coffee.
    - Case law for Art. III will likely inform interpretation of like products for Art. I:1. Future case law will clarify whether the concept of like products in Art. I:1 has as narrow a scope as the concept in Art. IIII:2, first sentence; as broad a scope as the concept in Art. III:4; or a scope that lies somewhere in between.
  + Advantage at issue is accorded ‘immediately and unconditionally’ to all like products concerned, irrespective of their origin or destination
    - “immediately” – no time should lapse between granting an advantage to a product and according hat advantage to all like products.
    - “unconditionally”
      * Strict textualist – no conditions allowed (adopted by most people)
        + *Indonesia-Autos (1998)* – WTO panel
        + “not limited by or subject to any conditions.” ***EC – Tariff Preferences (2004)***
      * Evaluate De jure/De facto
        + Reciprocal conduct test (*Canada-Autos* (200) – panel)
        + Identical treatment test (*EEC-Minimum Import Price* – GATT panel)
      * Note that all these decisions have been decided at panel level. AB has not weighed in yet.

### Exceptions

* Grandfathering (see Art. I.2. GATT)
* **Preferential trade agreements** (PTAs) – Art. XXIV GATT – customs union and free trade agreement (variants of PTAs)
* Special & differential treatment for developing countries (**Enabling Clause**)
* GATT XX exceptions
* Waiver

#### Enabling Clause

<https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm>

*1. Notwithstanding the [MFN provisions], contracting parties may accord differential & more favorable treatment to developing countries, without according such treatment to other contracting parties*

*2. These provisions apply to the following:*

*a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences(3),*

*b) . . . Non-tariff measures governed by . . . the GATT*

*c) Regional or global arrangements entered into amongst [LDCs] for the mutual reduction or elimination of tariffs and . . . non-tariff measures, on products imported from one another*

*d) Special treatment on [LDCs] . . .*

* Incorporated into GATT **1994** under provision 1(b)(iv) providing that The GATT 1994 shall consist of…other decisions between parties. 6
* Enabling Clause para. 2 – explicitly exempts Members from complying with the obligation in GATT I:1 for the purposes of providing differential and more favorable treatment to developing countries.
  + (2)(a) – GSP: Most developed country Members grant preferential tariff treatment to imports from developing countries under their respective Generalized System of Preferences (GSP) schemes.
    - US GSP: <https://ustr.gov/sites/default/files/uploads/factsheets/Trade%20Topics/Trade%20and%20Development/GSP/GSP%20statute%2019%20USC%202461%20et%20seq.pdf>
    - EU GSP Scheme: <http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/>
  + **Footnote 3** – non-discrimination requirement applies to GSP schemes. *But See* ***EC*** ***Tariff Preferences***.
* Criteria for Evoking Enabling Clause – Enabling Clause para. 3 and 4
* Who gets to decide who is a developing country?
  + UN sets who Least Developed Countries are – objective criteria
  + Developing country – self designation but may be challenged
* Can grant additional preferential treatment to certain developing countries to the exclusion of others. ***EC Tariff Preferences (DS246), AB Report (2004)***
  + Parties
    - Complainant: India
    - Respondent: European Communities
  + Agreement: GATT Art. I:1, Enabling Clause 2(a), particularly footnote 3
  + Measure at Issue: European Communities' generalized tariff preferences (“GSP”) scheme for developing countries and economies in transition. In particular, special arrangement under the scheme to combat drug production and trafficking (the “Drug Arrangements”) the benefits of which apply only to the listed 12 countries experiencing a certain gravity of drug problems.
  + Products at Issue: Products imported from India vs products imported from the **12 countries** benefiting from the Drug Arrangements under the EC GSP scheme.
  + AB Findings
    - **Nature of Enabling Clause:** Upheld two of the Panel’s findings that Enabling Clause operates as an exception to GATT I:1 and does not exclude the applicability of GATT I:1.
    - **Burden of proof (Enabling Clause):** AB noted that, as a general rule, the burden of proof for an “exception” falls on the respondent. Given “the vital role played by the Enabling Clause in the WTO system as means of stimulating economic growth and development”, however, when a measure taken pursuant to the Enabling Clause is challenged, a complaining party must allege more than mere inconsistency with Art. I:1 and must identify specific provisions of the Enabling Clause with which the scheme is allegedly inconsistent so as to define the parameters within which the responding party must make its defence under the requirements of the Enabling Clause. The AB found that India in this case sufficiently raised para. 2(a) of the Enabling Clause in making its claim of inconsistency with GATT Art. I:1
    - **Enabling Clause Paragraph 2(a):** The Appellate Body agreed with the Panel that the Enabling Clause is an “exception” to GATT Art. I:1, and concluded that the Drug Arrangements were not justified under para. 2(a) of the Enabling Clause, as the measure, inter alia, did not set out any objective criteria, that, if met, would allow for other developing countries “that are similarly affected by the drug problem” to be included as beneficiaries under the measure. In this regard, although upholding the Panel's conclusion, the Appellate Body disagreed with the Panel's reasoning and found that **not every difference in tariff treatment of GSP beneficiaries necessarily constituted discriminatory treatment.** **Granting different tariff preferences to products originating in different GSP beneficiaries is allowed under the term ‘nondiscriminatory’ in footnote 3 to para. 2, provided that the relevant tariff preferences respond positively to a particular “development, financial or trade need” and are made available on the basis of an objective standard to “all beneficiaries that share that need”.**
      * **In other words, a developed-country Member may grant additional preferential tariff treatment to some, and not to other, developing-country Members, as long as additional preferential tariff treatment is available to all similarly situated developing-country Members. Similarly situated developing-country Members are all those that have the development, financial and trade needs to which additional preferential tariff treatment is intended to respond.**

## Preferential Trade Agreements

* Regional Trade Agreements (RTAs) or Preferential Trade Agreements (PTA)
* Other PTAs outside of GATT XXIV:
  + Enabling Clause – PTAs concluded exclusively with developing countries
  + GATS V – PTAs for trade in services
* Original Purpose – exception to MFN but can be used as exception to other GATT provisions as well. *AB, Turkey – Textiles*.
* GATT Art. XXIV:4 – Allows under certain conditions, RTAs/PTAs establishing customs unions or free trade areas.

|  |  |  |
| --- | --- | --- |
|  | **Preferential Trade Agreement** | |
|  | **Free Trade Area** | **Customs Union** |
| Definition | *GATT XXIV:8(b)* | *GATT XXIV:8(a)* |
| Internal Requirement | 🡨 Same 🡪  Liberalize “substantially all trade” between PTA members | |
| External Requirement (countries outside of PTA) | “shall not be higher or more restrictive” | “substantially the same”  “shall not on the whole be higher or more restrictive than the general incidence” 5(a) |
| Notification Requirement | 🡨 GATT XXIV:7 🡪 (Wu p. 139) | |

* Reasons
  + Trade-creation v. Trade diversion – preferential trade opening allows some domestic production to be replaced by imports from more efficient firms located in preference-receiving countries, leading to welfare gains (trade creation). At the same time, RTAs may reduce imports from more efficient non-member countries, implying a welfare loss (trade diversion). The net welfare effect of RTAs depends on the relative magnitude of these opposing trends.
  + Enhance v. Undermine later multilateral trade liberalization
  + Political
* Do PTAs with Non-WTO Members Also Serve as a MFN Exception?
  + GATT XXIV:3 – “The provisions of this Agreement shall not be construed to prevent: (a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic…”
  + GATT Art. XXIV: 5, Chapeau – “…the provisions of this Agreement shall not prevent…the formation of a customs union or a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area…Provided that:… “
* Litigating Consistency of PTAs – *AB, Turkey-Textiles* held that WTO panels can review the consistency of PTAs with the multilateral rules

### Customs Unions

* Two Conditions. *AB Report*, *Turkey-Textiles (1999)*
  + (1) The measure at issue is introduced upon the formation of a customs union that fully meets the requirements of GATT Art. XXIV:8(a) and 5(a).
  + (2) The formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.
* First Condition: Definition of “Customs Union”
  + GATT XXIV:8(a) “A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that”
    - **Internal Requirement** – “(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,”
      * WTO Members have never reached an agreement on the term “substantially” all in this provision.
      * Some restrictions to trade are allowed under Art. XI-XV and XX.
    - **External Requirement** – “(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union”
      * It is not required that each constituent members of a customs union applies the same duties and other regulations of commerce as other constituent members with respect to third countries. “Substantially the same” offers a certain degree of flexibility to the constituent members of a customs union in the creation of a common commercial policy. However, this flexibility is limited. Something closely approximating sameness is definitely required. *AB Report*, *Turkey-Textiles (1999)*
  + GATT Art. XXIV:5(a)
    - **External Requirement** – “with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be”
    - Understanding on Article XXIV
      * “general incidence of duties” must be based on overall assessment of weighted average tariff rates and of customs duties collected.
      * “applicable” – Applied rate of duty as opposed to bound rate of duty must be used.
      * “regulations of commerce” – examination of individual measures, regulations, products covered and trade flows affected may be required on top of duties
      * “on the whole” and “general incidence” – “overall assessment of weighted average tariff rates and of customs duties collected…based on…previous representative period…” Interpretation of Article XXIV
  + GATT Art. XXIV:6
    - If, in the formation of a customs union, a constituent member must increase a bound duty (because the duty of the customs union is higher than the bound duty applied by that Member before the formation of the customs union), Art. XXIV:6 requires that the procedure for modification of schedules, set out in Art. XXVIII be applied.
    - If the reduction in the previously applied duty of other constituent members of the customs union is not sufficient to provide the necessary compensatory adjustment, the customs union must offer compensation. This compensation may take the form of reductions of duties on other tariff lines. If no agreement on compensatory adjustment can be reached, the customs union shall nevertheless be free to modify or withdraw the concessions at issue; and the affected WTO Members shall then be free to withdraw substantially equivalent concessions in accordance with Art. XXVIII.
* Second Condition: Conditions for the Justification of GATT-Inconsistency
  + E.g. *AB Report*, *Turkey-Textiles (1999) –* Turkey argued that, unless it was allowed to introduce quantitative restrictions on textiles and clothing from India, Turkey would be prevented from forming a customs union with the EC. AB rejected Turkey’s argument.

### Free Trade Areas

* Two Conditions.
  + (1) The measure at issue is introduced upon the formation of a free trade area that fully meets the requirements of GATT Art. XXIV:8(b) and 5(b).
  + (2) The formation of the free trade area would be prevented if it were not allowed to introduce the measure at issue.
* First Condition: Definition of a “Free Trade Area”
  + GATT XXIV:8(b)
    - **Internal Requirement** – “A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.”
      * WTO Members have never reached an agreement on the term “substantially” all in this provision. “substantially all the trade” not the same as all the trade and considerable more than merely some of the trade. *AB Report*, *Turkey-Textiles (1999)*
      * Some restrictions to trade are allowed under Art. XI-XV and XX.
      * Establishes only a standard for internal trade between constituent members. There is no standard, i.e. there are no requirements, for the trade of constituent members with third countries.
  + GATT Art. XXIV:5(b)
    - **External Requirement –** “with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area…”
      * “Existing” – Look at bound rates as opposed to applied rates. Interpretation of GATT XXIV clarifies that WTO Members entering into an FTA can raise their level of duties from the applied rate to the bound rate without violating GATT XIV:5(b).
* Second Condition: Conditions for the Justification of GATT-Inconsistency
  + No relevant WTO case law on this point yet.

### Interim Agreements

* GATT Art. XXIV – measures that are otherwise GATT inconsistent may be justified if they are taken in the context of interim agreements leading to the formation of customs unions and free trade areas meeting the requirements.
* Art. XXIV:5(c) – “Any interim agreement…shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.”
  + “reasonable period of time” – Understanding on Article XXIV provides that reasonable period of time should not exceed ten years except in exceptional circumstances.

### Special and Differential Treatment of Developing-Country Members

* Enabling Clause

*(1) …[Members] may accord differential and more favourable treatment to developing countries, without according such treatment to other [Members].*

*(2) The provisions of paragraph 1 apply to the following:*

*…*

*(c) Regional or global arrangements entered into amongst less-developed [Members] for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the [Ministerial Conference], for the mutual reduction or elimination of non-tariff measures, on products imported from one another.*

* The conditions that regional trade agreements under the Enabling Clause must meet are less demanding and less specific than those set out in Art. XXIV.

### Trans-Pacific Partnership (TPP)

* Parties – U.S., Canada, 10 countries in the Asia-Pacific region (Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam)
* Major provisions – eliminates tariffs on goods and services, tears down a host of non-tariff barriers and aims to harmonize all sorts of regulations.
* Text – <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>
* Preamble
* Chapter 1. Initial Provisions and General Definitions
* Chapter 2. National Treatment and Market Access for Goods
* Chapter 28. Dispute Settlement
* Chapter 29. Exceptions
  + “For the purposes of Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Rules of Origin and Origin Procedures), Chapter 4 (Textiles and Apparel), Chapter 5 (Customs Administration and Trade Facilitation), Chapter 7 (Sanitary and Phytosanitary Measures), Chapter 8 (Technical Barriers to Trade) and Chapter 17 (State-Owned Enterprises and Designated Monopolies), Article XX of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, mutatis mutandis.”

### India-Mercosur Preferential Trade Agreement

* Text – <http://commerce.nic.in/trade/international_ta_indmer.asp>
* India and Brazil here only includes 452 and 450 products. This is not “substantially all trade” under XXIV:8(a) for FTAs, but they are developing countries so this is allowed under Enabling Clause.

### Mega-Regional Trade Agreements

* Definition – deep integration partnerships between countries or regions with a major share of world trade and foreign direct investment (FDI), and in which two or more of the parties are in a paramount driver position, or serve as hubs, in global value chains. Beyond market access, emphasis in this integration is on the quest for regulatory compatibility and a rules basket aimed at ironing out differences in investment and business climates.
* Why?
  + The WTO stalled as a venue for trade-liberalizing negotiations.
  + Improved and/or preferential access to new markets
  + Economic stimulus in an era of tight budgets
  + Upgrading, refreshing, building out “old” agreements
  + Achieving higher ambition agreements.
  + Addressing new issues and creating potential precedents for future multilateral agreements.
  + Improving competitiveness
  + Continue trade liberalization for principles sake
  + Fear of being locked out
  + Protecting existing preferential trade arrangements
  + Easier to help write rules now than to accede to them later.

# Regulatory Barriers & Sector-Specific Agreements

## Technical Barriers to Trade

### Scope of Application of the TBT Agreement

#### Measures to which the TBT Agreement Applies

* The rules of the TBT apply to: (1) technical regulations; (2) standards; and (3) conformity assessment procedures.
* TBT applies to technical regulations, standards and conformity assessment procedures relating to: (1) products (including industrial and agricultural products); and (2) processes and production methods (PPMs).
  + Debate over whether the processes and production methods include non-product-related processes and production methods (NPR-PPMs) – processes and production methods that do not affect the characteristics of the final product put on the market. E.g. prohibition of the use of environmentally unfriendly sources of energy, or the use of child labor.
* Technical Regulations (mandatory)
  + Definition – “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.” *TBT Annex 1.1*.
  + Three-tier test for determining whether a measure is a technical regulations under the TBT Agreement (AB, *EC Asbestos (2001)*):
    - (1) Measure must apply to an identifiable product or group of products – technical regulation does not have to “expressly identify” the product but simply make it “identifiable,” for instance, through the characteristic that is the subject of regulation.
    - (2) Measure must lay down product characteristics, which may be intrinsic or related to the product, and which may be prescribed or imposed in a positive or negative form
      * Intrinsic – composition, size, shape, color, texture, harness, tensile strength, flammability, conductivity, density, or viscosity
      * Extrinsic – means of identification, presentation and appearance
    - **(3) Compliance with the product characteristics laid down in the measure must be mandatory**
  + E.g. law requiring that batteries are rechargeable, law requiring that wine be sold in green glass bottles
  + Rules applicable to technical regulations – *TBT Art. 2 and 3*.
  + AB, US-Tuna II (Mexico) US legislation which did not impose the label “dolphin-safe” on imports of tuna but which conditioned its lawful use upon meeting certain criteria was a technical regulation and not a standard although tuna could be marketed in the US market without carrying the label “dolphi-safe.”
  + AB, *EC – Sardines (2002)* Measure at issue was an EC regulation setting out a number of prescriptions for the sale of “preserved sardines,” including a requirement that a product sold under the name “preserved sardines” contained only one species of sardines (*Sardina pilchardus Walbaum*), to the exclusion of other species (such as *Sardinops sagax* **although not explicitly named**).
    - Identifiable product – a measure which does not expressly identify the products to which it applies, could still be applicable to identifiable products. The tool that the AB used to determine whether, in this case, *Sardinops sagax* was an identifiable product was an examination of the way the EC Regulation was enforced. As the enforcement of the EC Regulation had led to prohibition against labelling *Sardinops sagax* as “preserved sardines,” this product was considered to be “identifiable.”
    - Product Characteristics – product characteristics include means of identification and that, therefore, the naming rule at issue definitely met the requirement of the second element.
    - Mandatory – not contested.
* Standards (optional)
  + Definition – “[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process, or production methods.” *TBT Agreement Annex 1.2*.
    - **Voluntary – compliance is not mandatory**
  + E.g. standards set by the State Administration of China for Standardization or the European Committee for Standardization
  + Companies often have little choice but to comply with these voluntary standards as non-adherence would in practice make it much more difficult to ell their products. Therefore, it is important that these voluntary standards are also subject to international disciplines under the *TBT Agreement*.
  + Rules Applicable to Standards – *TBT Art. 4 and Annex 3*.
    - Must ensure that central government standardizing bodies are bound by the disciplines included in the Code of Good Practice which appears TBT Annex 3 and take all reasonable measures to ensure that local and/or non-governmental standardizing bodies adhere to it as well. TBT 4.1.
    - Compliance to Code of Good Practice amounts ipso facto to compliance with the principles of the TBT. TBT 2.4.
    - Included in the Code are the substantive provisions provided in section below.
    - Other provisions include those to foster transparency and to encourage further creation of standards at the international level. Wu p. 616
* Technical Regulation v. Standard – The mere fact that a labeling requirement does not require the use of a particular label in order to place a product for sale on the market, does not preclude that this labelling requirement is a technical regulation. AB considered that a determination of whether a particular measure constitutes a technical regulation or a standard must be made in light of the features of the measure and the circumstances of the case. Such exercise may involve considering: (1) whether the measure consists of a law or a regulation enacted by a WTO Member; (2) whether it prescribes or prohibits particular conduct; (3) whether it sets out specific requirements that constitute the sole means of addressing a particular matter; and (4) the nature of the matter addressed by the measure. *US – Tuna II (Mexico) (2012)*.
* Conformity Assessment Procedures
  + Definition – “[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.” *TBT Agreement Annex 1.3*.
  + Explanatory note: “Conformity assessment procedures include, inter alia, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations. TBT 1.3.
  + Rules applicable to conformity assessment – *TBT Agreement Art. 5-9*.

#### Entities Covered by the TBT Agreement

* Central Government Bodies
* Extends to local government bodies and non-governmental bodies involved in the application of measures covered by TBT Agreement.
  + Non-governmental bodies – broadly defined in TBT Agreement Annex 1.8, as bodies other than central government or local government bodies.
  + Debate on whether NGOs and commercial enterprises are non-governmental bodies under the TBT.

#### Temporal Scope of Application of the TBT Agreement

* Applies to measures, which although adopted prior to 1995 (when TBT came into force), are still in force.

#### Relationship with other WTO Agreements

* Consider the more specific agreement before the more general agreement. Panel, EC – Sardines.
* GATT 1994 – measures must be consistent with both TBT Agreement and GATT 1994. Panels review TBT before GATT.
* TBT trumps GATT
* Scope of application limited in favor of two other WTO Agreements: SPS Agreement and the Agreement on Government Procurement.
  + Agreement on Government Procurement – purchasing specifications related to the production or consumption of governmental bodies do not fall within the scope of application of the TBT. However, it is a plurilateral agreement, so it does not apply to most WTO Members.
  + SPS Agreement – sanitary and phytosanitary measures are excluded from the scope of the application of the TBT Agreement.

### Substantive Provisions of the TBT Agreement

* Non-discrimination (MFN and NT)
* Not more trade-restrictive than “necessary” to achieve a legitimate objective
* Use international standards when appropriate
* Be drafted in terms of performance requirements, if possible
* Notification; reasonable period before implementation; publication

#### Nondiscrimination – MFN Treatment and National Treatment Obligations

* MFN and National Treatment Obligations apply to TBT Agreement measures
  + Technical regulations – TBT Agreement Art. 2.1
  + Standards – TBT Agreement Art. Annex 3.D
  + Conformity assessment procedures – TBT Agreement Art. 5.1.1
* National Treatment Obligation Violation under TBT Agreement Art. 2.1 established under three criteria (AB, *US – Clove Cigarettes (2012)*):
  + - The measure at issue must be a technical regulation
    - The imported and domestic products at issue must be like products
    - The treatment accorded to imported products must be less favorable than that accorded to like domestic products.
* MFN treatment obligation Violation under TBT Agreement Art. 2.1 established under three criteria (AB, *US – Tuna II (Mexico) (2012)*):
  + - The measure at issue must be a technical regulation
    - The imported and domestic products at issue must be like products
    - The treatment accorded to imported products must be less favorable than that accorded to like originating in any other country.
* Reasonable to expect that, mutatis mutandi, a similar test of consistency with the MFN treatment obligation and the national treatment obligation will apply with regard to standards and conformity assessment procedures.
* Like Products
  + Test
    - Competition-based approach (similar but different from GATT Art. III:4) – Whether products are “like” within the meaning of Article 2.1 of the TBT Agreement is a determination about the competitive relationship (as opposed to regulatory purpose), nature and extent of a competitive relationship, between the products. AB, *US – Clove Cigarettes (2012)*
    - Use four factor test to inform whether they are like under competitive-based approach – analysis of the traditional “likeness” criteria (four factor test), namely (AB, *US – Clove Cigarettes (2012)*)
      * Physical characteristics
      * End-uses
      * Consumer tastes and habits, and
      * Tariff classification
    - Note: Unclear how this is different from Panel approach that used regulatory purpose-based test that also looked at four factors.
  + End uses – what matters in determining a product’s end-use is that a product is capable of performing it, not that such end-use represents the principal or the most common end-use of that product. AB, *US – Clove Cigarettes (2012)*.
  + Consumer Tastes and Habits (AB, *US – Clove Cigarettes (2012))*
    - Panel should assess the tastes and habits of all relevant consumers of the products at issue, not only of the main consumers.
    - It is not necessary to demonstrate that the products are substitutable for all consumers or that they actually compete in the entire market. Rather, if the products are highly substitutable for some consumers but not for others, this may also support a finding that the products are like.
* Treatment no Less Favorable
  + Prohibits both de jure and de facto discrimination. AB, *US – Clove Cigarettes (2012)*.
    - When no de jure discrimination, just de facto discrimination, “the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favorable treatment…”
  + Legitimate regulatory distinction exemption
    - In such cases of just de facto discrimination, a panel must “further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.”
      * Sort of a stand in for a GATT Art. XX. General Exceptions.
    - To determine whether the detrimental impact stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination, a panel must: “carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether the technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products.”
  + Product Scope – national treatment obligation calls for comparison of treatment accorded to the group of products imported from the complaining Member and the treatment accorded to the group of all like domestic products (not just specific product at issue). AB, *US – Clove Cigarettes (2012)*
  + Temporal Scope – AB says this is flexible.
  + Does not matter if imported product could get access to advantage, for example, by complying with all applicable conditions. Rather…a determination of whether imported products are accorded less favorable treatment…calls for an analysis of whether the contested measure modifies the conditions of competition to the detriment of imported products. *AB, US-Tuna II (Mexico)*

#### Refrain from Creating Unnecessary Obstacles to International Trade

* Three-tier test of consistency to refrain from creating unnecessary obstacles to International Trade: (1) whether the measure at issue is trade restrictive; (2) whether the measure at issue fulfills a legitimate objective; and (3) whether the measure at issue is not more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfilment would create.
  + Technical regulations – TBT Agreement Art. 2.2.
    - [T]echnical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective.”
  + Standards – TBT Agreement Annex 3.E
  + Conformity assessment procedures – TBT Agreement Art. 5.1.2.
* Trade Restrictive
  + “having a limiting effect on trade” AB, US – Tuna II (Mexico) (2012)
  + Threshold issue
* Fulfilling a Legitimate Objective
  + How to establish the objective pursued by the measure at issue
    - Panel not bound by a Member’s characterization of the objectives it pursues through the measure. AB, *US – Tuna II (Mexico) (2012)*
  + Which objectives are legitimate objectives within the meaning of Art. 2.2
    - Include, but not limited to, national security; prevention of deceptive practices; protection of human health and safety; animal or plant life or health; and protection of the environment. TBT Art. 2.2.
    - If objective listed under TBT Art. 2.2 , then per se legitimate; otherwise, the panel must make a determination. *AB, US-COOL.*
  + When a measure fulfills a legitimate objective
    - Concerned with the “degree of contribution” the measure makes toward the achievement of the legitimate objective. AB, *US – Tuna II (Mexico) (2012)*
  + How to establish whether, and if so, to what extent, the measure at issue fulfills the legitimate objective pursued
    - May be discerned from design, structure and operation of the measure, as well as from evidence relating to the application of the measure. AB, *US – Tuna II (Mexico) (2012)*
* Not More Trade-Restrictive Than Necessary – Chapeau of Art 2.2.
  + It is not the measure but the trade-restrictiveness of the measure that is assessed for necessity.
  + Relational Analysis – consider following factors: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfillment of the objective(s) pursued by the Member through the measure. AB, *US – Tuna II (Mexico) (2012)*
  + Comparative Analysis - “a comparison of the challenged measure and possible alternative measures should be undertaken.” AB, *US – Tuna II (Mexico) (2012).*
    - Factors to weight and balance: (1) whether the proposed alternative measure is less trade-restrictive; (2) whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create; and (3) whether it is reasonably available.
  + Requirement to consider the risks non-fulfillment would create.
    - Consider: (1) available scientific information; (2) related processing technology; or (3) intended end-uses of products. AB, *US – Tuna II (Mexico) (2012).*

#### Base Technical Barriers to Trade on International Standards

* Members are required to base their measures on international standards.
  + Technical regulations – TBT Agreement Art. 2.4.
  + Standards – TBT Agreement Annex 3.F
  + Conformity Assessment Procedures – TBT Agreement Art. 5.4.
* Three-tier test of consistency:
  + Whether there exists a relevant international standard
  + Whether the relevant international standard is used as a basis for the technical regulation at issue; and
  + Whether the relevant international standard is an effective and appropriate means for the fulfillment of the legitimate objectives pursued.
* Relevant International Standard
  + When is a standard an international standard? When it is approved by an international standardizing body. AB, *US – Tuna II (Mexico) (2012).*
  + What is an international standardizing body? Has to be open to all WTO Members (TBT Agreement Annex 1) without discrimination. AB, *US – Tuna II (Mexico) (2012).*
  + When is an international standard a relevant international standard? May include when addresses product at issue. *EC – Sardines (2002)*.
  + How must an international standard be adopted? Does not need to be adopted by consensus. *EC – Sardines (2002)*.
* Used as a Basis
  + Imposes the obligation to employ or apply the international standard as the principal constituent or fundamental principle for the purpose of enacting the technical regulation. *EC – Sardines (2002)*.
  + All relevant parts of an international standard, not only some of them, must form the basis of a technical regulation. *EC-Sardines (2002)*.
* Ineffective or Inappropriate Means
  + Whether a legitimate objective is pursued
    - Include, but not limited to, national security; prevention of deceptive practices; protection of human health and safety; animal or plant life or health; and protection of the environment. TBT Art. 2.2.
  + How to assess the ineffectiveness and inappropriateness of the international standard (*EC – Sardines (2002)*)
    - Ineffective – does not have the function of accomplishing, having a result, or brought to bear
    - Inappropriate – not specially suitable, proper, or fitting for the fulfillment thereof
  + Who has the burden of proof with regard to the ineffectiveness or inappropriateness of the relevant international standard
    - Complainant must demonstrate that the international standard in question is both an effective and an appropriate means to fulfill the legitimate objective. *EC – Sardines (2002)*.

#### Other Substantive Provisions

* Equivalence and Mutual Recognition – WTO Members must consider accepting, as equivalent, the technical regulations of other Members if the foreign technical regulations adequately fulfil the legitimate objectives pursued by their own measures. TBT Art. 2.7
* Product Requirements in terms of Performance – For technical regulations and standards, prefer that Members adopt technical regulations on the basis of product requirements in terms of performance rather than design or descriptive characteristics. TBT Agreement Art. 2.8 and Annex 3.1.
* Notification of WTO; reasonable period before implementation; publication – TBT Art. 2.5, 2.9, 2.11, and 2.12 for technical regulations; TBT Annex 3, L-P for standards.
* Special and Differential Treatment for Developing-Country Members
  + Members shall provide “differential and more favourable treatment” to developing-country Members. TBT 12.1. Members shall take into account their “special development, financial and trade needs. TBT 12.2 and 12.3.

### Institutional and Procedural Provisions of the TBT Agreement

#### TBT Committee

* Composed of representatives of all WTO Members

#### Dispute Settlement

* Consultations and settlement of disputes shall follow the provisions of GATT Art. XXII and XXIII.

#### Technical Assistance

* Members shall, upon request, advise or provide technical assistance to requesting Members, in particular to developing-country Members. TBT Agreement Art. 11.

### US – Clove Cigarette (DS406)

* Parties
  + Complainant: Indonesia
  + Respondent: U.S.
  + Third Parties: Brazil, Colombia, Dominican Republic, European Union, Guatemala, Mexico, Norway, Turkey
* Synopsis: In the U.S., Section 907 of the Family Smoking Prevention Tobacco Control Act of 2009 prohibits the production or sale in the U.S. of cigarettes containing certain additives, including clove (60-80% tobacco content), but would continue to permit the production and sale of regular or menthol (90% tobacco content) cigarettes. Indonesia alleged that Section 907 is inconsistent with GATT III:4, TBT Art. 2, and various provisions of the SPS Agreement.
* Key Findings:
  + Does measure fall under TBT Agreement?
    - Panel and AB found that Section 907 is a “technical regulation.”
  + Is the ban inconsistent with the national treatment obligation in TBT Agreement Art. 2.1?
    - Are the imported and domestic products at issue like products?
      * Panel found that clove and menthol-flavored cigarettes are “like products” based in part on its findings that both types of cigarettes are flavored and appeal to youth. Panel used regulatory purpose approach and focused on health objectives of Section 907.
      * AB found they were like products but under a different assessment method than panel. The AB considered that the determination of whether products are “like” within the meaning of Article 2.1 of the TBT Agreement is a determination about the competitive relationship (as opposed to regulatory purpose) between the products, based on an analysis of the traditional “likeness” criteria, namely, (1) physical characteristics, (2) end-uses, (3) consumer tastes and habits, and (4) tariff classification.
        + End uses – what matters in determining a product’s end-use is that a product is capable of performing it, not that such end-use represents the principal or the most common end-use of that product. Both clove and menthol cigarettes share the end-uses of satisfying an addiction to nicotine and creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke.
        + Consumer Tastes and Habits –

Panel should assess the tastes and habits of all relevant consumers of the products at issue, not only of the main consumers. Panel was wrong to confine analysis of consumer tastes and habits to young and potential young smokers.

It is not necessary to demonstrate that the products are substitutable for all consumers or that they actually compete in the entire market. Rather, if the products are highly substitutable for some consumers but not for others, this may also support a finding that the products are like.

However, this does not undermine Panel’s finding because the degree of competition and substitutability that the panel found for young and potential young smokers is sufficiently high to support a finding of likeness.

* + - Is the treatment accorded to imported products less favorable than that accorded to like domestic products?
      * The AB interpreted the obligation to accord “treatment no less favourable” in TBT Agreement Art. 2.1 as not prohibiting detrimental impact on imports that stems exclusively from a legitimate regulatory distinction. In determining whether a measure's detrimental impact on imports constitutes less favourable treatment a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even handed. Based on this interpretation of “treatment no less favourable”, the AB found that the design, architecture, revealing structure, operation, and application of Section 907(a)(1)(A) strongly suggest that the detrimental impact on competitive opportunities for clove cigarettes reflects discrimination against the group of like products imported from Indonesia.
      * Product Scope – national treatment obligation calls for comparison of treatment accorded to the group of products imported from the complaining Member and the treatment accorded to the group of like domestic products (not just domestic clove cigarettes but all like products). AB found that panel did not address domestic flavored cigarettes. However, AB found that their inclusion in the comparison would not have altered panel’s ultimate decision that the group of like domestic products essentially consisted of domestic menthol cigarettes, since clove cigarettes had a relatively low share in the US market.
      * Temporal Scope – Art. 2.2 doesn’t really define this so this is up to panel.
  + Is the ban inconsistent with obligation to refrain from creating unnecessary obstacles to International Trade in TBT Agreement Art. 2.2?
    - Is the measure at issue trade restrictive?
    - Does the measure at issue fulfill a legitimate objective?
    - Is the measure at issue more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfilment would create?
      * Panel found that Indonesia failed to demonstrate that the ban is more trade restrictive than necessary based, in part, on its finding that there is extensive scientific evidence supporting the conclusion that banning clove and other flavored cigarettes could contribute to reducing youth smoking.

### EC – Seals (DS400)

* Parties
  + Complainant – Canada, Norway
  + Respondent – EC
  + Third Parties – Argentina, China, Colombia, Ecuador, Iceland, Japan, Mexico, Norway, Russian Federation, U.S.
* Measure at issue: Regulations of the European Union (“EU Seal Regime”) generally prohibiting the importation and placing on the market of seal products, with certain exceptions, including for seal products derived from hunts conducted by Inuit or indigenous communities (IC exception); hunts conducted for marine resource management purposes (MRM exception); and seal products brought by travelers into the EU in limited circumstances (Travelers exception).
* Product at issue: Products, either processed or unprocessed, deriving or obtained from seals
* Key Panel/AB Findings
  + TBT Annex 1.1 (technical regulation): The Appellate Body reversed the Panel’s intermediate finding that the EU Seal Regime lays down “product characteristics”, and consequently reversed the Panel’s finding that the EU Seal Regime was a “technical regulation” within the meaning of TBT Annex 1.1.
    - Break down of measure:
      * Prohibition of pure seal products does not prescribe or impose any characteristics on such products.
      * Prohibition on seal-containing products (“mixed products”) – administrative provisions serve to identify the exempted products, through the type and purpose of the relevant seal hunt and the identity of the hunger. These are ancillary aspects that do not render measures to be technical regulations.
      * Conditions under exceptions – nothing suggests that the identity of the hunter, the type of hunt or the purpose of the hunt could be viewed as product characteristics.
    - Elements of technical regulation
      * Identifiable products – not contested
      * Mandatory compliance – not contested
      * Lays down product characteristics – contested. The Panel determined that the prohibition on seal-containing products lays down a product characteristic in the negative form by requiring that products placed on the EU market not contain seal. The Panel also found that the EU Seal Regime sets out, through its exceptions, the applicable administrative provisions for products with certain characteristics.
        + Product characteristics – might relate to a product’s composition, size, shape, color, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity.
        + Related Processes and production methods – “subject matter of a technical regulation may consist of a process or production method that is related to product characteristics.
    - The Appellate Body was unable to complete the legal analysis and thus did not rule on whether the EU Seal Regime lays down “related processes and production methods” within the meaning of TBT Annex 1.1. The Appellate Body therefore declared moot and of no legal effect the Panel’s conclusions under TBT Arts. 2.1, 2.2, 5.1.2, and 5.2.1.
  + GATT Art. I:1 (most-favoured-nation treatment): The Appellate Body upheld the Panel’s finding that the legal standard for the non-discrimination obligations under TBT Art. 2.1 does not apply equally to claims under GATT Art. I:1. The Appellate Body therefore upheld the Panel's finding that the EU Seal Regime was inconsistent with GATT Art. I:1 in respect of the IC exception, as it did not “immediately and unconditionally” extend the same market access advantage to Canadian and Norwegian seal products that it accorded to seal products from Greenland.
  + GATT Art. III:4 (national treatment – domestic laws and regulations): The Appellate Body upheld the Panel's finding that the legal standard for the non-discrimination obligations under TBT Art. 2.1 does not apply equally to claims under GATT Art. III:4. The European Union did not appeal the Panel's finding that the EU Seal Regime was inconsistent with GATT Art. III:4 in respect of the MRM exception, as it accorded less favourable treatment to imported Canadian and Norwegian seal products than that accorded to like domestic products.
  + GATT Art. XX(a) (general exceptions – necessary to protect public morals): The Appellate Body upheld the Panel's finding that the EU Seal Regime was “necessary to protect public morals” within the meaning of GATT Art. XX(a).
    - Public morals – “standards of right and wrong conduct maintained by or on behalf of the” Member (decided by each WTO Member).
    - Open to dynamic interpretation (what is public moral is not stuck on what was decided years ago).
  + The “chapeau” of GATT Art. XX (general exceptions): The Appellate Body found that the Panel erred in applying the same legal test to the chapeau of GATT Art. XX as it applied to TBT Art. 2.1, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau. The Appellate Body therefore reversed the Panel's findings under the chapeau. However, the Appellate Body completed the analysis and found, as did the Panel, that the European Union had not demonstrated that the EU Seal Regime, in particular with respect to the IC exception, met the requirements of the chapeau of GATT Art. XX. Therefore, the Appellate Body found that the European Union had not justified the EU Seal Regime under GATT Art. XX(a).

## Sanitary & Phytosanitary Standards

### Scope of Application of the SPS Agreement

#### Measures to which the SPS Agreement Applies

* Substantive Scope - measure must be (SPS Agreement 1.1):
  + A sanitary or phytosanitary measure
  + A measure that may affect international trade
* Sanitary or Phytosanitary measure (SPS Measure) is one that (SPS Agreement Annex A para. 1):
  + Has one of the following purposes within the territory of the Member:

|  |  |  |  |
| --- | --- | --- | --- |
|  | What measure is **aiming** to protect | | |
| Protection Against Risks From: | Plant | Animals | Humans |
| Entry, establishment, or spread of pests\* | X | X | X |
| Diseases carried or caused by organisms | X | X |  |
| Diseases carried by animals, plants, or products thereof |  |  | X |
| Additives, contaminants, toxins, or other disease-causing organisms in foods, beverages, or foodstuffs |  | X | X |
| \*Also can be used to “prevent or limit other damage” | | | |

*Note: “Aims” from Australia – Apples (2010 in which AB pointed out that the fundamental element of this definition relates to the purpose or intention of the measure, which is to be ascertained on the basis of objective considerations)*

* + Is a type covered by the open, illustrative list in the final paragraph of Annex A(1)
    - “Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.”
* Measure that may affect international trade
  + Any measure that applies to imports
  + Only requires that the measure MAY affect international trade. Not necessary to demonstrate that an SPS measure has an actual effect on trade. *EC – Approval and Marketing of Biotech Products (2006).*

#### Types of Measures

* Overview



* (1) SPS Measure Based on International Standard – SPS Ar. 3.2.
  + Criteria: based on international standard
    - “based on” – does not require absolute conformity (EC – Hormones (US))
  + Rebuttable presumption that “necessary” and consistent with MFN and NT
  + Indicative List (SPS Annex A (3))
    - Codex Alimentarius Commission (food safety)
    - International Office of Epizootics (animal health & zoonoses)
    - International Plant Protection Convention (plant health)
  + Impose SPS measures resulting in a higher level of protection than would be achieved by the relevant international standard (Art. 3.3)
    - Right to deviate from international standards is not an absolute or unqualified right. Either, (1) there must be scientific justification for the SPS measure (defined in a footnote as a scientific examination and evaluation in accordance with the rules of the SPS Agreement); or (2) the measure must be a result of the level of protection chosen by the Member in accordance with Art. 5.1-5.8. (Note under both options that a risk assessment under Art. 5.1. is required). *EC – Hormones (1998).*
* (2) Provisional SPS Measure Based on Precautionary Principle
  + Criteria: The matter has scientific insufficiency
  + The principle: Even in the absence of scientific certainty, if an action has a suspected high risk of causing harm, authorities have the discretion to regulate the action in order to safeguard the public.
  + Four prong test (SPS Art. 5.7):
    - (1) Insufficient relevant scientific information;
      * insufficiency”
        + “…If the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate risk assessment (US-Suspended Concession)
        + “insufficiency” ≠ “uncertainty (Japan-Apples)
    - (2) a Member may provisionally adopt SPS measures on the basis of available pertinent info;
      * A rational and objective relationship between the “available pertinent info” concerning a risk and the provisional SPS measure is required. *US/Canada – Continued Suspension (2008)*
    - (3) Members shall seek to obtain the additional information necessary for a more objective assessment; and
      * According to Japan – Agricultural Products II (1999) and US/Canada – Continued Suspension (2008):
        + The insufficiency of scientific evidence is not a perennial state, but a transitory one; as of the adoption of the provisional measure, a WTO Member must make best efforts to remedy the insufficiency
        + Art. 5.7 does not specify what actual results must be achieved; the obligation is to seek to obtain additional information; and
        + The information sought must be germane to conducting a risk assessment within the meaning of Art. 5.1.
    - (4) review the SPS measure accordingly within a reasonable period of time.
      * “within a reasonable period of time” – case-by-case basis (Japan-Agr. Prods. II)
      * Some factors: difficulty of obtaining the additional information necessary for the review and the characteristics of the provisional SPS measure.
* (3) Unilateral SPS Measure Based on Scientific Evidence
  + The matter has scientific sufficiency
  + Non-Discriminatory – MFN and National Treatment. SPS 2.2
  + Based on Scientific Evidence – Have to perform Risk Assessment. SPS 5.1
    - WTO member performing risk assessment must (Australia-Salmon):
      * (1) Assess an identifiable and real risk based on available scientific evidence.
      * (2) Evaluate:
        + Potential for adverse effects from additives, contaminants, toxins, or disease-causing organisms in food, beverages, or foodstuff
        + Likelihood of entry, establishment, or spread of a pest or disease

More strict that potential effects standard (Australia-Salmon)

* + - * (3)Evaluate the relative effectiveness of SPS measure in reducing the likelihood/potential – up to each member to determine appropriate level of SPS protection against risk, so long as measure is not a disguised restriction on trade
    - Can be done by government or based on that done by another country or international organization
    - To evaluate the scientific or technical issues in a risk assessment, panel “should seek advice from experts.” SPS 11.2 & US-Susp. Concession
      * Factors that Members must take into account in their risk assessments
        + SPS Agreement Art. 5.2 – “[A]vailable scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest – or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.”

List of factors in Art. 5.2 is not a closed list and, in particular, the risks arising from the abuse or misuse and difficulties of control in administration of hormones may be considered in the context of a risk assessment. *EC – Hormones (1998)*.

* + - * + With regard to risk assessments concerning animal or plant life or health, SPS Agreement Art. 5.3 requires Members to take into account the following relevant economic factors: (1) the potential damage in terms of loss of production or sales; (2) the costs of control or eradication in the territory of the importing Member; and (3) the relative cost-effectiveness of alternative approaches to limiting risks.

There is no requirement to take such economic factors into account in risk assessments concerning human life or health.

* + - Whether the SPS measure at issue is based on this risk assessment.
      * Must be a “rational relationship” between the measure and the risk assessment, and the risk assessment must “reasonably support” the measure. *EC – Hormones (1998)*.
      * It is permissible for an SPS measure to be based on a divergent or minority view rather than mainstream scientific opinion. *EC – Hormones (1998)*.
  + Necessary – Not More Trade Restrictive Than Required
    - “Members shall ensure that any [SPS] measure is applied only to the extent necessary to protect human, animal or plant life or health.” SPS 2.2 (Basic Rights and Obligations).
    - “Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.” SPS 5.6 (Risk Assessment)
    - To prove a violation of SPS 5.6, complainant must show that there is an alternative SPS measure which (*Australia – Salmon (1998)* (on the basis of SPS Agreement Art. 5.6. footnote)):
      * Is reasonably available taking into account technical and economic feasibility
      * Achieves the defendant’s unilaterally-defined “appropriate level of SPS protection”
        + Necessary to:

Identify what is the importing Member’s appropriate level of protection;

Determine the level of protection that would be achieved by the complainant’s proposed alternative measure; and

Determine whether the level of protection that would be achieved by the alternative measure would satisfy the importing Member’s appropriate level of protection. AB, *Australia – Apples (2010)*.

* + - * + Choice of a level of protection is the prerogative of the Member concerned. *AB, Australia – Salmon (1998)*.

“While there is no obligation to set the appropriate level of protection in quantitative terms, a Member is not free to establish its level with such vagueness or equivocation as to render impossible the application of the relevant disciplines of the SPS Agreement, including the obligation set out in Art. 5.6.” AB, *Australia – Apples (2010)*.

* + - * + “where a Member does not determine its appropriate level of protection, or does so with insufficient precision, the appropriate level of protection may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied.” *AB, Australia – Salmon (1998)*.
      * Is significantly less trade restrictive than the defendant’s SPS measure
        + Whether the market access would be substantially improved if an alternative measure were imposed. Panel, *Australia – Salmon (1998)*.
  + Consistent
    - “…each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.” SPS 5.5 (Risk Assessment)
    - To prove a violation of SPS 5.5, complainant must show (EC – Hormones (US)):
      * (1) Defendant has adopted appropriate level of SPS protection against risks in different situations
        + “Different situations” must be comparable situations. *EC – Hormones (1998)*.
      * (2) Differences in levels of protection are arbitrary or unjustifiable; and
        + It is necessary to examine whether reasons exist to justify the differences in levels of protection in order to determine whether these differences are arbitrary or unjustifiable.
      * (3) Arbitrary or unjustifiable distinctions result in discrimination or a disguised restriction on international trade.
        + Can be determined by three warning signals (not conclusive but can be taken together with other factors) (*EC – Hormones (1998)*):

The arbitrary character of the differences in the levels of protection;

The existence of substantial differences in the levels of protection; and

Degree of difference can act as a “warning signal” that a measure is a “disguised restriction on international trade” (Australia-Salmon)

The absence of scientific justification for the differences

#### Entities Covered by the SPS Agreement

* Central government bodies
* Regulatory agencies, regional bodies, sub-federal governments and non-governmental bodies
  + Members must ensure that these bodies comply with relevant provisions. SPS Agreement Art. 13.

#### Temporal Scope of Application of the SPS Agreement

* SPS Agreement applies to pre-1995 SPS measures, to the extent these measures are still in force. *EC – Hormones (1998)*.

#### Relationship with other WTO Agreements

* SPS trumps TBT which trumps GATT 🡪 according to Wu (more specific trumps less specific)
* TBT Agreement
  + Does not apply to SPS Measures. TBT Agreement Art. 1.5.
    - When a measure is an SPS measure, the SPS Agreement applies to the exclusion of the TBT Agreement.
  + A single measure or requirement may be imposed for a purpose that falls within the definition of an SPS measure as well as for a purpose not covered by this definition. *EC – Approval and Marketing of Biotech Products (2006)*.
* GATT 1994
  + No relationship of mutual exclusivity
  + Presumption of GATT 1994 consistency (under Article XX(b)) of all measures that are in conformity with the SPS Agreement. The opposite is not the case. SPS Agreement Art. 2.4.
    - SPS intended to clarify and establish more specific rules regarding the application of a GATT XX(b). XX(b) provides for a general exception while SPS provides for specific obligations. EC-Hormones (Canada)

### General Substantive Provisions of the SPS Agreement

#### Basic Principles – Article 2

* Sovereign right of WTO Members to take SPS measures. SPS Agreement Art. 2.1.
  + Different from GATT (exception under XX(b))
  + Different burden of proof – complaining Member must show inconsistency with SPS Agreement.
* Necessity Requirement – SPS measure must be “applied only to the extent necessary to protect human, animal or plant life” SPS 2.2.
* Non-discrimination requirement – obligation not to adopt or maintain SPS measures that arbitrarily or unjustifiably discriminate or constitute a disguised restriction on trade
  + MFN and National Treatment obligations. SPS Agreement Art. 2.3.
  + Three requirements for violating SPS Agreement Art. 2.3. *Australia – Salmon (Article 21.5 – Canada)(2000)*.
    - Measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and another Member;
      * Includes discrimination between DIFFERENT products.
      * Similarity of RISKS rather than similarity of products is what matters.
    - Discrimination is arbitrary or unjustifiable; and
    - Identical or similar conditions prevail in the territory of the Members compared.

#### Other Substantive Provisions

* Recognition of Equivalence. SPS Art. 4.1.
  + Obliges Members to accept different SPS measures as equivalent if the exporting Member objectively demonstrates to the importing Member that its measures achieve the latter’s appropriate level of protection.
  + Exporting Member is to provide appropriate science-based and technical information to the importing Member, as well as reasonable access, upon request, to the importing Member for inspection, testing and other relevant procedures for the recognition of equivalence.
* Adaptation to Regional Conditions
  + SPS Agreement Art. 6.2.
  + Obliges Members to ensure that their SPS measures are adapted to the SPS characteristics of the region of origin and destination of the product.
  + It is for the exporting Member to provide the necessary evidence that regions in its territory are pest-free or disease-free or have low pest or disease prevalence.
* Control, Inspection, and Approval Procedures. SPS Agreement Art. 8
  + In order to ensure that SPS requirements are complied with, countries usually have control, inspection and approval procedures in place.
  + Obliges Members to comply with the disciplines in Annex C that aim to ensure that procedures are not more lengthy and burdensome than is reasonable and necessary and do not discriminate against imports.
* Transparency and Notification. SPS Agreement Art. 7
  + Obliges Members to notify changes in their SPS measures and to provide information on their SPS measures according to Annex B to the SPS Agreement.
* Special and Differential Treatment for Developing-Country Members
  + SPS Agreement Art. 10.1 – “Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.

### Institutional and Procedural Provisions of the SPS Agreement

#### SPS Committee

* SPS Agreement Art. 12
* Composed of all WTO Members
* Three main tasks:
  + Forum for consultations
  + Must encourage the use of international standards
  + Must undertake a review of the operation and implementation of the SPS Agreement

#### Dispute Settlement

* SPS Agreement Art. 11.1
* Provisions of GATT Art. XXII and XXIII as elaborated by the DSU apply to consultations and the settlement of disputes under the SPS Agreement, except as otherwise provided.

#### Technical Assistance

* SPS Agreement Art. 9
* Members agree to facilitate the provision of technical assistance to other Members, especially developing countries.

### Cases

#### Australia – Salmon (DS 18)

* Background: Import restriction on chilled & frozen salmon from Canada & U.S. because of 24 “disease agents” considered to be a threat to Australian salmon. To qualify for importation, Canadian & American salmon must be “heat treated” first. Measure taken only against salmon & not other fish (e.g., cod) in the Pacific that might also harbor disease agents
* Outcome:
  + Defined 3-prong test for risk assessment for Art. 5.1 SPS of which Australia failed to meet two prongs:
    - Evaluation of likelihood of entry, establishment of diseases (2nd)
    - Evaluation / assessment of the relative effectiveness of SPS measure in reducing overall disease risk (3rd)
  + Violation of Arts. 2.2 & 5.1 (based on scientific evidence)
  + Violation of Art. 5.5 SPS (consistency)
    - Australia did not justify why provisions were applied only to salmon and not other fish
    - “Warning signals”

#### Japan-Apples DS

* Background
  + Restrictions on imports of host plants of 15 quarantine pests, including fire blight bacterium (originally native to N. America)
  + Restrictions can be lifted on a case-by-case basis
  + To qualify, U.S. apples needed to be:
    - Grown in blight-free zone (WA, OR) with buffer area, inspected 3x/year
    - Harvested & then soaked in sodium hypochlorite to disinfect surface
    - Kept in separate area, with containers & packaging treated by chlorine
* Outcome
  + No scientific evidence that mature, symptomless apple has ever served as a pathway for introduction of fire blight bacterium. Therefore, violation of Art. 2.2 SPS
  + Rejected Japan’s argument seeking to rely on Art. 5.7 SPS
    - Panel: 200 years of scientific studies & practical experience
    - AB: Uncertainty ≠ Insufficiency

#### EC – Biotech (DS 291-293)

* Background
  + Two divergent approaches to regulation of GM agricultural products
    - E.g., US: By 2004, 85% soy & 45% corn are GM. 75% of processed foods contain a GM ingredient
  + EC implements elaborate system to regulate “novel foods and novel food ingredients” to “protect human health & environment”
    - Directives 90/220 & 2001/18: Requires producer to submit extensive documentation to gain approval
    - Consideration of labeling & traceability requirements
    - Member states can adopt provisional safeguard measures
  + Resulted in a “de facto” moratorium on the approval of GM foods
* Outcomes
  + EC’s measures could not be justified through Art. 5.7 SPS (the precautionary principle)
    - Member states had conducted individual risk assessments for GM products
    - Thus, EC could not argue that there was “insufficient info” – fail the first prong
  + The measures taken were not “based on” the scientific evidence / risk assessment, as required under Art. 5.1 SPS

#### EC – Hormones (DS 26)

* Background: Prohibition on importation & sale of meats & meat products treated with any of six growth hormones - Three are naturally occurring hormones and three are artificially produced hormones.
* Outcomes:
  + Not based on Codex standards 🡪 Not int’l standard
  + Measure was not provisional 🡪 Precautionary principle (Art. 5.7 SPS) not at issue in the case
  + Scientific evidence had either found the growth hormones to be safe or was inconclusive 🡪 Therefore, violation of Arts. 3.3 & 5.1 SPS (EU failed to present scientific justification for SPS measure)

#### EC – Hormones (DS26 & DS48), AB Report

* Parties
  + Complainants – U.S., Canada
  + Respondent – EC
* Agreement – SPS Art. 3 and 5
* Measure at issue: EC prohibition on the placing on the market and the importation of meat and meat products treated with certain hormones. Note there were some exceptions for therapeutic and zootechnical purposes.
* Product at issue: Meat and meat products treated with hormones for growth purposes.
* Summary of Key Panel/AB Findings
  + **SPS Art. 3.1. (international standards)** – Panel found that EC maintained sanitary measures without justification under Art. 3.3, so EC acted inconsistently with Art. 3.1. The Appellate Body rejected the Panel's interpretation and said that the requirement that SPS measures be “based on” international standards, guidelines or recommendations under Art. 3.1 does not mean that SPS measures must “conform to” such standards (AB looked at (1) ordinary meaning, (2) fact that both words are used in same section so should have different meanings, and (3) purpose of Article 3 is to harmonize SPS measures on as wide a basis as possible). “A thing is commonly said to be based on another thing when the former stands or is founded or built upon or is supported by the latter. In contrast, much more is required before one thing may be regarded as conforming to another: the former must comply with, yield or show compliance with the latter.”
  + **Relationship between SPS Arts. 3.1, 3.2 and 3.3 (harmonization)** – The Appellate Body rejected the Panel's interpretation that Art. 3.3 (a Member may decide to set of itself a level of protection different from that implicit in the international standard) is the exception to Arts. 3.1 (Member may choose to establish an SPS measure that is based on the existing relevant international standard and 3.2 (Member may promulgate SPS measure that conforms to international standard) assimilated together and found that Arts. 3.1, 3.2 and 3.3 apply together, each addressing a separate situation. Accordingly, it reversed the Panel's finding that the burden of proof for the violation under Art. 3.3, as a provision providing the exception, shifts to the responding party.
  + **SPS Art. 5.1 and 5.2 (risk assessment)**
    - Interpretation of Risk Assessment
      * Notion of “risk” under Art. 5.1. – Member does not need to show a certain magnitude or threshold level of risk. A panel is authorized only to determine whether a given SPS measure is “based on” a risk assessment.
      * Factors to be considered in carrying out a risk assessment under Art. 5.2. – not a closed list and risk assessment should consider real world risk and not just science laboratory risk.
    - Interpretation of “based on”
      * No minimum procedural requirement that Member take into account certain scientific studies or that Member carry out its own risk assessment.
      * While upholding the Panel's ultimate conclusion that the EC measure violated Art. 5.1 (and thus Art. 3.3) because it was not based on a risk assessment, the Appellate Body reversed the Panel's interpretation, considering that Art. 5.1 requires that there be a “rational relationship” between the measure at issue and the risk assessment (IARC Monographs showed general risk of cancer but do not focus on specific risk at stake with hormones at issue).
  + **SPS Art. 5.5 (prohibition on discrimination and disguised restriction on international trade)**
    - Three criteria for establishing violation of Art. 5.5.
      * Member complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations.
      * Those levels of protection exhibit arbitrary or unjustifiable differences
      * Arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade.
    - The Appellate Body reversed the Panel's finding that the EC measure, through arbitrary or unjustifiable distinctions, resulted in “discrimination or a disguised restriction of international trade” in violation of Art. 5.5, noting: (i) the evidence showed that there were genuine anxieties concerning the safety of the hormones; (ii) the necessity for harmonizing measures was part of the effort to establish a common internal market for beef; and (iii) the Panel's finding was not supported by the “architecture and structure” of the measures.
  + **Standard of review (DSU Art.  11)** – Under DSU 11, a “panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements…” The Appellate Body noted that the issue of whether a panel has made an objective assessment of the facts is a “legal question” that falls within the scope of appellate review under DSU Art. 17.6. The Appellate Body further said that the duty to make an objective assessment of facts is an “obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence.” The Appellate Body found that the Panel did comply with the DSU Art. 11 obligation because although the Panel sometimes misinterpreted some of the evidence before it, these mistakes did not rise to the level of “deliberate disregard” or “wilful distortion” of the evidence.

## Agriculture

### Basics

#### Special Case or Special Problem?

|  |  |
| --- | --- |
| **Restrict** | **Liberalize** |
| * Food security * Domestic political constraints * Historical factors * Sovereign choice * Cultural constrains (special role of farmers) | * Enhance efficiency / competitive advantage * Regressive transfers (skewed toward large-scale farms in developed countries) * Over-production / anti-environment * Anti-development |

#### Relationship with Other Agreements

* AG and SCM Agreements should be complied with simultaneously, but when this is impossible, AG trumps SCM. *US-Upland Cotton* (2005).
* GATT and other Multilateral Trade Agreements in Annex 1A apply except to the extent that AG contains specific provisions dealing specifically with the same matter. AG Art. 21.1.

#### Product Coverage

* AG applies to all products included in Annex 1. AG Art. 2.
* Schedule of concessions are based on the list of products mentioned in Annex 1.

### Export Subsidies

* SCM Agreement – outright ban on export subsidies. AG Agreement constitutes an exception from this ban.
* What is an export subsidy?
  + Three conditions must apply (*EC – Export Subsidies on Sugar*):
    - Payment
    - On the export
    - Financed by virtue of government action
      * “Nexus” or “demonstrable link” between government action and financing
      * BUT, funding mechanism need not involve a public account.
  + What qualifies as an agricultural Export Subsidy?
    - AG Art. 1(e) – “subsidies contingent upon export performance, including the export subsidies listed in Art. 9 of this Agreement.”
    - AG Art. 9.1

1. Direct subsidies, including payments-in-kind, contingent on export performance
2. Sale or disposal, for export by government or agency of non-commercial stocks of agricultural products at price < comparable price for like product in domestic market
3. Payments on exports of an agricultural product
4. Provision of subsidies to reduce cost of marketing exports
5. Internal transport or freight charges on export shipments, provided or mandated by government, on more favorable terms
6. Subsidies on agricultural products contingent on their incorporation in exported products.

* Commitments
  + Scheduled Goods (goods included in schedule of concessions)
    - Total value of subsidies (cash value):
      * Developed: -36% over 6 years
      * Developing: -24% over 10 years
      * LDCs: None
    - Total Quantity (volume of products):
      * Developed: -21% over 6 years
      * Developing: -14% over 10 years
      * LDCs: None
    - Base Year: 1986-90
      * Time period is over so there have been no further commitments to cut.
  + Unscheduled Goods – No export subsidies allowed
* Anti-Circumvention Provision (AG Art. 10)
  + Art. 10.1 – reflects the general rule that export subsidy commitments should not be circumvented.
  + Art. 10.2 – reflects the willingness of WTO Members to eventually develop international disciplines on export credits, export credit guarantees, and insurance programs
  + Art. 10.3 – deals with the allocation of burden of proof in cases where a WTO Member claims that its exports exceeding its commitments have not been subsidized.
  + Art. 10.4 – deals with international food aid: it provides that aid must not be tied to commercial exports of farm products, and must be carried out in accordance with international standards, namely, the “Principles of Surplus Disposal and Consultation Obligations,” including, where appropriate, the system of Usual Marketing Requirements (URM) established by the FAO (Food and Agricultural Organization)

### Tariffs/Market Access

* Obligation: Tariffication – must convert various measures into tariffs (AG Arts. 4.1 and 4.2)
  + Indicative List of measures that come under this obligation (AG Art. 4.2, fn. 1)
    - QRs on imports (Chile Price Band)
    - Variable import levies (Chile – Price Band)
    - Minimum import prices (Chile – Price Band)
    - Discretionary import licensing
    - Non-tariff measures through state-trading enterprises
    - Voluntary export restraint agreements
    - Border measures other than ordinary customs duties.
  + Exception: Special Treatment Cases (AG Annex 5) – no obligation to tariffy if ALL of the following apply:
    - Effective production-restricting measures are applied to the primary ag product
    - Designated product (i.e., worked / prepared ag product)
      * Imports < 3% of domestic consumption in 86-88
      * No export subsidies have been provided to the designated products since the beginning of the agreed base period.
    - Minimum access opportunities given
      * = 4% of base domestic consumption
      * Increasing 0.8% each year thereafter (for up to 10 years)
* Obligation: Not to apply a tariff that exceeds any tariff binding made in Schedules of Concessions. AG Art. 4.1.
  + Exception: Special Safeguard Provision (AG Art. 5) (<https://www.wto.org/english/tratop_e/agric_e/ag_notif_2_e.pdf> ) (<http://www.fao.org/docrep/005/y3733e/y3733e05.htm>)
    - For pre-designated eligible agricultural goods, if denote in schedule of concessions the products that will benefit from the exception with the acronym SSG, AND:
      * IM Volume > Trigger Level\* (volume of imports of an agricultural product during any year exceeds a specific trigger level); OR
        + Set under AG Art. 5.4

X ≤ 10%: 125% of past 3 years

10% ≤ X ≤ 30%: 110% of past 3 years

X > 30%: 105% of past 3 years

Market Access Opportunities (X) = share of imports as a percentage of overall domestic consumption of the good during the preceding three years

Trigger level = percentage of the average quantity of imports for that good over the preceding three years

* + - * IM Price < Avg. 86-88 Ref. Price (import price of such product, determined on the basis of its c.i.f. import price, falls below a trigger price which is equal to the average 1986-88 reference price for the product)
        + AG Art. 5.1(b) – the price at which the product may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price is the c.i.f. import price alone and not the c.i.f. import price plus applicable duties.
    - Apply additional duty of up to one-third of the level of ordinary custom duty in effect until end of the year in which it has been imposed.
  + Exception: Special Treatment Cases (Wu p. 559)
* Average Tariffs
  + Developed: -36% over 6 years (min. -15% per product)
  + Developing: -24% over 10 years (min. -10% per product)
  + LDCs: none

### Domestic Subsidies

* Total Aggregate Measurement of Support (AMS) (AG 1(h) and Annex 3) =
  + Product-specific AMS
    - Market price support = Quantity × (Applied Admin. Price – External Ref. Price)
    - Non-exempt direct payments
    - Other national & sub-national subsidy payments
  + Non-product-specific AMS
  + Equivalent measure of support (EMS)
  + Note: Payments from farmers & items such as storage price are excluded

#### Farm Subsidies

* Amber Box
  + A farm subsidy that does not fall in any other categories (Amber Box = Farm Subsidies – Blue Box – Green Box – De minimis payments – Development payments (developing countries only)
  + **Only box where you have to cut/commitments made** (i.e. Total AMS)
    - Commitments are to be made to lower the level of Amber Box subsidies, i.e. the total Aggregative Measure of Support (AMS).
  + Commitments to Reduce Total AMS (AG Arts. 1(a), 6, and Annex 3)
    - Developed countries: -20% 6 years
    - Developing countries: -13.3% 10 years
    - LDCs: non but must bind if applicable
  + WTO Members enjoy flexibility and can decide to decrease protection in one agricultural commodity, while increasing it somewhere else as long as they can abide by their overall reduction obligation.
* Blue Box: Production-Limiting Programs (AG Art. 6.5)
  + Three situations where a WTO Member can exempt direct payments under production-limiting programs (subsidies specifically designed to limit production of agricultural goods for either crop or livestock) from the calculation of its AMS (and hence, the Amber Box):
    - Direct payments based on fixed area and yields (crops);
    - Direct payments based on fixed number of head (livestock); or
    - Direct payments made on ≤ 85% of base level of production (have to make production drop by 15%)
* Green Box (AG Annex 2)
  + Exempts from calculation of AMS twelve measures of support funded through a government program which does not have the effect of price support.
  + Rationale – 12 government services that have no, or minimal trade-distorting effects.
  + Any measure initially characterized as a Green Box measure must continue to conform to the criteria for exclusion on an ongoing basis. AG Art. 7.1.
  + 12 Schemes (Wu p. 563 for detail explanation):
    - (a) General Services (e.g., research, pest & disease control, infra.)
    - (b) Food security stockpiles
    - (c) Domestic Food Aid
    - (d) Direct Payments to Producers with no or minimal trade-distorting effects
    - (e) Income support de-coupled from prices, production, production factors (US – Upland Cotton: must be delinked from all production)
    - (f) Payments for Income Insurance and Income Safety Net
    - (g) Natural Disaster Relief
    - (h) Structural Adjustment Assistance Provided Through Producer Retirement Programs
    - (i) Structural Adjustment Assistance Provided Through Resource Retirement Programs
    - (j) Investment Aid (unrelated to prices or type/volume of production)
    - (k) Compliance cost payments for environmental programs
    - (l) Regional Assistance programs
* De minimis payments
  + AG Art. 6.4
  + Product Specific support
    - Basic Agricultural Product: payments < 5% (developed countries) and 10% developing countries) of total value production are exempted from calculation of AMS payments
      * Basic agricultural product – “the product as close as practicable to the point of first sale as specified in a Member’s Schedule and in related supporting material. AG Art. 1(b).
    - Others: None
  + Not Product Specific Support: payments < 5% (developed countries) and 10% (developing countries) of the value of their total farm production.
* Development payments – payments relating to development needs. AG Art. 6.2.
  + Available for developing countries only.
  + Three types of payments are excluded:
    - Investment subsidies that are generally available;
    - Agricultural input subsidies, which are generally available to low income, or resource poor-producers
    - Support to encourage diversification from growing illicit narcotic crops

### Other Commitments

* Peace Clause (AG Art. 13) – compliance with the obligations imposed under the Green Box, Blue Box and Arts. 8-10 AG meant ipso facto compliance with the WTO.
  + US-Upland Cotton – exports subsidies must comply not only with the AG but also with the SCM requirements.
* Net Food-Importing Developing Countries
  + AG Art. 16
    - Requires that developed countries take action in accordance with the “Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least Developed and Net Food Importing Developing Countries.”
    - Aims to ensure that LDCs and net food importing developing countries will not be negatively affected by the commitments undertaken.
    - Calls for review of the level of food aid established periodically by the Committee on Food Aid under the food Aid Convention; the initiation of negotiations in order to establish a level of food aid commitments sufficient to meet the needs of net food importers; the adoption of guidelines to ensure that increasing proportions of basic foodstuffs will be provided in fully grant form; and agreement by developed countries to help, through technical advice, increase the productivity in net food importing countries.
  + AG Art. 12
    - Requires any WTO Member with lawful recourse to export restrictions to pay due consideration to importing Members’ food security.
* Transparency Requirements
  + AG Art. 18 – WTO Members undertake to promptly notify the Committee on Agriculture of all matters of interest to the reform program.

### US – Upland Cotton

* User Marketing (Step 2) Payment
  + Marketing loan program
  + Triggered when certain market conditions > US benchmarks
  + Entitled to subsidy for “domestically-produced” upland cotton opened by “an eligible exporter”
* Export Credit Guarantee
  + Guarantee repayment of loans used to finance exports, up to 98% of principal + portion of interest
  + Pay fee capped by law to 1% of guaranteed value of loan

### What’s on the Table in the Doha Round?

* Treatment of direct subsidies
* Market access commitments
* Export subsidies
* Special agricultural safeguard mechanism
* Food security
* Who get specialized treatment (LDCs, other developing countries)

# Trade Remedies

* Three different terms for same thing – Contingent Protection Measures/Safety Valves/Trade Remedies:
  + Countervailing duties (CVD) (in response to subsidies)
  + Anti-Dumping duties (AD)
  + Safeguards (SG)

## Subsidies

### Basic Elements of WTO Law on Subsidies and Subsidized Trade

#### Sources of Law

* Subsidies and Countervailing Measures Agreement (SCM) – part of Annex 1A to the WTO Agreement
* GATT Art. VI and XVI

#### WTO Treatment of Subsidies

* Three types of subsidies: prohibited, actionable, and non-actionable.
* Each kind of subsidy has its own substantive and procedural rules.
* Subsidies on agricultural products are subject to specific rules.

#### Response to Injurious Subsidized Trade

* Double Remedies (AD and CV measures) is inconsistent with SCM 19.3. US – AD/CD (China).
* WTO Dispute on SCM (Multilateral)
  + Prohibited and Actionable Subsidies
  + Option necessary if competing in third market and don’t want to have to go to each country
  + Takes longer
  + No retrospective damages (also no retrospective in unilateral)
* Countervailing Duties (Unilateral)
  + Subsidy
  + Injury
  + Causation

### Subsidies Covered by the SCM Agreement

* A subsidy shall be deemed to exist if (SCM Art. 1.1):
  + (1)
    - (a) there is a financial contribution by a government or any public body within the territory of a Member…or
    - (b) there is any form of income or price support in the sense of Article XVI of GATT 1994; and
  + (2) a benefit is thereby conferred.
  + (3) Specificity – a subsidy as defined in paragraph 1 shall be subject to the provisions [of Parts of the SCM Agreement] only if such a subsidy is specific in accordance with the provisions of SCM 1.2

#### Financial Contribution

* SCM Art 1.1 provides an exhaustive list of types of financial contributions.
* Direct Transfers of Funds
  + Direct transfers of funds – includes grants, loans, and equity infusion. SCM Art. 1.1(a)(1)(i).
  + Potential direct transfers of funds or liability (e.g. loan guarantees)
  + Similar transactions also covered – interest rate reduction, debt forgiveness or the extension of a loan maturity. Japan – DRAMs (Korea) (2007).
  + “funds encompasses not only money but also financial resources and other financial claims more generally…” Japan – DRAMs (Korea) (2007).
  + Financial contribution exists not only when a direct transfer of funds or a potential direct transfer of funds has actually been effectuated. It is sufficient that there is a “Government practice” involving the transfer of funds. SCM Art. 1.1(a)(1)(i); *Brazil – Aircraft (1999)*.
* Government Revenue, Otherwise Due, that is Foregone or Not Collected (SCM Art. 1.1(a)(1)(ii))
  + E.g. fiscal incentives such as tax credits
  + “Foregone” – government has given up an entitlement to raise revenue that it could “otherwise” have raised.
  + “Otherwise due” – cannot be entitlement in the abstract, because governments, in theory, could tax all revenues. Implies some kind of comparison between the revenues due under the contested measure and revenues that would be due in some other situation. AB, *US – FSC (2000)*.
* Provision or Purchase by a Government
  + “government provides goods or services other than general infrastructure, or purchases goods.” SCM Art. 1.1(a)(1)(iii)
  + Unclear whether includes purchase of services. See AB, US – Large Civil Aircraft (2012) (not ruling on panel’s finding that does not include purchase of services).
  + “general infrastructure” – “[i]nfrastructure that is not provided to or for the advantage of only a single entity or limited group of entities, but rather is available to all or nearly all entities.” *EC and certain member States – Large Civil Aircraft (2011)*.

#### Income and Price Support

* “any other form of income support as spelled out in” GATT XVI as a “subsidy.” SCM 1.1(a)(2)
* “price support” – only captures government measures that set or target a given price; it does not capture every government measure that has an incidental and random effect on price. Panel, *China – GOES (2012)*.

#### Government or Public Body

* Anti-circumvention device – designed to ensure that governments do not try to skirt the obligation by simply channeling the subsidy through an entity outside the formal structures of government.
* What is a Public Body? AB, *US – Anti-Dumping and Countervailing Duties (China) (2011)* – state ownerships, by itself, is insufficient.

317. A public body within the meaning of Article 1.1.(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority…

318. . . . We do not, for example, consider that the absence of an express statutory delegation of authority necessarily precludes a determination that a particular entity is a public body. What matters is whether an entity is vested with authority to exercise governmental functions, rather than how that is achieved. There are many different ways in which government in the narrow sense could provide entities with authority. . . . . It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. . . . We stress, however, that, apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority. Thus, for example, the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.

* Payments to a Funding Mechanism or Through a Private Body
  + “government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions” illustrated in paragraphs (i) to (iii), which would normally be vested in the government and the practice, in no reas sense, differs from practices normally followed by governments.
  + “government uses a private body as a proxy to provide a financial contribution…cannot be so broad as to allow Members to apply countervailing measures to products whenever a government is merely exercising its general regulatory powers.” AB, *US – Countervailing Duty Investigation on DRAMs*.
  + “entrustment” – occurs where a government gives responsibility to a private body. AB, *US – Countervailing Duty Investigation on DRAMs*.
  + “direction” – refers to situations where the government exercises its authority over a private body. AB, *US – Countervailing Duty Investigation on DRAMs*.

#### Conferring a Benefit

* Tests
  + Private Investor Test – Has the recipient “received a ‘financial contribution’ on terms more favorable than those available to the recipient in the market”? (Canada – Aircraft)
  + Cost of Production Test (use if market itself is distorted):
    - Is the recipient receiving a payment greater than the average total cost of production?
    - Avg. Cost = (Total Fixed Costs + Total Variable Cost) / # of Units Produced
  + Fair Market Value Test (use in cases involving privatization) (pass-through benefit):
    - Was the transaction done at arms-length?
    - Did the private party pay the fair market value for the transaction?

#### Requirement of Specificity

* WTO rules on subsidies only apply to specific subsidies. SCM Art. 1.2.
* Four types of specificity (SCM Art. 2)
  + Enterprise specificity – government targets a particular company or companies for subsidization
  + Industry specificity - - government targets a particular sector or sectors for subsidization
  + Regional specificity – government targets producers in specified parts of its territory for subsidization
  + Specificity of prohibited subsidies – government targets export goods or goods using domestic inputs for subsidization
* **Specific per se**:
  + Export subsidies
  + Local content subsidies
  + Subsidies “limited to certain enterprises located within a designated geographic region. SCM 2.2
* Non-specific:
  + The setting or change of generally applicable tax rates by all levels of government. SCM 2.2
  + The granting of subsidies according to objective criteria or conditions. SCM 2.1(b).
    - “Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favor certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.” SCM fn. 2
* What about all other subsidies?
  + Are there objective criteria / Conditions?
  + De facto specific?
    - Use limited to a certain number of enterprises?
    - Predominantly used by certain enterprises?
    - Disproportionate large amounts to certain enterprises?
    - Amount of discretionary authority given to granting authority
* “industry” – (1) an industry, or group of industries, may be generally referred to by the type of products they produce; (2) the concept of an industry relates to producers of certain products; and (3) the breadth of this concept of industry may depend on several factors in a given case. AB, US-Upland Cotton (2004).

#### US – Carbon Steel (India)(DS436), Appellate Body Report

* Background: India challenges U.S. countervailing duties levied on products through various instruments, as well as provisions of the US Tariff Act and Code of Federal Regulations on customs duties. India claims that the countervailing duty investigation and related measures are inconsistent with GATT I and VI and with SCM 1-2, 10 -15, 19, 21 and 22. India also claims that the challenged provisions of US Law are inconsistent “as such” with SCM 12, 14, 15, 19 and 32.

Indian Steel Company

Loan

NMDC (mining company)

- 98% GOI

Mining Rights

Loan

Loan

Joint Plant Committee (JPC)

Steel Development Fund (SDF)

* Public Body
  + India appealed the Panel's findings regarding the USDOC's determination that the National Mineral Development Corporation (NMDC) is a public body within the meaning of SCM 1.1(a)(1).
  + For its part, the US argued that the Panel interpreted and applied SCM 1.1(a)(1) in a manner consistent with the AB, US — AD/CD (China). Further, the US requested, in its other appeal, that the AB clarify that “an entity that is controlled by the government, such that the government may use the entity's resources as its own” is also a public body.
  + “Public Body” Legal Standard
    - A public body is “an entity that possesses, exercises or is vested with governmental authority.” Quoting US – AD/CVD
    - Whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates.
    - “the absence of an express statutory delegation of governmental authority does not necessarily preclude a determination that a particular entity is a public body.”
  + The AB found that the Panel erred in its application of SCM 1.1(a)(1) to the USDOC's public body determination in the underlying investigation, in effect treating the Government of India’s (GOI) ability to control the NMDC as determinative for purposes of establishing whether the NMDC constitutes a public body.
  + Panel did not give proper consideration to India’s argument that the USDOC failed to consider evidence that showed that government directions and policies have not influenced the transactions or pricing of the products sold by the NMDC.
  + The AB consequently reversed the Panel’s findings, and completed the legal analysis and found that the USDOC’s determination that the NMDC is a public body is inconsistent with SCM 1.1(a)(1).
    - U.S. just looked at government shareholding and GOI’s power to appoint directors as opposed to the relationship between the NMDC and the GOI within the Indian legal order and “extent to which the GOI fact “exercised” meaningful control over the NMDC and over its conduct in order to conclude properly that the NMDC is a public body within the meaning of SCM 1.1(a)(1).
* Financial Contribution
  + India appealed the Panel's findings regarding whether India's captive mining rights and Steel Development Fund (SDF) loans constitute financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement.
  + Mineral Rights
    - “government provides goods or services”
    - “provides” means “to make available” or “to put at the disposal of”
    - “there must exist a reasonably proximate relationship between the governmental action of providing a good or service, and the use or enjoyment of that goods or service by a beneficiary.”
    - Finding that the Panel correctly determined that there was a reasonably proximate relationship between India's grant of mining rights for iron ore and coal and the beneficiary's use or enjoyment of the final extracted goods, the AB upheld the Panel's finding in respect of SCM 1.1(a)(1)(iii).
  + SDF Loans
    - “direct transfer of funds” – certain “immediacy to the conveyance”
    - “government practice involves” a direct transfer of funds – use of the word “involves” suggests that the government practice need not consist, or be comprised solely of the transfer of funds, but may be a broader set of conduct in which such a transfer is implicated or included.”
    - Resources don’t necessarily have to be drawn from governmental resources or result in a charge on the public account.
    - India puts too much emphasis on “direct” and not enough on “involves.”
    - The fact that a government effects a transfer through an intermediary does not necessarily exclude such funds from the scope of a financial contribution
    - With respect to SDF loans, the AB affirmed Panel’s finding that the role of the SDF Managing Committee in making critical decisions regarding the issuance and terms of the SDF loans, despite the JPC acting as intermediary, supported a conclusion that the SDF loans constitute direct transfers of funds, and upheld the Panel's finding in respect of Article 1.1(a)(1)(i). JPC could not extend a

### WTO Action Against Subsidies

#### Prohibited Subsidies

* SCM Art. 3 – prohibits (Except for as provided in AG Agreement) (1) export subsidies and (2) local content subsidies/import substitution subsidies. a/k/a “red light” subsidies.

##### Export Subsidies

* Definition – “subsidies contingent, in law or in fact, whether solely or as one of several conditions, upon export performance, including those illustrated in Annex 1. SCM Art. 3.1.
  + “contingent” = conditional or “dependent for its existence on something else.” *AB, Canada – Aircraft*
* Illustrative List of Export Subsidies – SCM Agreement Annex I. Scheme that falls under the purview of the Illustrative List is ipso facto prohibited. AB, Brazil-Aircraft (Art. 21.5-Canada).
* Prohibits subsidies that are contingent de jure and de facto on exports. AB, Canada – Aircraft (1999).
  + De jure – does not have to provide expressly that the subsidy is available only upon the fulfillment of the condition of export performance. Can also be derived by necessary implication from the words actually used in the measure. Panel, Australia – Automotive Leather II
  + De Facto – must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, which may include the following factors: (1) the design and structure of the measure granting the subsidy; (2) the modalities of operation set out in such a measure; and (3) the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure’s design, structure, and modalities of operation. See EC and certain member States – Large Civil Aircraft (2011).
    - Objective standard. EC and certain member States – Large Civil Aircraft (2011).

##### Local Content/Import Substitution Subsidies

* “The following subsidies, …, shall be prohibited,…(b) subsidies contingent, whether solely or as one of several conditions, upon the use of domestic over imported goods.” SCM Art. 3.1(b)
* “No contracting party shall establish or maintain any internal QR relating to the mixture, processing, or use of products in any specified amount or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources.” GATT III:5

##### Multilateral Remedies for Prohibited Subsidies

* Consultations may be requested with any Member believed to be granting or maintaining a prohibited subsidy. SCM Art. 4.1.
* If such consultations fail to resolve the dispute, the dispute may be referred to a dispute settlement panel (DSP), and then to the AB, for adjudication (Similar to DSU rules except timeframes are half as long.)
* If DSP finds measure to be a prohibited subsidy:
  + Subsidizing Member: must “withdraw the subsidy without delay” Panel shall specify time period. SCM Art. 4.7.
  + If the subsidizing Member does not do so within the time period specified by the panel, (counting from date of adoption of panel or AB report)
    - Injured party (i.e., complainant): given authority to “take appropriate countermeasures.” SCM 4.10
      * What does “appropriate circumstances this mean? No AB decision, just panels
        + Amount of the subsidy (Brazil – Aircraft (Art. 22.6 – Brazil)), OR

Most common

* + - * + Amount of the subsidy + % mark-up (Canada – Aircraft (Art. 22.6 – Canada)),
        + BUT NOT Trade Effects test
      * Countermeasure does not have to be related to same good.
    - Unless DSB by consensus rejects request

#### Actionable Subsidies

* Have to establish one of the following types of adverse effects (SCM Art. 5):
  + Injury to the domestic industry of another Member (Art. 5(a))
  + Nullification or impairment of benefits accruing directly or indirectly to other Members under the GATT (Art. 5(b))
  + Serious Prejudice, including a threat thereof, to the interests of another Member (Art. 5(c))

##### Subsidies Causing Injury

* Subsidies have adverse effects on the interests of other Members within the meaning of SCM Art. 5(a) – and are therefore actionable – when the subsidized imports cause injury to the domestic industry producing the like product.
* Like Product
  + Definition – “product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.” SCM Agreement fn. 46
  + Seems narrower in scope than GATT Art. I and III and Agreement on Safeguards
  + But similar to the approach under GATT. See Indonesia – Autos (1998).
    - GATT elements: physical characteristics, end-uses, consumer habits and preferences, tariff classification
  + Based on tariff lines?
* Domestic Industry
  + Definition – “[t]he domestic producers as a whole of the like products or…those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.” SCM Art. 16.1.
  + Two Exceptions:
    - Domestic producers that are related to exporters or importers or which themselves import the subsidized products may be excluded from the relevant domestic industry. SCM 16.1.
    - In exceptional circumstances, the territory of a Member may be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry. A regional industry then constitutes the relevant domestic industry.
* Injury
  + Includes: (1) material injury to a domestic industry; (2) a threat of material injury to a domestic industry; and (3) material retardation of the establishment of a domestic industry (not used much so don’t really worry about it). SCM Agreement ft. 45.
  + Determination of injury to the domestic industry must be based on (SCM Art. 15.1):
    - Positive evidence; and
    - Involve an examination of
      * The volume of the subsidized imports
        + Must be examined whether there has been a significant increase of the subsidized imports (SCM Art. 15.2)
      * Effect of the subsidized imports on prices in the domestic market for like products
        + Must be examined whether there has been a significant price undercutting by the subsidized imports, or whether these imports otherwise depress or suppress prices to a significant degree. (SCM Art. 15.2)
      * Consequent impact off these imports on the domestic producers of like products.
        + Must include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry (SCM Art. 15.4).
        + Relevant factors include (not exhaustive list) (SCM Art. 15.4):

An actual and potential decline in the output, sales, market share, profits, productivity, return on investments or utilization of capacity;

Factors affecting domestic prices; AND

Actual and potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital or investments.

* + Threat of material injury
    - Determination of threat of material injury must be based on facts and not merely on allegations, conjecture or remote possibility. SCM Art. 15.7.
    - Change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. SCM Art. 15.7.
    - Non-exhaustive list of factors: (1) nature of the subsidy and the trade effects likely to arise from it; (2) significant rate of increase of subsidized imports; and (3) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices. SCM Art. 15.7 (i), (ii), (iv)
    - The effects of the subsidized imports may be assessed cumulatively for the purpose of establishing injury to the domestic industry only when (SCM Art. 15.3):
      * The amount of subsidization is more than de minimis (i.e. more than or equal to 1 per cent ad valorem);
      * The volume of the imports of each country is not negligible; and
      * The cumulative assessment of the effects of the imports is appropriate in light of conditions of competition between products imported from different countries and the conditions of competition between the imported products and the like domestic products.
* Causation
  + Non-attribution analysis: Injury suffered by the domestic industry may be caused by subsidized imports OR? (SCM Art. 15.5):
    - Volumes and prices of non-subsidized imports of the product in question
    - A contraction in demand or changes in the patterns of consumption
    - Trade-restrictive practices of, and competition between, the foreign and domestic producers;
    - Developments in technology
    - The export performance and productivity of the domestic industry
    - Note: Injury caused by these other factors may not be attributed to the subsidized imports.
  + Causal relationship demonstrated by examining the “effects” of the subsidized imports. Examination comprised of following elements (SCM Art. 15.2 and 15.4):
    - Whether there has been a significant increase in subsidized imports;
    - The effect of the subsidized imports on prices; and
    - The consequent impact of the subsidized imports on the domestic industry.

##### Subsidies Causing Nullification or Impairment

* Subsidies have adverse effects on the interests of other Members within the meaning of SCM Art. 5(b) – and are therefore actionable – when the subsidized imports cause the nullification or impairment of benefits accruing directly or indirectly to other Members under the GATT.

##### Subsidies Causing Serious Prejudice

* “serious prejudice” may arise where a subsidy has one or more of the following effects:
  + The subsidy displaces or impedes imports of a like product of another Member into the market of the subsidizing Member (SCM Art. 6.3(a));
  + The subsidy displaces or impedes the export of a like product of another Member from a third country market (SCM Art. 6.3(b));
  + The subsidy results in a significant price undercutting, or significant price suppression, price depression or lost sales in the same market (SCM Art. 6.3(c)); **OR**
  + The subsidy leads to an increase in the world market share of the subsidizing Member in a particular primary product or commodity in comparison to the average share it had during the previous period of three years (SCM Art. 6.3(d))
* Burden of proof
  + If a complaining Member can show that a subsidy has any of these effects, then serious prejudice may be found to exist.
  + If the subsidizing Member can show that subsidies do no result in any of these effects, these subsidies will not be found to cause serious prejudice. SCM Art. 6.2.
* To assess whether there is serious prejudice within the meaning of SCM Art. 5(c) and 6, it is necessary to determine:
  + (1) What the relevant geographical market and product market is
    - The degree to which a market is limited by geography will depend on the product itself and its ability to be traded across distances. AB, US – Upland Cotton (2004
    - “Two products would be in the same market if they were engaged in actual or potential competition in the market. Thus, two products may be in the same market even if they are not necessarily sold at the same time and in the same place or country…The scope of market, for determining the area of competition between two products, may depend on several factors such as the nature of the product, the homogeneity of the conditions of competition, and transport costs. This market for a particular product could well be a world market.” AB, US-Upland Cotton (2005).
  + (2) Whether there is displacement or impedance of imports or exports
    - “Displacement” – refers to an “economic mechanism in which exports of a like product are replaced by the sales of the subsidized product.” AB, US – Large Civil Aircraft (2nd Complaint) (2012) The concept connotes a substitution effect between the subsidized product and the like product of the complaining Member.
    - SCM Art. 6.3(a) – the effect of the subsidy is that imports of a like product of the complaining Member are substituted by the subsidized product.
    - SCM Art. 6.3(b) – exports of the like product of the complaining Member are substituted in a third country market by exports of the subsidized product.
  + (3) Whether there is price undercutting, price suppression, price depression, or lost sales
    - Price suppression – situation where prices either are prevented or inhibited from rising or they do actually increase, but the increase is less tha nit otherwise would have been. Panel, US-Upland Cotton (2005)
    - Price depression – situation where prices are pressed down, or reduced. Panel, US-Upland Cotton (2005)
    - Lost sale – sale that a supplier failed to obtain. AB, EC and certain member States – Large Civil Aircraft (2011).
  + (4) Whether the price undercutting, price suppression, price depression or lost sales are significant
    - Must reach level of “significance.” SCM Art. 6.3(c)
      * “significant” = “important, notable, or consequential. US – Upland Cotton (2005)
  + (5) Whether there is an increase in world market share
    - Serious prejudice may arise where a subsidy leads to an increase in the world market share of the subsidizing Member in a particular primary product or commodity in comparison to the average share it had during the previous three years. SCM Art. 6.3(d)
    - “world market share” – the “share of the world market supplied by the subsidizing member of the product concerned.” Panel, US – Upland Cotton (2005).
  + (6) Whether there is threat of serious prejudice; and/or
    - Different from claim of present serious prejudice. AB, US – Upland Cotton (2005)
  + (7) whether the market phenomena referred to above are “the effect of” the challenged subsidies (i.e. causal link and non-attribution)
    - In respect to all forms of serious prejudice, the complainant must demonstrate not only the existence of the relevant subsidies and of the adverse effects to its interests, but also that the subsidies at issue have caused such effects. AB, US – Large Civil Aircraft(2nd complaint) (2012).
* Temporal Scope of SCM Art. 5
  + A pre-1995 subsidy may fall within the scope because of its possible nexus to the continuing situation of causing, through the use of the subsidy, adverse effects to which Art. 5 applies.
* Pass-through of Subsidies
  + Pass-through analysis not always required
* Effect of subsidies over time
  + Panel is required to consider whether the “life of a subsidy” has ended, for example, by reason of the “Amortization of the subsidy over the relevant period or because the subsidy was removed from the recipient.” AB, EC and certain member states – Large Civil Aircraft (2011)
* Collective Analysis of the Effects of Subsidies
  + While SCM Art. 6.3 refers to the “effect of the subsidy,” it still permits an integrated examination of the effects of any subsidies when these subsidies have a sufficient nexus with the subsidized product and the particular effects-related variable under examination. US – Upland Cotton (2005).
* Annex V on Procedures for Developing Information Concerning Serious Prejudice
  + Existence of serious prejudice must be determined on the basis of information submitted to, or obtained by, the panel.

##### Multilateral Remedies for Actionable Subsidies

* If a panel concludes that a subsidy causes adverse effects to the interests of another Member, the subsidizing Member must (1) remove the adverse effects; or (2) withdraw the subsidy, within 6 months from the adoption of the report by the DSB. SCM Art. 7.8.
* “In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel’s report or the Appellate Body’s report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining party to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request…” SCM Art. 4.10

#### Non-Actionable Subsidies

* Non-specific subsidies
* SCM Agreement does not apply

### Unilateral Countervailing Measures

* Definition of countervailing duty – “[a] special duty levied for the purpose of offsetting…any subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise. GATT Art. VI; SCM fn. 36.
* Two requirements for countervailing measures (SCM Art. 10):
  + Must be in accordance with GATT Art. VI and the SCM.
  + May only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.
* Process
  + Foreign producers and domestic producers petition government
  + Government deliberates whether to investigate
  + If government proceeds, disputes heard in domestic administrative courts
  + Provide for provisional measures and then final measures
  + If CVD is imposed, losing party can appeal judicially within the country or through WTO DSU Proceedings

#### Conditions for the Imposition of Countervailing Duties

* Three conditions (GATT Art. VI and SCM Art. 10 and 32.1):
  + There are subsidized imports, i.e. imports of products from producers who benefited or benefit from specific subsidies within the meaning of SCM Art. 1, 2, and 14;
  + There is injury to the domestic industry of the like products within the meaning of SCM Art. 15 and 16; AND
  + There is a causal link between the subsidized imports and the injury to the domestic industry and injury caused by other factors is not attributed to the subsidized imports.
* Specific Subsidies
  + Prior discussion on multilateral dispute settlement for subsidies covering these three conditions is mutatis mutandis.
* Injury
  + Actual injury analysis (SCM 15.1)
    - Volume of the subsidized imports
    - Effect on prices in the domestic market for like products
    - Consequent impact of these products on domestic producers of the like product
  + De minimis subsidies:
    - < 1% ad valorem (developed)
    - < 2% a.v. (developing)
    - < 3% a.v. (LDCs)
  + Threat of Injury analysis (SCM 15.7)
    - Nature of the subsidies and the trade effects likely to arise therefrom
    - Rate of increase of subsidized imports into the domestic market
    - Capacity of the exporter (taking into account the ability of other markets to absorb)
    - Price of imports – depression or suppression
    - Inventories of product
* Causation: Non-attribution analysis (SCM 15.5)
  + Volume & prices of non-subsidized imports of the product in question
  + Contraction in demand or changes in the patterns of consumption
  + Trade restrictive practices of and competition between foreign and domestic producers
  + Technology developments
  + Export performance & productivity of domestic industry

#### Conduct of Countervailing Investigations

* Van den Bossche p. 817.
* Initiation of an Investigation
  + Submission of an “application,” i.e. a written complaint
  + Application must contain sufficient evidence of the existence of (SCM Art. 11.2) (same analysis of these elements as that in WTO disputes above):
    - A subsidy and, if possible, its amount;
    - Injury to the domestic industry; and
    - A causal link between the subsidized imports and the alleged injury.
  + Application must be made by or on behalf of domestic industry (SCM Art. 11.4)
    - More than 50% of those weighing in need to support – This is met if application is supported by those domestic producers whose collective output constitutes more than **50%** of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application.
    - 25% of total need to support – However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than **25%** of total production of the like product produced by the domestic industry.
  + If does not clear above hurdle, government still has option of going ahead.
  + Government can also investigate ex-officio.
  + Immediate rejection of application when (SCM Art. 11.9):
    - The amount of the subsidy is de minimis (less than 1% ad valorem)
    - The volume of subsidized imports, actual or potential, or the injury, is negligible.

#### Public Notice and Judicial Review

#### Application of Countervailing Measures

* Three types of countervailing measures allowed:
  + Provisional countervailing measures
  + Voluntary undertakings
  + Definitive countervailing duties
* Imposition of Provisional Countervailing Measures
  + May take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization. SCM Art. 17.2.
  + Cannot be applied less than 60 days from the date of initiation of the investigation.
  + Application must be limited to as short a period as possible and may not be applied for more than 4 months. SCM Art. 17.3 and 17.4.
* Voluntary Undertakings
  + Investigations may be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which (SCM Art. 18.1):
    - (1) the government of the exporting Member agrees to eliminate or limit the subsidy or to take other measures concerning its effects; or
    - (2) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated
* Imposition and Collection of Countervailing Duties
  + Members may impose definitive countervailing duties only after making a final determination that: (1) a countervailable subsidy exists; and (2) the subsidized imports cause, or threaten to cause, injury to the domestic industry. SCM Art. 19.1.
  + **Amount of the countervailing duty imposed on subsidized imports** – “No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.” SCM Art. 19.4.
  + **Lesser duty rule** – if the amount of the injury caused is less than the amount of the subsidy, the definitive countervailing duty should *preferably* be limited to the amount necessary to counteract the injury caused. SCM art. 19.2.
  + Must be collected on a non-discriminatory basis (SCM 19.3) – “When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury.”
  + May not be imposed retroactively. SCM Art. 20.1.
* Duration, Termination and Review of Countervailing Duties
  + “shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.” SCM Art. 21.1.
  + Unless a review is conducted, a CVD must be withdrawn five years after its imposition.
  + Two types of review :
    - Administrative review. SCM 21.2
    - Sunset review. SCM 21.3
      * Termination of a CVD is the rule and its continuation is the exception. AB, US-Carbon Steel.

## Anti-Dumping

### Basic Elements of WTO Law on Dumping

* Source of Law – GATT VI and WTO Agreement on Implementation of GATT VI (“Anti-Dumping Agreement”) (AD) found here: <https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm>
* “Dumping” definition – the introduction of a product into the commerce of another country at less than its normal value. GATT VI and AD 2.1.

#### WTO Treatment of Dumping

* WTO law does not prohibit dumping. Prices are set by private companies.
* WTO law only addresses WTO Members responses to dumping.
* Anti-Dumping measures are regulated by GATT VI and AD. AD 1.

#### Response to Injurious Dumping

* The only permissible responses to dumping are (GATT VI:2 and See AD 18.1 (saying only actions that can be taken are those in GATT))
  + Provisional Measures
  + Price Undertakings
  + Definitive Anti-Dumping Duties
* US – 1916 Act (2000)
  + US legislation at issue provided for civil and criminal proceedings and penalties for conduct which presented the constituent elements of dumping.
  + Since these civil and criminal actions are not among the permissible responses to dumping listed in GATT IV:2, the AB upheld the finding of the panel that the 1916 Act was inconsistent with GATT Art. VI:2, as interpreted by the Anti-Dumping Agreement.
* US – Offset Act (Byrd Amendment) (2003) – United States Continued Dumping and Subsidy Act (CDSOA) provided that US Customs shall distribute duties assessed pursuant to an anti-dumping duty order to affected domestic producers for qualifying expenditures. AB concluded this measure was inconsistent with GATT Art. VI:2.
* Members are entitled to impose anti-dumping measures if, after an investigation initiated and conducted in accordance with the Agreement, on the basis of pre-existing legislation that has been properly notified to the WTO, a determination is made that: (1) there is dumping; (2) the domestic industry producing the like product in the importing country is suffering injury (or threat thereof); and (3) there is a causal link between the dumping and the injury. GATT VI.

### Determination of Dumping

* “Dumping” definition – the introduction of a product into the commerce of another country at less than its normal value. GATT Art. VI and AD Art. 2.1. **Export Price < Normal Value**

#### Normal Value

* Home Market Price
  + Unless:
    - No sales in ordinary course of trade
    - Particular market situation
    - Low volume of sales in home market
  + Then, Third-Country Price or Constructed Normal Value
* Definition of “normal value” – “the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.” AD Art. 2.1. a/k/a price of the like product in the home market of the exporter or producer.
* Four conditions on domestic sales transactions so that they may be used to determine the “normal value” (US – Hot-Rolled Steel (2001)):
  + The sale must be in the “ordinary course of trade;”
    - Situations that may form a reason to determine that transactions were **not** made in the ordinary course of trade: sales to affiliated parties aberrationally high-priced sales; or abnormally low-priced sales; or sales below cost. See AD Art. 2.2.1
    - Members have discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not “in the ordinary course of trade, but the discretion must be exercised in an “even-handed” way that is fair to all parties. US – Hot-Rolled Steel (2001).
  + The sale must be of the “like product;”
    - Must first examine the imported product that is alleged to be dumped and then establish the product that is “like.”
    - Definition of “like product” – “a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.” AD Art. 2.6. a/k/a an identical product or a product with a close resemblance to the product under consideration.
  + The product must be “destined for consumption **in** the exporting country;” and
  + The price must be “comparable.”
    - Comparison “shall be made at the same level of trade, normally at the ex-factory level.” AD Art. 2.4.
    - “Article 2.4 mandates that due account be taken of differences which affect price comparability, such as differences in the levels of trade at which normal value and the export price are calculated.” US – Hot-Rolled Steel (2007).
* Where the domestic price in the exporting country market may not represent an appropriate normal value for the purposes of comparison with the export price, AD Art. 2.2 provides that an importing Member may select one of two alternatives methods for determining an appropriate normal value for comparison with the export price:
  + Using an “appropriate” third-country price as the normal value; or
    - “appropriate” not defined
  + Constructing the normal value
    - “the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.” AD Art. 2.2.

#### Export Price

* Observed Market Price,
  + Unless:
    - No price, or
    - Relationship between exporter & importer or third-party makes price unreliable
  + Then, price for first independent buyer, or Constructed Price

#### Comparison of the “Export Price” with the “Normal Value”

* To determine whether dumping exists, the export price is compared with the normal value.
* Fair Comparison Requirement
  + “A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.” AD Art. 2.4.
  + Adjustments must be made to both export price and the normal value
    - “due allowances shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.” AD Art. 2.4.
    - “other differences” – not exhaustive list
    - “Article 2.4 also applies a contrario: this sentence implies that allowances should not be made for differences that do not affect price comparability.” AB, US – Zeroing (EC) (2006)
  + Use of “zeroing” is inconsistent with fair comparison requirement. US – Softwood Lumber V (Article 21.5- Canada) (2005).
* Calculation of Dumping Margin
  + Margin of dumping – difference between the export price and the normal value.
  + Options for calculation (AD Art. 2.4.2):
    - Comparison of the weighted average normal value to the weighted average of prices of all comparable export transactions
    - Transaction-to-transaction comparison of normal value and export price
    - Exception: Comparison of weighted average normal value to export prices in individual transactions
      * May only occur if :
        + There is “targeted dumping” (i.e. a pattern of export prices differing significantly among different purchasers, regions or time periods); and
        + The investigating authorities provide an explanation as to why such differences cannot be taken into account appropriately in weighted average-to-weighted-average or transaction-to-transaction comparisons.
  + Margins must be established for the “product” and not for “types or models of the product.” AB, EC – Bed Linen (2001).
  + Zeroing (when normal value < export price, change to zero as opposed to negative) rejected.
    - Rejected in:
      * Weighted average-to-weighted-average calculation in EC – Bed Linen (2001)
      * Transaction-to-transaction calculation in US – Softwood Lumber V (Article 21.5 – Canada) (2005)
      * Periodic Reviews in AB, US – Continued Zeroing (2009)
      * Sunset Reviews in AB, US – Corrosion-Resistant Steel Sunset Review (2004).
    - Has not been raised as an issue for third methodology of calculation.

### Determination of Injury to the Domestic Industry

#### Domestic Industry

* “Domestic Industry” (AD Art. 4.1)
  + “domestic producers as a whole of the like product;” or
  + “those of them whose collective output of the products constitutes a major proportion of the total domestic production.”
  + Exceptions
    - Domestic producers that are related to the exporters or importers or are themselves importers of the allegedly dumped product may be excluded. AD Art. 4.1(i)
    - Domestic industry may be limited to include only those producers within a particular geographic region, if certain criteria are met. AD Art. 4.1 (ii).

#### Injury

* Injury defined to be one of three things (AD Art. 3 fn. 9):
  + Actual material injury to a domestic industry;
  + Threat of material injury to a domestic industry; or
  + Material retardation of the establishment of a domestic injury.
* Actual Material Injury
  + The determination of injury to the domestic industry must be (AD Art. 3.1):
    - (1) Based on positive evidence; and
      * “positive” – evidence must be affirmative, objective, verifiable, and credible. AB, US – Hot-Rolled Steel (2001)
    - (2) Involve an objective examination of both:
      * (a) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products (AD 3.2), and
        + Imports from those exporters who were not found to be dumping may not be included in the volume of dumped imports from a country. AB, EC – Bed Linen (Article 21.5 – India).
        + Must consider whether dumped imports have explanatory force for the occurrence of significant depression or suppression of domestic prices. AB, China – GOES 2012
      * (b) the consequent impact of these imports on domestic producers of such products (AD 3.4 & 4). Non-exhaustive list of factors to consider (AD 3.4):
        + Actual or potential decline in sales, profits, output, market share, productivity, return on investment, utilization of capacity
        + Factors affecting domestic prices
        + Magnitude of the margin of dumping
        + Actual & potential negative impacts on cash flow, inventories, employment, wages, growth, ability to raise capital or investment
* Threat of Material Injury (AD 3.7)
  + The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.
  + A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility.
    - Factors to consider: (1) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation; (2) sufficient freely disposable, or an imminent substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member’s market, taking into account the availability of other export markets to absorb any additional exports; (3) whether imports are entering at prices that will have a significant depressing or suppressing effect of domestic prices, and would be likely to increase demand for further imports; and (4) inventories of the product being investigated
* Material Retardation in the establishment of an industry (AD 3.5)
  + “Demonstration of a causal relationship…hall be based on an examination of all known evidence”
  + Non-attribution requirement: Must examine other possible causes, including:
    - Volume and prices of imports not sold at dumping prices
    - Contraction in demand or changes in the patterns of consumption
    - Trade restrictive practices of and competition between the foreign and domestic producers
    - Developments in technology
    - Export performance and productivity of the domestic industry
  + 1967 Anti-Dumping Code – indicates that a finding must be based on convincing evidence that such a new industry is actually forthcoming.
  + Rarely used (if don’t have domestic industry, and foreign producers are selling it to you cheaper, then who is going to complain?

### Demonstration of a Causal Link

* Must demonstrate a causal link between the dumped imports and the injury to the domestic industry. AD Art. 3.5.
* AD does not require that dumped imports are the sole cause of the injury to the domestic industry, just a genuine and substantial cause and that the other causes of injury not be attributed to the dumped imports.

#### Relevant Factors

* Factors which may be relevant in demonstrating a causal link between dumped imports and injury and in ensuring non-attribution to the dumped imports of injury being caused by other factors: (1) the volume and prices of imports not sold at dumping prices; (2) contraction in demand or changes in the patterns of consumption; (3) trade-restrictive practices of and competition between the foreign and domestic producers; (4) developments in technology; and (5) the export performance and productivity of the domestic industry. AD Art. 3.5.
* “Provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the causal relationship between dumped imports and injury.” US – Hot-Rolled Steel (2001).
* Factors are illustrative and not mandatory. Thailand – H-Beams (2001).

#### Non-Attribution Requirement

* Non-attribution requirement – investigating authorities must examine any known factors other than the dumped imports that are injuring the domestic industry at the same time and they must not attribute the injury caused by these other factors to the dumped imports. AD Art. 3.5.
* In order for this obligation to be triggered, AD Art. 3.5 requires that the factor at issue: (1) be known to the investigating authority; (2) be a factor other than dumped imports; and (3) be injuring the domestic industry at the same time as the dumped imports. AB, EC – Tube or Pipe Fitting (2003).

#### Cumulation

* Cumulative analysis – the consideration of the effects of dumped imports from more than one country in determining whether dumped imports are causing injury to the domestic industry.
* Cumulation is not mandatory under any circumstances but is permitted , be it only under the conditions set forth in AD Art. 3.3.
* An investigating authority may cumulatively assess the effects of imports if it determines that (AD Art. 3.3):
  + (1) the margin of dumping established in relation to the imports from each country is more than de minimis (as defined in AD Art. 5.8) and the volume of imports from each country is not negligible; and
  + (2) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

### Anti-Dumping Investigation

#### Initiation of an Investigation

* Two tracks for initiation: *Ex officio* and Upon Request
  + Art. 5.1 AD: by request w/ written application
  + Art. 5.6 AD: gov’t can initiate investigation without application, but “only if they have sufficient evidence of dumping, injury and a causal link… to justify the initiation of an investigation.” (\* highly exceptional)
* Standing requirements:
  + Art. 5.4 AD. 2 thresholds must be met simultaneously:
    - 50%: application must be supported by producers w/ >50% of production of producers w/ opinion on petition, excl. producers without opinion
    - 25%: producers supporting initiation need to represent >25% of total production.
* Note: *US – Offset Act*, AB: no “good faith” requirement; gov’t can incentivize support for investigation
* Required contents of the initiation request: (1) evidence of dumping; (2) evidence of injury to the domestic industry; and (3) evidence of a causal link between the dumped imports and the injury to the domestic industry.
* Application must contain information that is “reasonably available” to the applicant in accordance with AD Art. 5.2.
* Investigating authorities must examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of the investigation. AD Art. 5.3.
* In determining whether there is sufficient evidence to initiate an investigation, an investigating authority is not limited to the information contained in the application. Guatemala – Cement II (2000)
* Must promptly terminate an investigations in the event that (AD Art. 5.8): (1) the margin of dumping is de minimis (i.e. less than 2% of the export price); and (2) the volume of imports from each country is negligible (i.e. normally less than 3 per cent of imports of the like product in the importing Member, unless countries accounting for less than 3% individually account collectively for more than 7% of imports of the like product in the importing Member).

#### Conduct of the Investigation

* All interested parties in an anti-dumping investigation must be given notice of the information which the authorities require as well as ample opportunity to present in writing all evidence which parties consider relevant in respect of the investigation. AD Art. 6.1.
* Investigation must be completed within one year, and in no case be more than 18 months, after initiation. AD Art. 5.10.

#### Public Notice and Judicial Review

* Before a final determination is made, investigating authorities must inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. AD Art. 6.9.
* AD Art. 12 contains detailed requirements for public notice by investigating authorities.

### Anti-Dumping Measures

* Three types of anti-dumping measures: (1) provisional measures; (2) price undertakings; and (3) definitive antidumping duties.

#### Imposition of Provisional Anti-Dumping Measures

* Before applying a provisional anti-dumping measure, investigating authorities must (AD Art. 7):
  + (1) Make a preliminary affirmative determination of dumping, injury, and causation; and
  + (2) Judge that such a measure is necessary to prevent injury being caused during the investigation.
  + (3) Wait at least 60 days following the initiation of the investigation.
* Types include: provision duty or, preferably, a security, by cash deposit or bond, equal to the amount of the preliminarily determined margin of dumping. AD Art. 7.2.
* Time Period
  + “Shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months.” AD Art. 7.4.
  + Lesser duty rule – period of provisional application is generally six months, with the possibility of extension to nine months upon request of the exporters.

#### Price Undertakings

* Definition – undertakings to revise prices or cease exports at the dumped price so that anti-dumping measures are not imposed
* Before price undertakings may be entered into, investigating authorities must make a preliminary affirmative determination of dumping, injury and causation. AD Art. 8.
* Voluntary on part of both exporters and investigating authorities.
* Exporter may request that the investigation be continued after the acceptance of an undertaking.

#### Imposition and Collection of Anti-Dumping Duties

* It is desirable that, even where all the requirements for imposition of duties have been fulfilled, the imposition of anti-dumping duties remain optional. AD Art. 9.
* Lesser duty rule – it is desirable that the duty imposed be less than the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry.
* MFN – Members must collect anti-dumping duties on a non-discriminatory basis on imports from all sources found to be dumped and causing injury. AD Art. 9.2.
* Anti-dumping duty collected shall not exceed the dumping margin, AD Art. 9.3, regardless of whether the duties are assessed retrospectively or prospectively. AB, US – Zeroing (Japan) (2007)
* In case the ceiling is exceeded, AD provides for a refund obligation. AB, US – Zeroing (Japan) (2007).
* Retroactive Duties for provisional and definitive duties (AD Art. 10)
  + Application is generally prohibited – may be applied only as of the date on which the determinations of dumping, injury and causation have been made.
  + AD Art. 10.6 contains rules for the retroactive application of anti-dumping duties in specific circumstances not early than 90 days prior to the application of provisional measures.: (1) a history of dumping which caused injury; or a situation in which the importer was, or should have been, aware that the exporter practices injurious dumping; and (2) the injury is caused by massive dumped imports in a short time which is likely to undermine the remedial effect of the definitive anti-dumping duty

#### Duration, Termination and Review of Anti-Dumping Duties

* “An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.” AD Art. 11.1.
* “If, at any point in time, it is demonstrated that no injury is being caused to the domestic industry by the dumped imports, the rationale for the continuation of the duty would cease.” AB, US – Stainless Steel (Mexico) (2008).
* Can maintain as long as they are still causing injuries. Just have to review every five years.

#### Problem of Circumvention of Anti-Dumping Duties

* E.g. change characteristics of product so that it no longer corresponds to the characteristics of the product subject to an anti-dumping duty
* E.g. move part of assembly or manufacturing operations to the importing country or to a third country so that the product arguable no longer originates in the country an anti-dumping duty was imposed.

### Institutional and Procedural Provisions of the Anti-Dumping Agreement

#### The Committee on Anti-Dumping Practices

* Composed of representatives of each Member.
* Each Member has to notify the Committee which of its authorities are competent to initiate and conduct investigations and domestic procedures governing such investigations. AAD Art. 16.5.

#### Dispute Settlement

* Dispute Settlement Understanding rules apply unless specified otherwise.
* Standard of Review
  + Objective assessment standard
  + Panel is confined to examining whether the evaluation of the evidence by the investigating authority was unbiased and objective. Panel Report, Mexico – Corn Syrup (2000).

### Special and Differential Treatment for Developing-Country Members

* “Possibilities of constructive remedies provided for by this Agreement shall be **explored** before applying anti-dumping duties where they would affect the essential interests of developing country Members.” AD Art. 15.

## Safeguards

* Source of Law: GATT Art. XIX and Agreement of Safeguards (AS)
* Justified under the economic emergency exception provided for in GATT Art. XIX and AS (are inconsistent with GATT Art. II and XI).
* Difference with AD and CVD:
  + Don’t have to show that something is “unfair”
  + Have to compensate after year 3 (in year 4) if want to keep Safeguard.
* Why are Safeguards used less?
  + Have to be applied on MFN basis – essentially have to shut out entire foreign industry.
  + Have to compensate
  + “serious injury” standard is stricter
  + Unforeseen developments is “fourth” factor

### Requirements for the Use of Safeguard Measures

* Members may apply safeguard measures to a product only when three requirements are met (AS 2.1. and GATT XIX:1(a)):
  + (1) the increased imports requirement (including the unforeseen developments requirement) – product is being imported into its territory in such increased quantities, absolute or relative to domestic production (maybe as a result of unforeseen developments);
  + (2) Serious injury requirement – to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products; and
  + (3) Causation requirement – of the effect of the obligations incurred by a Member under this Agreement.
* Increased Imports
  + Increase in imports can be (AS Art. 2.1.): (1) an absolute increase (i.e. an increase by tonnes or units of the imported products) or (2) a relative increase (i.e. an increase of imports relative to domestic production, for example even if imports and domestic production decreased, imports decreased less than domestic production).
  + “the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause “serious injury.” AB, Argentina – Footwear (EC) (2000)
  + Four elements to increased imports requirement (US – Steel Safeguards (2003)): (1) recent increase; (2) sudden increase; (3) sharp increase; and (4) significant increase. Test does not depend on the proof of the mere existence of these conditions, but on the extent and intensity of their manifestations.
  + Unforeseen developments (GATT Art. XIX) – increase in imports must occur as a result of unforeseen developments.
    - Definition of unforeseen developments – “developments occurring after the negotiations of the relevant tariff concession which is would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.” US – Fur Felt Hats (1951).
    - E.g. Working Party held in US – Fur Felt Hats (1951) that the fact that hat styles had changed did not constitute an unforeseen development. However, the degree to which the change in fashion affected the competitive situation could not, according to the Working Party, reasonably have been foreseen by the U.S. authorities in 1947.
* Serious Injury Requirement
  + Serious injury – “a significant overall impairment in the position of a domestic industry.” AS Art. 4.1.
    - Stricter than the standard of “material injury” of the AD Agreement and the SCM Agreement. US – Lamb (2001).
    - Injury factors include (AS Art. 4.2(a)): (1) the rate and amount of the increase in imports, of the product concerned, in absolute and relative terms; (2) the share of the domestic market taken by increased imports; and (3) changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.
    - Must “be based on facts and not merely on allegation, conjecture or remote possibility.” AS At. 4.1(b).
  + Domestic industry - “the **producers as a whole** of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a **major proportion** of the total domestic production of those products.” AS Art. 4.1(c)
    - “like products” and “directly competitive products” – significant relevant case law of these concepts used in GATT – factors that must be considered include: (1) physical characteristics of the products; (2) end-use; (3) consumer habits and preferences regarding the products; and (4) customs classification of the products.
    - “if an input product and an end-product are not like or directly competitive, then it is irrelevant, under the Agreement on Safeguards, that there is a continuous line of production between an input product and an end-product.” US – Lamb (2001).
* Causation Requirement
  + Test for establishing causation: (1) a demonstration of the causal link between the increased imports and the serious injury or threat thereof (the causal link element); and (2) an identification of any injury caused by factors other than the increased imports and the non-attribution of this injury to these imports (the non-attribution element). AS Art. 4.2(b).
  + It is not necessary to show that increased imports ALONE must be capable of causing serious injury. US – Wheat Gluten (2001).

### Domestic Procedures and Notification and Consultation Requirements

* A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public. AS Art. 3.
* A Member making a finding of serious injury or threat thereof, or taking a decision to apply or extend a safeguard, should provide all pertinent information to the WTO Committee on Safeguards. AS Art. 12.2.
* Member applying or extending a measure shall provide adequate opportunity for prior consultations with Members affected by the measure, for the purpose of reviewing the information provided, exchanging views and, most importantly, to facilitate reaching an understanding on the substantially equivalent levels of concessions to be maintained under Art. 8.1. AS Art. 12.3.

### Characteristics of Safeguard Measures

* Typically take the form of (1) customs duties above the binding (inconsistent with GATT Art. II:1); or (2) quantitative restrictions (inconsistent with GATT Art. XI). Safeguard measures can take other forms.
* Duration of Safeguard Measures
  + May only be applied “for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment.” AS Art. 7.1.
  + Max =8 years, AS Art. 7.3, unless developing country = 10 years, AS Art. 9.2.
  + Must carry out midterm review if measure will exceed 3 years. AS Art. 7.3.
* Non-Discriminatory Application of Safeguard Measures
  + “Safeguard measures shall be applied to a product being imported irrespective of its source.” AS Art. 2.2.
  + Can exempt free trade partners and customs area. However, have to back them out of your injury analysis. AB, Argentina – Footwear (EC) (2000). Some of these agreements allow for safeguards. How do these megaregional safeguards interact with WTO safeguards?
  + Two exceptions:
    - AS Art. 5.2(b) – allows the selective application of safeguard measures taken in the form of quotas allocated among supplying countries if, apart from other requirements, “clear demonstration is provided to the Committee [on Safeguards] that…imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product.”
    - AS Art. 9.1. – “Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively amount for not more than 9 per cent of total imports of the product concerned.”
* Safeguard Measures Commensurate with the Extent of Necessity
  + A safeguard shall apply only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. AS Art. 5.1.
  + Where the safeguard measure takes the form of a quantitative restriction and such a measure reduces the quantity of imports to a level less than the average imports in the last 3 representative years, a clear justification to that effect is necessary. AS Art. 5.1.
* Compensation of Affected Exporting Members
  + “A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavor to maintain a substantially equivalent level of concessions and other obligations…between it and the exporting Members which would be affected by such a measure…To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.” AS Art. 8.1.
  + Is an agreement on compensation is not reached within 30 days, the affected exporting Members are free “to suspend…the application of substantially equivalent concessions or other obligations under GATT, to the trade of the Member applying the safeguard measure.” AS Art. 8.2. However, affected exporting Members cannot always exercise this right of suspension – see AS Art. 8.3.
  + Have to start compensating in year 4.
* Provisional Safeguard Measures
  + Members may take provisional safeguard measures in “critical circumstances.” AS Art. 6.
  + Critical circumstances = circumstances where delay would cause damage which it would be difficult to repair.
  + Before taking provisional safeguard measures, the competent domestic authorities must make a preliminary determination that there is clear evidence that the increased imports have caused or are threatening to cause serious injury.
  + Max of 200 days (difficult to challenge in practice because last for such a short period of time)
  + Can only take the form of tariff increases.

### US – Lamb (DS 177 & DS 178)

* Complainants: Australia and New Zealand
* Respondent: U.S.
* Measure at Issue – a definitive safeguard measure imposed by the United States in the form of a tariff-rate quota.
* Product at issue – fresh, chilled and frozen lamb meat from Australia and New Zealand
* GATT Art.  XIX:1(a) (unforeseen developments): The Appellate Body held that an investigating authority must demonstrate the existence of unforeseen developments “in the same report of the competent authorities” as that containing other findings related to the safeguard investigation at issue to show a “logical connection” between the conditions set forth in Art. XIX and the “circumstances” such as “unforeseen developments”. As there was no such demonstration in the United States International Trade Commission (“ITC”) Report, the Panel's ultimate finding that the United States violated Art. XIX:1(a) by failing to demonstrate, as a matter of fact, the existence of “unforeseen developments” was upheld.
  + USITC Report identified two changes in the type of lamb meat products imported into the U.S.: the proportion of imported fresh and chilled lamb meat increased in relation to the proportion of imported frozen lamb meat; and, the cut size of imported lamb meat increased. USITC Report provided that these changes were unforeseen when negotiating tariff cuts but did not discuss or offer any explanation as to why these changes could be regarded as “unforeseen development” within the meaning of GATT Art. XIX:1(a). Thus, the USITC Report does not demonstrate that the safeguard measure at issue has been applied as a result of unforeseen developments.
* SA Art. 4.1(c) (injury determination – domestic industry): The Appellate Body upheld the Panel's finding that the measure was inconsistent with Art. 4.1(c), as the ITC based its serious injury analysis not only on the producers of lamb meat but also in part on lamb growers and feeders. The Appellate Body stated that the “domestic industry” under Art. 4.1(c) extends solely to the producers of the like or directly competitive products, and thus only to the lamb meat producers in this case.
  + USITC included growers and feeders of live lambs, as well as packers and breakers of lamb meat, because it considered that there was a continuous line of production from the raw to the processed product, and that there was a substantial coincidence of economic interests between and among the growers and feeders of live lambs, and the packers and breakers of lamb meat.
  + USITC did not find that live lambs or any other products were directly competitive with lamb meat. Thus, the domestic industry could only include the producers of lamb meat. By expanding the domestic industry to include producers of other products, including live lambs, the USITC defined the domestic industry inconsistently with AS Art. 4.1.(c)
* Standard of review (SA):
  + Panels are required to examine whether the competent authorities (i) have examined all relevant factors; and (ii) have provided a “reasoned and adequate” explanation of how the facts support their determination.
  + Found that the Panel correctly interpreted the standard of review (“objective assessment of the facts”), set forth in Article 11 of the DSU, which is appropriate to its examination of claims made under Article 4.2 of the Agreement on Safeguards;
    - “objective assessment of the facts” (between de novo and total deference) – two elements:
      * Formal – whether the competent authorities have evaluated all relevant factors
      * Substantive – whether the competent authorities have given a reasoned and adequate explanation for their determination.
  + But concluded that the Panel erred in applying that standard in examining the claims made concerning the USITC’s determination that there existed a threat of serious injury; and found, moreover, that the US acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards because the USITC Report did not explain adequately the determination that there existed a threat of serious injury to the domestic industry (panel just summarized parties’ substantive arguments).
* SA Art. 4.2(a) (injury determination – threat of serious injury):
  + Standard of “serious injury” is very high and higher than “material injury” in AD Agreement and SCM Agreement.
  + Serious injury must be “clearly imminent” under AS Art. 4.1(b)
    - Imminent – must be on the verge of occurring.
    - Clearly – high degree of likelihood
  + While upholding the Panel's finding that the data the ITC relied on for the threat of serious injury analysis was not sufficiently representative of the domestic industry, the Appellate Body found that it was Art. 4.2(a) (“read together with the definition of domestic industry in Art. 4.1(c)) that the United States had violated, rather than Art. 4.1(c) itself.
  + Also, having concluded that a threat of serious injury analysis requires an assessment of evidence from the most recent past in the context of the longer-term trends for the **entire investigative period**, the Appellate Body reversed the Panel's interpretation of Art. 4.2(a) and concluded (after finding that the Panel had violated DSU Art. 11) that the ITC determination was inconsistent with Art. 4.2(a) as the ITC had failed to adequately explain how the facts relating to prices support its determination, under Art. 4.2(a), that the domestic industry was threatened with such injury.
    - “A rise in prices…should, in the ordinary course of events, be beneficial for an industry…such a rise could lead to an increase in revenues, and could increase margins and profits, and, possibly, also, production levels…if an industry is not yet in a state of serious injury, and that industry has enjoyed rising prices in the most recent past, it is, at least, questionable whether the industry is highly likely to suffer serious injury in the very near future. In such a situation, the competent authorities should devote particular attention to explaining the apparent contradiction between the most recent price rises and their view that the industry is still threatened with serious injury…the USITC offered no such edxplanation.”
* SA Art. 4.2(b) (injury determination – causation):
  + The Appellate Body reversed the Panel's interpretation that the SA requires that increased imports be “sufficient” to cause serious injury or that imports “alone” be capable of causing or threatening serious injury.
  + Instead the Appellate Body explained that where several factors are causing injury simultaneously, “a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated”.
  + ITC identified six other factors other than increased imports contributing to the situation of the domestic industry at the time. ITC determined the relative causal importance of each factor and concluded that four of the six other factors were relatively less important cause of injury than increased imports. The Appellate Body found that the ITC had acted inconsistently with Art. 4.2(b), as the ITC Report failed to separate out the injurious effects of different factors and to explain the nature and extent of the injurious effects of the factors other than imports.

# Additional Issues

## Investment

### Trade and Investment

* There are three main areas of work in the WTO on trade and investment:
  + A Working Group established in 1996 conducts analytical work on the relationship between trade and investment.
  + The Agreement on Trade-Related Investment Measures (“TRIMs Agreement”), one of the Multilateral Agreements on Trade in Goods, prohibits trade-related investment measures, such as local content requirements, that are inconsistent with basic provisions of GATT 1994.
  + The General Agreement on Trade in Services addresses foreign investment in services as one of four modes of supply of services.

### Trade Related Investment Measures (TRIMs)

#### No Comprehensive Treatment of Investment in the GATT

* GATT Panel in Canada-FIRA clarified that protection of investment is not addressed by the GATT.
* GATT requires WTO Members to abolish two types of investment measures:
  + Local content requirements (GATT Art. III.5), and
  + Export performance requirements (GATT Art. XI).

#### Measures Coming Under the Purview of TRIMS

* TRIMS Ar. 2.1 prohibits WTO Members from applying any investment measure that is inconsistent with GATT Art. III or GATT Art. XI.
* List annexed to TRIMS provides the following examples of measures that are inconsistent with GATT Art. III or GATT Art. XI:
  + Local content requirements;
  + Export performance requirements;
  + Trade balancing requirements;
  + Foreign exchange balancing restrictions; and
  + Restrictions on an enterprise’s export or sale for export of products.
* Assuming a measure challenged falls under the Illustrative List, it will be ipso factor judged WTO inconsistent; the judge will not have to see to what extent it violates a specific provision. See Indonesia-Autos Panel.
* GATT III-Type Measures
  + Measures that could fall under GATT III-Type measure in the Illustrative List
    - Required purchase or use by an enterprise of products of domestic origin or from any domestic source; or
    - Requirements to the effect that an enterprise’s purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.
  + Indonesia-Autos: Panel rules on the legality of an Indonesian car programme, linking tax benefits for cars manufactured in Indonesia to local content-requirements, and linking customs duty benefits for imported components of cars manufactured in Indonesia to similar local content requirements. The Panel found that these were indeed local content requirements which had a significant impact on investment in the automotive sector (section 14.80), and that they were trade-related, because they affected trade (section 14.82). The Panel also found that compliance with the requirements for the purchase and use of products of domestic origin was necessary to obtain the tax and customs duty benefits and that such benefits were advantages within the meaning of the illustrative list (sections 14.89-91). As a result, the Panel ruled that the local content-requirements imposed by Indonesia violated the TRIMs Agreement (section 14.91).
* GATT XI-Type Measures
  + Three categories of measures come under the purview of GATT Art. XI.1:
    - The importation by an enterprise of products used in or related to its local production, generally in an amount related to the volume or value of local production that it exports;
    - The importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise;
    - The exportation or sale for export by an enterprise of products.
  + All these measures are somewhat linked to export-related performance. The Indian-Autos litigation involved the review of an Indian trade balancing measure: the import (By domestic car manufacturers) of parts and components necessary for the production of cars was conditioned on a certain free on board value of exports of cars and components over the same period; if the statutory thresholds had not been metm no imports would occur. The legislation thus gave an incentive to Indian car manufacturers to export (so that they could profit from cheap inputs. The Panel found that the “trade balancing condition…by limiting the amount of imports trhough linking them to an export commitment, acts as a restriction on importation, contract to the terms of Article XI:1.”

#### Obligations During and After the Transitional Phase

* TRIMS Art. 5.2 provides for three different transition periods during which WTO Members, according to their level of development, must phase out WTO-inconsistent measures that the Council on Trade in Goods (CTG) had been notified of:
  + Developed countries – by Jan. 1, 1997
  + Developing countries – by Jan. 1, 2000
  + LDCs – by Jan. 1, 2002
* New measures introduced within 180 days before the entry into force of the Agreement shall not profit from the transitional period. TRIMs Art. 5.4.
* During the transitional periof, a WTO Member could not modify the terms of any WTO-inconsistent measure. TRIMs Art. 5.4.
* Some developing countries requested an extension of the deadline under TRIMs Art. 5.3.

#### Procedural Obligations

* WTO Members must”notify the Secretariat of the publications in which TRIMs can be found, including those applied by regional and local governments and authorities within their territories.” TRIMs Art. 6.2.

#### Special and Differential Treatment

* Annex F of the Hong Kong Ministerial Decision provides:
  + LDCs were allowed to maintain existing TRIMs until the end of a new transition period lasting 7 yetars.
  + LDCs were further allowed to introduce new TRIMs.

#### The Relationship Between TRIMs and the GATT

* WTO Agreement Annex 1A – when a conflict exists between a provision of the GATT and a provision of another agreement in Annex 1A (like TRIMs), the provision of the other agreement “shall prevail to the extent of the conflict.”
* Lex specialis – even if no genuine conflict between two provisions in two different agreements exists, a transaction which potentially could be submitted under two different agreements should always be submitted to the one that regulates in more detail the transaction at hand.

#### The Relationship with Other Annex 1A Agreements

* Indonesia-Autos – Panel concluded that measured challenged under both TRIMs and SCM must be reviewed under both agreements. The Panel examined whether there was conflict between the two agreements. In its view, the General Interpretive Note did not apply to the relationship between TRIMs and SCM (section 14.49). It used a narrow definition of the term “conflict” to arrive at its final judgment. It held that (section 14.55): “there is no general conflict between the SCM Agreement and the TRIMs Agreement.” It thus moved on and applied the two agreements cumulatively to the transaction before it.

#### TRIMs Committee

* Established by TRIMs Art. 7
* Main task – monitor the operation and implementation of the TRIMs Agreement.
* Provides a forum for consultations among WTO Members on trade and investment issues.
* Reports annually to the CTG.

#### Trade and Investment Revisited

* WTO does not deal with investment in comprehensive manner.
* Attempts to multilateralize investment protection have taken place outside the WTO, most notably within the OECD where the Multilateral Agreement on Investment (MAI) was launched. This initiative too was not led to fruitful conclusion.
* As a result, investment protection nowadays takes place within bilateral investment treaties (BITs), regional schemes, and PTAs.

### TPP Chapter 9. Investment

* Core Obligations
  + TPP’s Investment chapter includes a set of core obligations that provide basic protections, including:
    - National Treatment (TPP 9.4)
    - MFN (TPP 9.5)
  + “Minimum standard of treatment” for investments, defined narrowly based on customary international law, including protections against denial of justice and failure to provide police protection. TPP 9.6.
  + Ensuring that if a TPP government expropriates an investment, it does so for a public purpose, in accordance with due process of law, and subject to prompt, adequate and fully realizable and transferable compensation. TPP 9.7.
  + Allowing for transfer of funds related to an investment covered under the agreement — such as contributions to capital, transfers of profits and dividends, payments of interest or royalties, and payments under a contract — to be made freely and without delay, subject to exceptions. These exceptions ensure that governments retain the flexibility to manage volatile capital flows, including permitting countries to impose non-discriminating temporary safeguard measures (i.e., capital controls) restricting investment-related transfers in the context of a balance of payments crisis, and certain other economic crises, or in the context of prudential measures to protect the integrity and stability of the financial system. TPP 9.8.
  + Barring specified “performance requirements,” including local content requirements, export requirements, and technology transfer or technology localization requirements. TPP 9.9.
  + Ensuring investors have the ability to appoint senior managers without regard to nationality, and ensuring that any nationality-based restrictions on the appointment of board members do not impair an investor’s control over its investment. TPP 9.10.
* Non-conforming measures (TPP 9.11): TPP countries have agreed to accept these core obligations on a “negative-list basis,” meaning that all obligations apply to all sectors and activities, apart from limitations negotiated and explicitly set out in a list of specific reservations describing the nature of any “non-conforming measures” that would be permissible even after the agreement enters into effect. These are recorded in two annexes:
  + Annex I contains a list of current measures that would otherwise violate one or more of the core obligations of the chapter, but which the country has determined that it needs to maintain. In listing a measure in Annex I, the country commits to a “standstill,” which ensures that the measure will not become more restrictive in the future, as well as a “ratchet,” which means that if the measure is amended in the future to become less restrictive, the new, more favorable treatment will set the benchmark for the standstill requirement.
  + Annex II contains a list of reservations that enable a country to have full discretion to maintain existing non-conforming measures or adopt new restrictions without any limitation under the agreement.
* Denial of Benefits (TPP 9.14) – The Investment chapter allows a TPP Party to deny benefits to “shell companies” owned by persons of that Party or a non-Party that establishes in another TPP country in order to take advantage of treaty rights but that lack substantial business activities in that country. It also allows the denial of benefits to companies that invest in a TPP country, but are owned by persons of non-Parties with whom a TPP Party prohibits certain transactions, such as under sanctions regimes.
* Investor-State Disputes (TPP Ch. 9 Section B starting at 9.17) – TPP investors will have the right to pursue neutral, international arbitration in the event of a dispute between an investor of a TPP Party and another TPP Party over a violation of one of the commitments of the Investment chapter. The chapter specifies these proceedings will be conducted in a transparent manner, with opportunities for public participation and safeguards to prevent abuse and help deter frivolous or otherwise non-meritorious claims. The safeguards include:
  + Transparency of arbitral proceedings – Ensuring that arbitration hearings and documents are open and available to the public. For investor-State cases against the United States under TPP, all submissions, hearing transcripts, and other key documents will be available on the U.S. State Department website.
  + Amicus curiae submissions – Ensuring that interested stakeholders, including labor unions, civil society organizations and other interested stakeholders, can submit amicus curiae or “friend of the court” briefs.
  + Non-disputing party submissions – Ensuring that an investor’s home government and other TPP Parties are able to make submissions to panels on the interpretation of the Agreement.
  + Expedited review of frivolous claims and possible award of attorneys’ fees – Ensuring, as under the U.S. Federal Rules of Civil Procedure, that panels are able, on an expedited basis, to review and dismiss frivolous claims and award costs and attorneys’ fees to the respondent government.
  + Interim review and award challenges – Ensuring that disputing parties will be able to review and comment on proposed arbitral awards prior to their issuance, and to allow both disputing parties the option to challenge a tribunal award.
  + Binding joint interpretations – Ensuring that TPP Parties, at any time, can agree on interpretations of the agreement that are binding on tribunals.
  + Time limits – The time period during which an investor can bring an investor-State claim is limited to three and a half years from the date of actual or constructive knowledge of an alleged breach.
  + Claimant waiver – To prevent “forum shopping,” a claimant pursuing a claim in investor-State arbitration must waive the right to initiate parallel proceedings in other fora challenging the same measures
* New Features
  + TPP’s Investment chapter includes innovations going beyond previous U.S. Free Trade Agreements (FTAs) to address new and emerging investment issues. These include obligations to address the growing problem of discriminatory measures that provide advantages to foreign SOEs, national champions, and others by forcing U.S. investors to favor another country’s domestic technology. They also include clarifications that TPP investment disciplines apply to SOEs and other persons exercising delegated government authority — whether delegated formally or informally — so that SOEs, acting on behalf of governments, cannot take actions that discriminate against foreign investors and then evade challenge by asserting that they are not covered by the disciplines of the agreement.
  + At the same time, the chapter includes stronger safeguards to close loopholes and to raise the standards of investor-State dispute settlement above virtually all of the other 3,200 plus investment-related agreements in effect around the world. These include underscoring that countries can regulate in the public interest, including on health, safety, financial stability, and environmental protection; expanding the rules discouraging and dismissing frivolous suits; clarifying that the claimant bears the burden to prove all elements of its claims; allowing governments to issue binding interpretations of the agreement; making proceedings fully open and transparent; and providing for the participation of civil society organizations and others parties not a direct party to the dispute. In addition, the chapter will for the first time clarify key concepts in the non-discrimination and minimum standard of treatment obligations, for example, clarifying the significance of legitimate public welfare objectives in the non-discrimination analysis and addressing the concern that frustrating investor expectations in and of itself could result in a minimum standard of treatment claim. The chapter will also require the Parties to provide detailed guidance on arbitrator ethics and issues of arbitrator independence and impartiality.
    - Explicit language underscoring right to regulate in the public interest. – TPP includes new language underscoring that countries retain the right to regulate in the public interest, including to protect public health, safety, financial stability, and the environment. TPP will also include a separate, explicit recognition of health authorities’ right to adopt tobacco control measures in order to protect public health.
    - Burden on claimant. – A new provision in TPP clarifies that the claimant — the investor bringing the case against the government — bears the burden to prove all elements of its claims, including claims of breach of the minimum standard of treatment (MST) obligation, an obligation which guarantees investors due process and certain other protections in accordance with customary international law.
    - Dismissal of frivolous claims. – TPP expands existing rules discouraging frivolous suits by permitting governments to seek expedited review and dismissal of claims that are “manifestly without legal merit.”
    - Investor “expectations” aren’t enough. – TPP explicitly clarifies that an investor cannot win a claim for breach of the MST obligation merely by showing that a government measure frustrated its expectations (for example, its expectations of earning certain profits).
    - Arbitrator ethics/code of conduct. TPP countries will establish a code of conduct for ISDS arbitrators that will provide additional guidance on issues of arbitrator independence and impartiality.

#### Elizabeth Warren Opinion

* <https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html>
* Against Investor-State Dispute Settlement (ISDS)
* Will further favor big MNCs.
* Would allow foreign companies to challenge U.S. laws – and potentially to pick up huge payouts from taxpayers – without going to U.S. courts because can instead go to international panel of arbitrators.
* Panels won’t employ independent judges but will have highly paid corporate lawyers representing corporations one day and sitting judgment the next.
* Special court is only accessible by international investors (big corporations)
* Original purpose of panels – after WWI, some investors worried about plunking down their money in developing countries, where the legal systems were not as dependable. They were concerned that a corporation might build a plant one day only to watch a dictator confiscate it the next. To encourage foreign investment in countries with weak legal systems, the United States and other nations began to include ISDS in trade agreements. Those justifications don’t make sense anymore, if they ever did. Countries in the TPP are hardly emerging economies with weak legal systems.

#### White House Q&A on ISDS

* <https://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers>
* Standards
  + The reality is that ISDS does not and cannot require countries to change any law or regulation. Looking more broadly, TPP will result in higher levels of labor and environmental protections in most TPP countries than they have today. If TPP is passed by Congress, it will also create strong, enforceable new labor protections that would allow the United States to take action – on its own, or on the basis of a petition from labor unions or other interested parties – against TPP governments that don't honor their labor commitments. The same is true for enforcing environmental commitments.
* Protect American investors abroad from discrimination and denial of justice.
  + U.S. investors often face a heightened risk of bias or discrimination when abroad. That’s why governments have looked to international arbitration to resolve such disputes for centuries.
* Integrity of Arbitrators:
  + ISDS panels more frequently side with respondent governments. The U.S. government, for example, has won every single case concluded against it.
  + The arbitration rules used under TPP require the independence of arbitrators and provide for challenge and disqualification in the event of conflict of interest or bias. They also provide a central role for the government being sued to determine which arbitrators hear the case.

## Competition and State-Owned Enterprises

### Current Coverage

* State-Owned Enterprises: SCM Agreement; GATT XVII

### Interaction Between Trade and Competition Policy

* Doha Round
  + No longer going to be addressed in Doha Round.
  + Issues that were going to be discussed:
    - core principles, including transparency, non-discrimination and procedural fairness
    - provisions on hardcore cartels;
    - modalities for voluntary cooperation; and
    - support for progressive reinforcement of competition institutions in developing countries through capacity building.

### TPP Chapter 16: Competition

* Effective Competition Laws – Art. 16.1
  + TPP members agree to adopt or maintain national competition laws that proscribe anticompetitive business conduct and work to apply these laws to all commercial activities in their territories. To ensure that such laws are effectively implemented, TPP Parties will establish or maintain authorities responsible for the enforcement of national competition laws.
* Consumer Protection – Art. 16.6
  + TPP members agree to adopt or — as in the case of the United States — maintain laws that proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers. Parties also agree to cooperate, as appropriate, on matters of mutual interest related to competition activities, including in the enforcement of consumer protection laws.
* Procedural Fairness – Art. 16.2
  + Includes a range of obligations related to procedural fairness, including rules that ensure a person subject to an enforcement action has a reasonable opportunity to be represented by counsel, to provide evidence in its defense, and that the enforcement authority adopt a series of transparency procedures.
* Private Rights of Action – Art. 16.3
  + TPP Parties agree to provide an independent right to seek redress for injury caused by a violation of a Party’s competition law or, to provide persons with a right to request that a Party’s competition authority initiate an investigation and to seek redress after the finding of a violation of competition law.
* Cooperation and Transparency – Art. 16.4 and 16.7
  + TPP Parties agree to cooperate in the area of competition policy and competition law enforcement, including through notification, consultation and exchange of information. They also agree to ensure that final decisions finding a violation of competition law are made publicly available, while ensuring that business confidential information is protected.
* Dispute Settlement – Art. 16.9
  + Consistent with previous U.S. Free Trade Agreements (FTAs), **dispute settlement will not apply to competition policy provisions**. However, the TPP Parties do agree to enter into consultations on issues related to the chapter, upon the request of another Party. E.g. Do not want panel saying that DOJ did not enforce its anti-trust policies correctly and then impose trade sanctions.
* Impact
  + Competition policy systems vary widely in the Asia Pacific. Some countries have advanced systems of anti-trust law and guarantee consumer rights, but take different approaches to achieve these ends. Some have no competition policy laws at all; others use opaque systems in which case filings can appear to be arbitrary or designed to reduce the market share of U.S. or other foreign businesses. This issue appears to be a rapidly growing challenge to American exporters, especially, but not only, in sectors where U.S. businesses and workers are perceived to be world technological leaders.
  + TPP’s Competition Policy chapter encourages effective and transparent competition policy systems that encourage market-based competition and protect consumers against monopoly tactics. These principles are meant to be the foundation of transparent laws ensuring fair competition in the Asia-Pacific region, and ensuring that regulatory actions rest on objective and transparent criteria and are taken in a manner that does not discriminate against foreign or specifically U.S. businesses.
  + Some companies are essentially worldwide monopolies. So if you are a downstream company buying from these companies and don’t like their prices, you can initiate an antitrust case against them. There is a worry that anti-competition policy in TPP is being used for this.

### TPP Chapter 17: State-Owned Enterprises

* Coverage – Art. 17.2 and 17.3
  + TPP’s State-Owned Enterprise chapter provides broad coverage of SOEs that are principally engaged in commercial activity. At the same time, to avoid an outcome in which a government could easily evade its obligations by delegating its authority to an SOE, it includes rules requiring SOEs that operate under delegated authority to abide by the obligations of the TPP Agreement.
* Commercial considerations and non-discriminatory treatment – Art. 17.4
  + The SOE chapter includes commitments by TPP Parties to ensure that their SOEs make commercial purchases and sales on the basis of commercial considerations, except when doing so would be inconsistent with any mandate under which an SOE is operating that would require it to provide public services. TPP governments also agree to ensure that their SOEs or designated monopolies do not discriminate against the enterprises, goods, and services of other Parties.
* Immunity and impartial regulation – Art. 17.5
  + The SOE chapter includes obligations requiring TPP countries to provide their courts with jurisdiction over commercial activities of foreign SOEs so that a foreign SOE operating in a TPP country could not evade legal action regarding its commercial activities merely by claiming sovereign immunity. At the same time, it includes rules requiring Parties to ensure that administrative bodies regulating both SOEs and private companies do so in an impartial manner and do not use their regulatory authority to provide preferential treatment to their SOEs.
* Non-commercial assistance – Art. 17.6
  + The SOE chapter ensures that, in providing any non-commercial assistance (**big difference from SCM Agreement?**) to SOEs, TPP Parties agree to not cause adverse effects to the interests of other TPP Parties. This includes a commitment from TPP Parties to not cause injury to another Party’s domestic industry by providing non-commercial assistance to a SOE that produces and sells goods in the territory of another Party.
* Transparency – Art. 17.10
  + Requires TPP Parties to share a list of their SOEs with the other TPP countries and provide, upon request, additional information about the extent of government ownership or control and the non-commercial assistance they provide to SOEs.
* Exceptions - Art. 17.13
  + Establishes exceptions to the commitments on SOEs. For example, nothing in this chapter would prevent a Party from taking prudential measures or other measures to respond temporarily to an economic emergency.
* Dispute settlement – Annex 17B
  + SOE rules are fully enforceable, subject to State-to-State dispute settlement. Investor-state dispute settlement does not apply to the SOE rules.
* Annexes – Art. 17.9
  + In addition to the exceptions that apply to all Parties, a set of country-specific Annexes define narrowly-tailored and country-specific exceptions to specific obligations as well as transition periods to provide certain countries additional time to meet the obligations of the chapter.
* Impact
  + SOEs have grown rapidly as actors in global trade, in cross-border investment, and in major American export markets over the past decade. Whereas in 2000, there was only one SOE in the Fortune Global 50 list of the largest companies in the world, now there are close to a dozen. Their international activity has raised new concerns about government influence, potential trade distortions, and unfair competition. In addition, some TPP countries that maintain many SOEs are already considering reforms to enhance the efficiency and productivity of their economies.
  + SOEs exist in all TPP countries, are used for different purposes, and are regulated and managed in widely varying ways. Some SOEs provide public services, but other times, extensive government participation in economies through SOEs can distort competition to the detriment of private American firms and their workers. This can occur through SOEs that receive advantages from governments, such as preferential financing, including through State-owned banks; provision of goods or services from the government or from other SOEs at preferential prices or free of charge; direct subsidies and debt forgiveness, or other preferences. These preferences can tilt the playing field in favor of SOEs and against U.S. workers and businesses. Even where enforcement against SOEs in foreign markets has been pursued for anti-competitive behavior or other unlawful behavior, commercial SOEs have avoided prosecution by claiming sovereign immunity.
  + Concerns about the role of SOEs have grown in recent years because SOEs that had previously operated almost exclusively within their own territories are increasingly engaged in international trade of goods and services or acting as investors in foreign markets. Their coverage in a specific TPP chapter is a new feature in U.S. trade agreements that will help us address emerging concerns, including financing and subsidization of SOEs involved in exporting, domestic competition for business and contracts; and regulatory policies which, by design or because of lack of transparency, create inherent advantages for SOEs favored by home governments. At the same time, TPP recognizes, defines, and ensures legitimate roles for SOEs in provision of public services.

## Labor and Environment

### Trade and Environment

* While there is no specific agreement dealing with the environment, under WTO rules members can adopt trade-related measures aimed at protecting the environment provided a number of conditions to avoid the misuse of such measures for protectionist ends are fulfilled.
* WTO Members have the right to adopt trade-related measures to protect the environment. US – Gasoline. AB in US – Gasoline cautioned, however, that a balance needed to be maintained between market access obligations an d the right of members to invoke the environmental justifications foreseen in the GATT.
* GATT Exemptions:
  + Articles XX(b) and (g) allow WTO members to justify GATT-inconsistent measures if these are either necessary to protect human, animal or plant life or health, or if the measures relate to the conservation of exhaustible natural resources, respectively.
  + In addition, the introductory paragraph of Article XX (its “chapeau”) has been designed to prevent the misuse of trade-related measures. Pursuant to the chapeau, an environmental measure may not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”
* Other relevant WTO Texts
  + SPS Agreement

### TPP General

* Political discourse: those saying that it does not go far enough just want to stop it as opposed to proposing how we can get other countries to go along with more progressive agenda. Other saying that we will never go far enough to get all of liberal vote so just go far enough to get just enough votes to pass it.

### TPP Chapter 20: Environment

* Note: Environmental Chapter seems to defer to state sovereignty more than Labor chapter
* Coverage and General Commitments – Art. 20.3
  + The Environment chapter includes commitments by all TPP Parties to effectively enforce their environmental laws and not to waive or derogate from environmental laws in order to attract trade or investment.
* Dispute Settlement – Art. 20.23
  + Commitments in the Environment chapter will be enforced through the same dispute settlement procedures and mechanisms available for disputes arising under other chapters of the TPP Agreement, including the availability of trade sanctions.
* Marine Fisheries – Art. 20.16
  + TPP countries agree to prohibit some of the most harmful fisheries subsidies, such as those given to illegal fishermen. They also agree to restrain new subsidy programs and enhancements to existing subsidy programs, and create enhanced transparency requirements related to such programs. In addition, the chapter includes commitments to promote sustainable fisheries management; to promote the long-term conservation of species at risk, such as sharks, sea turtles, seabirds and marine mammals; and to combat illegal fishing, including by implementing port state measures and by supporting increased monitoring and surveillance.
* Multilateral Environmental Agreements (MEAs) – Art. 20.4
  + TPP countries are signatories to many MEAs covering a wide range of environmental issues. However, these agreements may lack binding enforcement regimes. By requiring MEA implementation, TPP provides valuable reinforcements to these commitments. The Environment chapter requires Parties to reaffirm their commitment to implement those MEAs they have joined, effectively enforce their implementing legislation for all MEAs to which they have joined, and work together as they negotiate and implement new MEAs. The chapter highlights and reinforces the commitment to implement common MEAs of particular importance to the Asia-Pacific, including CITES, the Montreal Protocol on Ozone Depleting Substances and the International Convention for the Prevention of Pollution from Ships (MARPOL). Several MEAs are not common to the TPP Parties. For those MEAs dealing with marine species and conservation of wetlands, TPP includes broader, stand-alone commitments for the sustainable management of fisheries, combatting illegal fishing, promoting conservation of marine mammals, and protecting and conserving all specially protected natural areas including wetlands, but also glaciers and other fragile ecosystems. By establishing consistent, enforceable commitments that apply to all TPP Parties equally, we are advancing the basic objectives of the original MEAs and providing for similar levels of environmental protection across the region. And in several cases, TPP goes beyond any previous MEA commitments to establish pioneering new commitments, such as commitments to prohibit harmful government handouts to illegal fishermen, and to take enhanced actions to combat wildlife trafficking — regardless of whether the wildlife is protected under CITES.
* Cooperation – Art. 20.12
  + Collectively, TPP countries have a wealth of knowledge and experience to share with one another on environmental and conservation issues. TPP will help take full advantage of this by establishing a framework for conducting, reviewing, and evaluating cooperative activities that support implementation of the Environment chapter, and for public participation in these activities.
* Biodiversity – Art. 20.13
  + The TPP region includes several countries known as biodiversity ‘hot spots’ such as Peru, Vietnam, and Malaysia; and several likewise with unique and sensitive habitat, including Australia, New Zealand, and Alaska and the Canadian Arctic. TPP’s cooperative commitments will promote conservation and sustainable treatment of biodiverse areas, and recognize the importance of maintaining indigenous knowledge and practices.
* Transition to a Low-Emissions Economy – Art. 20.15
  + TPP countries recognize that the world is in the midst of an energy revolution. The agreement includes commitments to cooperate to address issues such as energy efficiency; the development of cost-effective, green technologies; and alternative, clean and renewable energy sources.
* Corporate Social Responsibility and Public-Private Partnerships – Art. 20.10
  + The Environment chapter includes commitments to encourage companies to voluntarily adopt corporate social responsibility policies, and to use mechanisms, such as public-private partnerships, to help to protect the environment and natural resources.
* Implementation – Art. 20.19
  + The Environment chapter establishes a senior-level Environment Committee, which will meet regularly to oversee implementation of the chapter, with opportunities for public participation in the process.
* New Features
  + TPP’s Environment chapter builds on previous agreements and introduces pioneering commitments in key environment areas, including:
    - Prohibitions on some of the most harmful fisheries subsidies, as well as enhanced transparency requirements for fisheries subsidies programs.
    - Broad commitments to promote sustainable fisheries management, which can support measures being developed or implemented through relevant regional fisheries management organizations and other arrangements in the Asia-Pacific region; and to address illegal fishing, as well as species-specific protections for ecologically critical and iconic marine species, such as whales and sharks.
    - Broad commitments to combat wildlife trafficking beyond CITES.
  + These provisions enable TPP Parties to work together to address international challenges such as wildlife trafficking and overfishing — issues which do not respect borders and require stepped-up domestic actions combined with enhanced cross-regional cooperation– more effectively than has been possible in any previous Free Trade Agreement (FTA).

### TPP Chapter 19: Labour

* NOTE: There are already ILO treaties in place. So TPP not much different if country has already signed onto ILO treaties?
* NOTE: nothing really in WTO laws on Labor – can attach to GSP or public morals exception under GATT XX/GATS
* Labor rights – Art. 19.3
  + The Labor chapter establishes broad commitments that require all TPP Parties to adopt and maintain in their laws and practices the fundamental labor rights as recognized by the ILO, including freedom of association and the right to collective bargaining; elimination of forced labor; abolition of child labor; and the elimination of employment discrimination. It also includes commitments, again required for all TPP Parties, to have laws governing minimum wages, hours of work, and occupational safety and health.
* Implementation and enforcement of labor laws – Art. 19.4 and 19.5
  + The Labor chapter bars TPP Parties from waiving or derogating from laws implementing fundamental labor rights in a manner affecting trade or investment. In addition, for export processing zones, which present heightened concerns, it includes additional commitments not to waive or derogate from laws governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. The chapter also includes commitments by TPP Parties not to fail to effectively enforce their labor laws in a sustained or recurring pattern that would affect trade or investment between the TPP Parties.
* Dispute Settlement – Art. 19.5
  + Commitments in the Labor chapter are subject to the same dispute settlement procedures available for other chapters of TPP, including the availability of trade sanctions.
* Forced labor – Art. 19.6
  + In addition to commitments by Parties to eliminate forced labor in their own countries, the Labor chapter includes commitments to discourage importation of goods that are produced by forced labor or that contain inputs produced by forced labor, regardless of whether the source country is a TPP country.
* Cooperation Mechanisms and Capacity-Building – Art. 19.10
  + Recognizing the importance of cooperation to achieve our goals, the Labor chapter establishes a mechanism for cooperation and coordination on labor issues, including opportunities for stakeholder input in identifying areas of cooperation and participation, as appropriate, in cooperative activities. Areas of cooperation will be determined by the TPP countries jointly, with the range of issues including job creation and promotion of entrepreneurship; promotion of productivity, including in small- and medium-sized enterprises; awareness of and respect for ILO fundamental labor rights; eliminating discrimination, including against migrant workers, women and other workers; and other areas.
* Labor Dialogue – Art. 19.11
  + To promote the rapid resolution of labor issues between TPP countries, the Labor chapter establishes a labor dialogue mechanism that countries can use to try to resolve any labor issue between them. This dialogue will allow for expeditious consideration of matters and help TPP countries to agree mutually to a course of action to address issues, such as through action plans, cooperative programs or capacity building. Whether or not TPP countries use the dialogue route, dispute settlement would always remain available to them.
* New Features
  + To date, only four trade agreements in the world provide for strong, fully-enforceable requirements to adopt and maintain fundamental ILO labor rights and to effectively enforce labor laws — the U.S. Free Trade Agreements (FTAs) with Peru, Panama, Colombia, and Korea. TPP’s Labor chapter extends these requirements to 10 new countries, more than quadrupling the number of people around the world covered by enforceable labor rights. TPP is also the first-ever trade agreement to include the following:
    - Commitments to discourage trade in goods produced by forced labor, including forced child labor.
    - Commitments on adoption and maintenance of laws on acceptable working conditions, including minimum wage, hours of work, and occupational safety and health.
    - Commitments to require countries not to weaken labor protections in export processing zones.
* Impact
  + The rapid development of the Asia-Pacific clearly produces great benefits for American consumers, and great opportunities for American exporters as the Asian middle class grows. But it also creates great pressure on American workers, who need and deserve confidence that international competition rests on productivity and creativity, and labor laws that respect and protect workers’ rights, and not on exploitation, denial of rights, dangerous factories and child labor. Likewise, when workers’ rights are not respected development is ultimately slowed, and the gains of trade are spread unevenly.
  + TPP is a chance to address these issues on a scale never before attempted. Several of our 11 TPP partners are countries, such as Vietnam and Malaysia, with which we have no trade and labor agreements at all. In other cases, the Labor chapters and side-agreements of existing agreements with TPP partners– i.e. the North American Free Trade Agreement (NAFTA) of 1993, and the U.S.-Chile and U.S.-Singapore agreements of 2003, and the U.S.-Australia agreement of 2004 — are weak in comparison to TPP and their substantive labor commitments are less enforceable than their obligations in other areas. Labor rights were in fact not included at all in the body of NAFTA. Rather, they were incorporated, after the fact, into a side agreement called the “North American Agreement on Labor Cooperation” under which a single provision — countries’ requirement to enforce their own labor laws related to child labor, occupational health and safety and minimum wage — was enforceable, but through the levy of a capped “monetary assessment.” NAFTA’s dispute settlement procedures did not apply. It was not until the groundbreaking “May 10, 2007” Congressional-Executive Agreement that countries were required to adopt and maintain the fundamental ILO rights in their laws and that all labor obligations were subject to full dispute settlement and trade sanctions.
  + TPP is therefore a unique opportunity to create the first enforceable standards for our new partners; to reform and modernize several of our existing agreements; and, ultimately, to set the foundations of a region-wide commitment to labor practices which meet international standards, ensure a level playing field for competition, and share the benefits of trade fairly.
  + To address these issues, TPP will require all signatory countries to afford their workers the rights that have been recognized as “fundamental” by the ILO: (1) freedom of association; (2) the right to bargain collectively; (3) freedom from forced labor; (4) freedom from child labor; and (5) freedom from discrimination in employment. The ILO has recognized these as “enabling” rights — rights that all others build upon and that make it possible to promote and realize decent and dignified work.
  + In addition, TPP signatories commit to take on a number of first-ever commitments:
    - A commitment to discourage imports made with forced labor, no matter what the origin of the goods. This addresses a growing global problem that, according to the ILO, currently affects 21 million men, women, and children and in industrial sectors generates about $43 billion in illegal profits worldwide annually. The United States has strong laws prohibiting trade in goods produced by forced labor, but in many other countries, more needs to be done to address this global challenge.
    - A commitment to put in place laws on acceptable working conditions, including a minimum wage, limits on hours of work, and occupational safety and health, which are well established in the United States, but less so in many other countries around the world.
    - Special commitments to protect labor standards in export processing zones (EPZs). These “EPZs” are special zones in which governments offer businesses special benefits to establish operations in the zones, such as exemptions from certain taxes or regulations. In some cases, governments also lower or provide exemptions from labor laws to attract investment, leading to poor and deteriorating labor standards. As the number of export processing zones has grown, the concern about workers’ rights and working conditions in these zones has also increased.
  + Together, these provisions not only set the high-water mark for labor protections in a trade agreement, but mark a sea-change from early U.S. FTAs. TPP provides an opportunity to lock in those gains for nearly 40 percent of the global economy, bringing us closer to establishing a new global norm for labor rights in trade agreements. In particular, applying these standards to Mexico and Canada delivers on the President’s promise to renegotiate NAFTA.

# Trade in Services

## An Overview of the GATS

### Most-Favored-Nation (MFN) Treatment under the GATS

#### Nature of the MFN Treatment Obligation of GATS Art. II:1

* GATS II:1 – “With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
* Applies to de jure and de facto discrimination although it does not explicitly state that it applies to de facto discrimination. AB, EC – Bananas III (1997)

#### MFN Treatment Test of Article II:1 of the GATS

* Three elements
  + (1) Measure at issue falls within the scope of application of GATS Art. II:1;
  + (2) Services or service suppliers concerned are “like services” or “like service suppliers;” and
  + (3) Like services or service suppliers are accorded treatment less favorable.
* (1) Measure covered by GATT Art. II:1
  + Measure by a Member
    - GATS Art. XXVIII(a) defines measure as “any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.”
    - GATS Art. I:3(a) defines “measure by Members” as measures taken by central, regional or local governments and authorities.
    - Measures taken by non-governmental bodies are also measures by Members when they are taken in the exercise of powers delegated by central, regional or local governments or authorities.
  + Measure affecting trade in services
    - GATS Art. XXVIII(c) gives examples
    - Two key issues (AB, Canada – Autos (2000)):
      * Whether there is trade in services in the sense of GATS I:2
        + GATS Art. I:2 (explanation of modes: <https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s3p1_e.htm>)

For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) **[mode 1 - cross border supply:]** from the territory of one Member into the territory of any other Member;

(b) **[mode 2 - consumption abroad:]** in the territory of one Member to the service consumer of any other Member;

(c) **[mode 3 - commercial presence:]** by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) **[mode 4 – presence of natural persons:]** by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

* + - * + Definition of service? GATS I:3(b) – service includes “any service in any sector except services supplied in the exercise of governmental authority.” GATS I:3(c) – services supplied in the exercise of governmental authority are any services which are supplied neither on a commercial basis nor in competition with one or more service suppliers.
      * Whether the measure at issue affects such trade in services within the meaning of GATS I:1
        + Broad scope, broader than “regulating” or “governing.” AB, EC – Bananas III (1997)
  + Not exempted from the MFN treatment obligation
    - Members could list measures in the Annex on Article II Exemptions until the date of entry (January 1, 1995) of the WTO Agreement. GATS Art. II:2.
      * Exemptions should not last more than 10 years “in principle” under Annex on Article II Exemptions, but many exemptions continue with emphasis on the “in principle” language.
    - GATS II:3 – measure that grants advantages to adjacent countries in order to facilitate trade in services between contiguous frontier zones is not subject to the MFN treatment obligation of GATS II:1. For GATS Art II:3 to apply, it is required that the services concerned are both locally produced and consumer.
* (2) “Like Services” or “Like Service Suppliers”
  + GATS I:3(c) – services includes “any service in any sector except services supplied in the exercise of governmental authority.”
  + GATS XXVIII(g) – service supplier is “any person who supplies a service,” including natural and legal persons as well as service suppliers providing their services through forms of commercial presence, such as a branch or a representative office.
  + To the extent that service suppliers provide “like services,” they are “like service suppliers.” Panel, Canada – Autos (2000). Not clear whether this is always the case or whether other factors, such as size of the suppliers, their assets and the nature and extent of their expertise, must be taken into account.
  + Services are “like” if “it is determined that the services in question in a particular case are essentially or generally the same in competitive terms.” Panel, China – Electronic Payment Services.
* (3) Treatment no Less Favorable
  + GATS Art. XVII:3 on the national treatment obligation contains guidance on the meaning of the concept in Art. II (no guidance provided in II) – “Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to the like services or service suppliers of any other Member.”
  + Don’t have to consider “aims and effects.” AB, EC – Bananas III(1997)
* Recognition
  + GATS VII – a Member may recognize the education or experience obtained, requirements met or licenses or certificates granted in a particular country.
  + This can be consistent with MFN even when it leads to treatment less favorable if the following conditions are met under VII:
    - First sentence: A WTO Member, which has negotiated a recognition agreement or arrangement with another Member, must afford “adequate opportunity” for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate a comparable one with it.
    - Second sentence: a WTO Member, which accords recognition autonomously, must afford “adequate opportunity” for any other Member to demonstrate that education, experience, licenses or certifications obtained or requirement met in that other Member’s territory should be recognized.
  + GATS VII:3 – “A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standard or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.”

### National Treatment under the GATS

* GATS XVII – “In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.”

#### Nature of the National Treatment Obligation of GATS Article XVII:1

* Does not apply to all measures affecting trade in services. The national treatment obligation only applies to a measure affecting trade in services to the extent that a WTO Member has explicitly committed itself to grant national treatment in respect of the specific services sector concerned. Such commitments are set out in a Member’s Schedule of Specific Commitments, also referred to as its “Services Schedule” (can be found on WTO website).
* Covers de jure and de facto discrimination explicitly. GATS XVII:3.

#### National Treatment Test of GATS XVII:1

* Four part test (EC – Bananas III (1997)):
  + Whether, and to what extent, a national treatment commitment was made in respect of the relevant services sector;
  + Whether the measure at issue is a measure by a Member affecting trade in services, i.e. a measure to which the GATS applies;
  + Whether the foreign and domestic services or service suppliers are “like services” or “like service suppliers;” and
  + Whether the foreign services or service suppliers are accorded “treatment no less favorable.”
* National Treatment Commitment
  + Must first examine the Member’s Services Schedule to establish whether, and to what extent, that Member has made a national treatment commitment with respect to the services sector at issue.
* Measures by Members Affecting Trade in Services
  + “Measure by a Member” – see discussion under MFN treatment
  + “Measure affecting trade in services” – see discussion under MFN treatment
* Like Services or Like Service Suppliers
  + “When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the “like service suppliers” requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin.” China – Publications and Audiovisual Products (2010).
  + “for services to be considered “like,” they need not necessarily be exactly the same, and that in view of the references to “approximately” and “similar,” services could qualify as “like” if they are essentially or generally the same.” China – Electronic Payment Services (2012).
  + “services in a competitive relationship with each other (or would be if they were allowed to be supplied in a particular market)”Panel, China – Electronic Payment Services (2012).
  + To the extent that service suppliers provide “like services,” they are “like service suppliers. EC – Bananas III (1997). Panel, China – Electronic Payment Services (2012) agreed that this might raise a presumption that they are like service suppliers, but said that a separate inquiry into likeness of suppliers may be called for because it needs to be evaluated on a case-by-case basis.
* Treatment no Less Favorable
  + GATS XVII

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

* + “Aims and effect” not relevant. EC – Bananas III (1997)

### Market Access Barriers to Trade in Services

* With regard to non-tariff barriers to trade in services, GATS distinguishes between market access barriers and barrier to trade in services.

#### Definition and Types of Market Access Barriers

* GATS XVI:2 exhaustive list of market access barriers.
  + Quantitative restrictions on (a) the number of service suppliers; (b) the value of the service transactions; (c) the number of service operations; (d) the number of legal persons employed by a service supplier; and (f) the amount of foreign capital invested in service suppliers.
    - Refer to maximum limitations as opposed to minimum requirements.
  + (e) Limitation on the kind of legal entity or joint venture through which services may be supplied.
  + May be discriminatory or non-discriminatory.
  + Do not relate to temporal limitations. Mexico – Telecoms (2004).

#### Rules on Market Access Barriers

* Whether a Member may maintain or adopt these market access barriers with regard to a specific service depends on whether, and if so to what extent, that Member has, in its Services Schedule, made market access commitments with regard to that service or the relevant services sector. Referred to as “positive list” or “bottom-up” approach to liberalization of trade in services. Positive list – default rule is that it is not open except for what is listed in terms of market access commitments Member has made. Negative list – default rule is that everything is open except for what is listed.
  + GATS XVI (1) With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.
* GATS XVI (2) provides that when a Member has undertaken a market access commitment in a services sector, it may not maintain or adopt any of the listed market access barriers with regard to trade in services in that sector, unless otherwise specified in its Services Schedule.
* When a Member makes a market access commitment, it binds the level of market access specified in its Schedule and agrees not to impose any market acces barrier that would restrict access to the market beyond the level specified.

#### Negotiations on Market Access for Services

* GATS XIX provides for successive rounds of negotiations to achieve progressively higher levels of liberalization of trade in services. Applies to market access commitments AND national treatment commitments.

#### Schedules of Specific Commitments

* Results of negotiations on market access for services are set out in Schedules of Specific Commitments (“Services Schedules”).
* Contents and Structure of Services Schedules
  + Services Schedules are annexed to the GATS
  + Services Schedules have two parts:
    - Horizontal commitments
      * Apply to all sectors included in the Schedule
      * Often concern two modes of supply – commercial presence and natural persons
    - Sectoral commitments
      * Commitments made regarding specific services sectors or sub-sectors
  + Services Sectoral Classification List (GATS-equivalent of HS code), also referred to as “document W/120,” based on the CPC
    - Problem that W/120 is not updated – hasn’t been updated since 1994 – although CPC is updated (just based on CPC, not constantly dated every five years as CPCis).
  + Four columns in Services Schedules
    - (1) identifying the services sector or sub-sector which is the subject of the commitment.
    - (2) containing the terms, limitations and conditions on market access
    - (3) containing the conditions and qualification on national treatment
    - (4) undertakings relating to additional commitments.
  + For each market access commitment with respect to each mode of supply, four different ways in which a commitment can be scheduled:
    - Full commitment – the situation in which a Member does not seek in any way to limit (**no limit**) market access in a given sector and mode of supply through market access barriers within the meaning Art. XVI:2. Record “**none**” in the second column of its Schedule.
    - Commitment with limitations – situation in which a Member wants to limit market access in a given sector and mode of supply through market access barriers within the meaning of Art. XVI:2. Describe the market access barriers that are maintained in second column of its Schedule.
    - No commitment – situation in which a Member wants to remain free in a given sector and mode of supply to introduce or maintain market access barriers within the meaning of Art. XVI:2. Record “**unbound**” in second column of its Schedule.
    - No commitment technically feasible – situation in which a particular mode of supply is not technically possible, such as the cross-border supply of hair-dressing services. Record “**unbound**” in the second column of its Schedule.

#### Modification or Withdrawal of Commitments

* GATS XXI – a Member may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force.
* Must first notify its intention to unbind a commitment to the Council for Trade in Services.
* If requested, Member must enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment.

### Other Barriers to Trade in Services

#### Lack of Transparency

* GATS III – requires with regard to trade in services that Members publish all measures of general application affecting trade in services.

#### Unfair and Arbitrary Application of Trade Measures

* GATS VI:1 – requires a Member to ensure “that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.”

#### Licensing and Qualification Requirements and Technical Standards

* GATS VI:5(a)

(a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and

(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

* GATS VI:4(a), (b), (c) – licensing requirements, qualification requirements and technical standards relating to services sectors in which specific commitments are undertaken must: (1) be based on bojective and transparent criteria such as competence and the ability to supply the service; (2) not be more burdensome than necessary to ensure that quality of the service; and (3) in the case of licensing procedures, not be, in themselves, a restriction on the supply of the service.

#### Government Procurement Laws and Practices

* GATS XIII

(1) Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

(2) There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

#### Other Measures and Actions

* Lack of recognition of foreign diplomas and professional certificates
  + WTO law does not require Members recognize foreign diplomas or professional certificates, but it encourages and facilitate their recognition.
  + GATS VII:1 – “…a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country…”
* Monopolies and exclusive service providers
  + WTO law does not prohibit them
  + GATS VIII:1 – “Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member’s obligations under Article II and specific commitments.”
* Restriction son international payments and transfers
  + GATS XI:1 requires Members not to apply any restriction on international transfers and payments related to services covered by specific commitment. However, Art. XI:2 allows the use of exchange controls or exchange restriction in certain situations, such as serious balance-of-payments difficulties within the meaning of Art. XII, or when such exchange actions are requested by the IMF.

### General Exceptions Under the GATS

* GATS XIV

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

(a) necessary to protect public morals or to maintain public order;

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII [national treatment], provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;

(e) inconsistent with Article II [MFN], provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

* + Very similar to GATT XX
    - Decisions under GATT XX are relevant to analysis under GATS XIV. AB, US – Gambling (2005).
* PTAs (Wu p. 801)

#### Two-Tier Test Under GATS XIV

* (1) Whether the measure can be provisionally justified under paragraphs (a) to (e)
* (2) If so, whether the application of the measure meets the requirements of the chapeau.

#### Specific Exceptions Under GATS Article XIV

* XIV(a)
  + Meaning of public morals and public order – “can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values….Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate.” US – Gambling (2005).
  + Public morals – “standards of right and wrong conduct maintained by or on behalf of a community or nation.” Panel, US – Gambling (2005).
  + Public order – “A condition in which the laws regulating the public conduct of members of a community are maintained and observed; the rule of law or constituted authority; absence of violence or violent crimes.” Panel, US – Gambling (2005).
    - GATS XIV(a) fn 5 – “may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
  + “**necessary**” (**case law relevant to other paragraphs**) – must assess the following factors (AB, US – Gambling (2005)):
    - relative importance of the interests or values furthered by the challenged measure
    - Weigh and balance: contribution of the measure to the realization of the ends pursued by it; and restrictive impact of the measure on international commerce
    - Then, having assessed above factors, a comparison between the challenged measure and possible alternatives
* XIV(c)
  + Gives EXAMPLES of laws or regulations but NOT exhaustive list. Panel, US – Gambling (2005).
  + Three tier test (US-Gambling (2005)):
    - The measure at issue is designed to secure compliance with national laws or regulations
    - Those national laws and regulations are not inconsistent with the WTO Agreement
    - The measure at issue is necessary to secure compliance with those national laws and regulations
* XIV(d)
  + Footnote 6 contains a non-exhaustive list of measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes.

#### Chapeau of GATS Art. XIV

* Requires that application of measure at issue does not constitute: (1) arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or (2) a disguised restriction on trade in services.
* Similarto language of chapeau of GATT Art. XX do lessons can be drawn from its case law. Panel, US – Gambling (2005).

#### Economic Integration

* GATS V. Economic Integration – can enter into free trade agreement (GATTS XXIV equivalent)

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

(a) has substantial sectoral coverage, and

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

1. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.
2. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply

6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

#### Labour Markets Integration Agreements

* GATS Art V bis

### US-Gambling (DS 285), AB Report

* Complainant – Antigua and Barbuda
* Respondent – U.S.
* Agreement – GATS XIV chapeau, (a), (c); XVI
* Measure at issue: Various US measures relating to gambling and betting services, including federal laws such as the “Wire Act”, the “Travel Act” and the “Illegal Gambling Business Act” (“IGBA”), which allegedly make it unlawful for foreign suppliers to supply gambling and betting services to consumers within the U.S. Complainants argue that because the U.S. made full market access and national treatment commitments (that is, inscribed “None” in the relevant columns of its GATS Schedule), the U.S., in maintaining the measures at issue, is acting inconsistently with its obligations under its GATS Schedule, as well as VI, XI, XVI, and XVII.
* Service at issue: Cross-border supply of gambling and betting services.
* Summary of Key Panel/AB Findings
  + **Scope of GATS commitments:** U.S. argued that by excluding “sporting” services from the scope of subsector 10.D, “Other recreational services,” of its GATS Schedule, it excluded gambling and betting services from the scope of the specific commitments that it undertook therein. The Appellate Body upheld, based on modified reasoning, the Panel's finding that the US GATS Schedule included specific commitments on gambling and betting services. Resorting to “document W/120” and the “1993 Scheduling Guidelines” as “supplementary means of interpretation” under Art.  32 of the VCLT, rather than context (Art. 31), the Appellate Body concluded that the entry, “other recreational services (except sporting)”, in the US Schedule must be interpreted as including “gambling and betting services” within its scope. In other words “sporting” does not include gambling and betting.
    - Antigua argues that CPC (on which W/120 was based) provides that gambling falls under recreational services and CPC is what everyone had in mind when making commitment.
    - Several Members specifically used the words “gambling and betting services,” or some approximation thereof, in their Schedules. The fact that the United States did not use any such specific language tends, if anything, to undercut its assertion that it intended to single out such services for exclusion from the scope of its commitment.
    - US argued text is clear so no need to resort to context. AB disagreed and found that interpretation under VCLT 31 is inconclusive so resorted to VCLT 32.
  + **GATS Art. XVI:1 and 2 (market access commitment):** The Appellate Body upheld the Panel's finding that the United States acted inconsistently with Art. XVI:1 and 2, as the US federal laws at issue, by prohibiting the crossborder supply of gambling and betting services where specific commitments had been undertaken, amounted to a “zero quota” (“none”) that fell within the scope of, and was prohibited by, Art. XVI:2(a) and (c). However, it reversed a similar finding by the Panel on state laws because it considered that Antigua and Barbuda (“Antigua”) had failed to make a prima facie case with respect to these state laws.
    - (a) “limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economics needs test;…”
      * “number of service suppliers” and “numerical quotas” reflect that focus of (a) is on quantitative restrictions.
      * Definitions of “in the form of monopolies and exclusive service suppliers” in other provisions of GATS suggest that reference in (a) should be read to include limitations that are in form OR IN EFFECT, monopolies or exclusive service suppliers.
      * 1993 Scheduling Guidelines set out an example of the type of limitation that falls within (a) – “nationality requirements for suppliers of services (equivalent to a zero quota).”This example confirms the view that measures equivalent to a zero quota fall within the scope of (a).
    - (c) “limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test.”
      * Types of limitations in (c) are quantitative in nature, and all restrict market access. So even if (c) is read as referring to only two types of limitations, as contended by U.S., (c) would still catch a measure equivalent to a zero quota.
      * Scheduling Guidelines provide example that does not mention number of units.
  + **GATS Art. XIV(a) (general exceptions – necessary to protect public morals):** The Appellate Body upheld the Panel's finding that the US measures were designed “to protect public morals or to maintain public order” within the meaning of Art. XIV(a), but reversed the Panel's finding that the United States had not shown that its measures were “necessary” to do so. AB stated that Panel appeared to understand that, in order for a measure to be accepted as “necessary,” the responding Member must have first explored and exhausted all reasonably available WTO-compatible alternatives before adopting its WTO-inconsistent measure. Because the Panel found that the U.S. had not engaged in such consultations with Antigua, the Panel also found that the U.S. had not established that its measures are necessary. AB held that the Panel had erred in considering consultations with Antigua to constitute a “reasonably available” alternative measure, because “consultations are by definition a process, the results of which are uncertain and rherefore not capable of comparison with the measure at issue...” The Appellate Body found that the measures were “necessary”: the United States had made a prima facie case showing of “necessity” and Antigua had failed to identify any other alternative measures that might be “reasonably available”. “it is not for the responding party to identify the universe of alternative measures against which its own measure should be compared. It is only if such an alternative is raised that this comparison is required.” With respect to the Art. XIV(c) defence, the Appellate Body reversed the Panel due to its erroneous “necessity” analysis and declined to make its own findings on the issue, since the Panel would have found that the US made its prima facie but for its erroneous necessity analysis.
    - Previous decisions under GATT XX are relevant for analysis under GATS XIV
    - Two-tier analysis
      * (1) (a) Challenged measure falls within the scope of one of the paragraphs of XIV. (b) Sufficient nexus between the measure and the interest protected (e.g. relating to, necessary to)
    - Necessity analysis
      * Standard of necessity is an objective standard.
      * Process of weighing and balancing a series of factors: (1) contribution of the measure to the realization of the ends pursued by it; (2) restrictive impact of the measure on international commerce.
      * Comparison between the challenged measure and possible alternatives should then be taken, and results of such comparison should be considered in the light of the importance of the interests at issue.
      * Burden is on complainant to show what other alternatives should have been considered.
  + **Chapeau (GATS Art. XIV):** The Appellate Body modified the Panel's finding with respect to the chapeau of Art. XIV. The Appellate Body reversed the Panel's finding that the measures did not meet the requirements of the chapeau because the United States had discriminated in the enforcement of those measures. However, the Appellate Body upheld the second ground upon which the Panel based its finding, namely that in the light of the Interstate Horseracing Act (which appeared to authorize domestic operators to engage in the remote supply of certain betting services), the United States had not demonstrated that its prohibitions on remote gambling applied to both foreign and domestic service suppliers, i.e. in a manner that did not constitute “arbitrary and unjustifiable discrimination” within the meaning of the chapeau.

## Digital Trade

Are WTO rules out of date?

* Blurring between goods and services?
* What mode is it?

Cannot worry about making law on this at all so who wins?

* A lot of decisions could go to WTO so AB given a lot of power in making these decisions

### The Key Challenges and Opportunities

#### Quantifying the Digital Trade Potential

* Studies find a positive correlation between
  + Increase in internet access and increase in trade.
  + Increase in internet access and firm productivity, which in turn increases the competitiveness of businesses.
* Study finds that for every job destroyed by the internet, it creates 2.6 jobs.

#### How the Internet can grow International Trade

* Expansion of the internet means that businesses can reach overseas customers and sell products online.
* Internet can reduce trade costs, which can grow international trade
  + E.g. communication at little or no cost, cost-effective ways to deliver goods and services

#### The Opportunities for Small and Medium Sized Enterprises

* SMEs that use the internet at high levels have revenue growth of up to 22% higher than those that do not or only use the internet at low levels.
* Crowdfunding provides access to finance
* Website gives SMEs an instant international presence.
* Cloud computing enables SMEs to access IT services with little upfront investment and to quickly scale of their IT use in response to changes in demand.
* Access to critical knowledge and information
* Global supply chains enables SMEs to specialize in specific tasks and use the internet to deliver that service to a particular part of a global value chain.

#### Opportunities for Developing Countries

* Decrease costs in engaging in trade.
* Getting access to customers globally
* Sell goods and services online
* Access to business inputs, e.g. legal, financial and accounting services.

### The Barriers and Challenges to Digital Trade

#### Internet Access

* Significant gaps remain
* Mobile devices are main way of accessing internet in developing world, so mobile access is inseparable from the challenge of internet access
* Broadband access needed for businesses to become part of global supply chains and to take full advantage of internet services such as cloud computing.
* Access to power supply is still a challenge in some areas of the world
* Language barriers – majority of online content is in English

#### Cross-border Data Flows

* Government intervention in the free flow of data can reduce the potential of the internet for international trade.
  + Legitimate restrictions – privacy, cybersecurity, limiting access to child porn
  + Protect domestic companies

#### Data Localization

* Data localization – any law that limits the ability for data to move globally and to remain local.
* E.g. privacy laws, requirement for local data centers

#### Market Access Restrictions on Trade in Goods and Services

* Internet-enabled trade faces traditional trade barriers
* E.g. tariffs and non-tariff barriers
* Service trade barriers are often higher

#### IP Right Protection

* Balancing protection and not burdening ISPs too much.
* Use of internet to steal trade secrets can reduce trust in using the internet

#### Domestic Rules for Internet Enable Trade

* Countries need domestic laws that allow contracts to be concluded online.
* eBay created its own dispute settlement process which resolves more than 60 million online disputes annually.

#### Access to Cost-effective Dispute Settlement Mechanisms

* Absence of cost-effective and timely mechanisms for resolving disputes arising from an online international transaction increases the risk of engaging in in internet-enabled trade.

#### International Payments Systems

* To complete an online transaction requires international payment options.
* Government ceilings on what can be paid online.
* Access to credit cards or banks is limited in some parts of the world.

#### Trade Logistics

* Transport services
* Customs
* Access to efficient logistics networks

### How the WTO and Free Trade Agreements Regulate Digital Trade

#### The WTO Information Technology Agreement

* Plurilateral agreement
* 80 members representing 97% of world trade in ICT goods

#### GATS

* WTO Members have scheduled commitments to liberalize trade in services
* MFN
* National Treatment
* Market Access Commitments

#### GATS Annex on Telecommunications

* Set of commitments WTO Members have made regarding access to telecom networks.
* Requires WTO Members to provide service suppliers from another Member with access to and use of their public telecommunications networks and services on reasonable and non-discriminatory terms.

#### The WTO Telecoms Reference Paper

* Includes pro-competitive regulatory principles for the telecommunications sector, which are designed to ensure that monopoly operators do not use their market power – such as control of access to telecoms infrastructure – to undermine competitive opportunities for new market entrants.
* Requires WTO Members to prevent major suppliers from engaging in anti-competitive practices.
* Includes commitments to allow for interconnection with a major supplier on non-discriminatory terms, in a timely fashion, and on cost-oriented rates.
* Allocation and use of scarce resources, including frequencies…will be carried out in an objective, timely, transparent and non-discriminatory manner.”

#### The WTO Understanding on Commitments in Financial Services

* Members agree that they will not “prevent transfers of information or the processing of financial information, including transfers of data by electronic means.”

#### The Trade Related IP Rights Agreement and other FTAs

* TRIPS provides minimum IP standards that all WTO Members have agreed to apply and enforce domestically.
* TRIPS provides copyright protection based on the life of the author and of not less than 50 years (Article 12).
* TRIPS requires WTO Members to have a system for registering trademarks for terms of seven years, renewable indefinitely (Article 18).
* FTAs include IP enforcement issues
* FTAs incorporating WIPO Internet treaties and WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty

#### Other Free Trade Agreements

* FTAs build on WTO rules on data transfers for financial services
* Many FTAs include e-commerce chapters

### New Trade Rules for a Digital World?

#### Commitments on Cross-border Data Flows

* There are already commitments on data flows for the financial sector in the WTO, but not other sectors per se.

#### Rules on Data Localization

* No trade rules that address government regulation requiring local data centers.
* Such rules being pursued in TPP.

#### Are Digital Products Goods or Services?

* No consensus
* Implications:
  + GATS v. GATT?
    - China-Audiovisuals – AB found that a measure that conditioned import and distribution of films to review and approval of their content affected trade in goods. Found that mode of deliver on hard-copy cinematographic film raised GATT issues.
  + Collection of customs duties

#### Update the General Agreement on Trade in Services

* Significant barriers are on professional services such as accounting, law, and consulting.
* Includes requirements for a local presence to provide the service and membership or licensing by local professional bodies.
* Need to update classification of services in WTO Members’ Schedules – even if you agree that they are services, what type of services are they?
* Need to clarify whether providing a service online is a mode 1 or mode 2 form of delivery.

#### The General Agreement on Trade in Services Reference Paper

* Provides limited guiding principles on telecommunications regulations.
* Provides non-exhaustive list of what constitutes anti-competitive practices.
* Only applies to basic telecommunications services.

#### New Intellectual Property Rules

* ICAN

#### The WTO Technical Barriers to Trade Agreement and International Standards

* Various efforts have been made to promote interoperability by developing internet principles.

#### Improve Financial Payment Options

* Service commitments could address limits on restrictions of financial flows across borders
* Free flow of data across borders
* Greater competition in the services sector should also lead to innovation that can expand access to financial services for the poor.
* Encouraging international cooperation to address online fraud.

#### Improve Trade Logistics

* WTO Members have agreed to a moratorium on imposing customs duties on electronic transmissions, though this does not apply to the physical delivery of goods.

#### Developing Common Legal Rules for Online International Trade

* For the internet to function as a platform for international trade, global rules on contract formation and dispute resolution will be required.
* Commercial contract law has become increasingly harmonized globally as countries have based their contract laws on the Uniform Principles of International Commercial Contracts (UPICC).
* However, the UPICC significance for e-commerce has been limited as it does not apply to consumer contracts.
* The United Nations Commission on International Trade Law (UNCITRAL) has developed a 1996 Model Law on Electronic Commerce that applies to the electronic element of commercial sales of goods and services, and this has been supplemented by the 2001 UNCITRAL Model Law on Electronic Signatures. These Model Laws address the legal process such as rules governing formation of contracts online, but does not address issues of access for such goods and services to the consumer market. The UNCITRAL Model Laws are also not legally binding but have become the basis for legislation in various states, including US laws on use and acceptance of electronic signatures.

#### Digital Disputes Settlement

* An effective resolution system would need to be able to respond to disputes that are often over claims worth less than $100 and to resolve the disputes in a matter of days.

### TPP Chapter 14: Electronic Commerce

* Customs Duties (Article 14.3)
  + Prohibits the imposition of customs duties on digital products, to ensure that products distributed electronically, such as software, music, video, e-books, and games are not disadvantaged.
* Non-Discriminatory Measures (Article 14.4)
  + A companion provision prevents TPP countries from favoring national producers or suppliers of such products through measures such as discriminatory taxation or outright blocking or other forms of content discrimination.
* Cross-Border Data and Information Flows
  + Commitments ensuring that companies and consumers can access and move data freely (subject to safeguards, such as for privacy), which will help ensure free flow of the global information and data that drive the Internet and the digital economy. These commitments, along with others on market access and national treatment, combine to help prevent unreasonable restriction, such as the arbitrary blocking of websites.
* Location of Computing Facilities (Article 14.13)
  + Includes guarantees that companies will not have to build expensive and unnecessarily redundant data centers in every market they seek to serve. The economies of scale of the digital economy, where capital and energy-intensive data centers serve multiple countries, depend on this flexibility.
* Consumer Protection and Privacy (Article 14.7 and 14.8)
  + Includes commitments by TPP Parties to adopt and maintain consumer protection laws related to fraudulent and deceptive commercial activities online. It also includes commitments ensuring that privacy and other consumer protections can be enforced in TPP markets. Governments have different ways of implementing privacy protections, and TPP recognizes that diversity and promotes interoperability between diverse legal regimes. The chapter also includes provisions requiring Parties to have measures to stop unsolicited commercial electronic messages (spam).
* Facilitating Electronic Transactions and Trading
  + Includes provisions encouraging TPP countries to promote paperless trading between businesses and the government (Article 14.9), such as customs forms being put in electronic format; as well as providing for electronic authentication and signatures for commercial transactions (Article 14.6).
* Software
  + Prohibits requirements that force suppliers to share valuable software source code with foreign governments or commercial rivals when entering a TPP market.
* Cooperation (Article 14.15 and 14.16)
  + Ensures close cooperation among TPP Parties to help businesses, especially small- and medium-sized enterprises, overcome obstacles and take advantage of electronic commerce. It also encourages cooperation on policies regarding personal information protection, online consumer protection, cybersecurity threats and cybersecurity capacity, especially given the rise of cyber-attacks and the global diffusion of malware.
* New Features
  + First-ever commitments addressing the twin concerns over requirements that data be stored locally and prohibitions on the flow of data or information across borders. These commitments will help guarantee that key inputs to digital trade are not arbitrarily impeded by governments, and reduce the threat of “balkanization” of the Internet.
  + Ensuring that consumers have access to an open Internet, while requiring online consumer protection laws and ensuring that privacy and other consumer protections can be enforced.
  + Encouraging cooperation of TPP countries on consumer protection, including privacy and cybersecurity.
  + First-ever commitments underscoring the need to maintain consumer protection, for measures to stop unsolicited commercial electronic messages, and to ensure that privacy protections can be enforced in order to build consumer confidence and trust in the use of the Internet.
  + Barring forced sharing of software code with governments or commercial rivals when entering a TPP market.
  + Comprehensive commitments on cooperation related to digital trade, particularly to help small- and medium-sized enterprises take advantage of digital trade.
  + First-ever commitments in an FTA on cooperation on cybersecurity threats and cybersecurity capacity, a significant problem, on which TPP countries will benefit from working collectively.
* Impact – TPP address various issues:
  + Barriers to cross-border data flows
    - Such data flows are the building blocks for all digital trade, and barriers to them are among the most serious impediments to the future of digital trade. Impediments to such flows affect not only technology companies, but almost every sector of the economy from manufacturing to farming and small businesses — all of which now depend on digital technology to provide the innovation and efficiency that drive economic growth.
  + Requirements that companies must store data locally
    - Such policies, which have been implemented in China and are being proposed by many other governments, undermine the architecture of the Internet, preventing the use of all “cloud” based services — from business software, to online music, e-mail, and travel services. They also affect the ability of companies, particularly small and medium-sized enterprises, to use the Internet as a global platform for delivery of goods and services. This is because small and medium-sized enterprises, which need information from customers in all of their markets, are generally unable to afford to build data centers in every market they serve. Where data localization requirements are instituted, commitments to provide access to specific services on a cross-border basis can become all but meaningless. In addition, even if a company wants to invest in a foreign market, it may still want to use its data processing facilities established in the United States or elsewhere.

# Trade-Related Intellectual Property Rights

## Overview of the TRIPS Agreement

### Origins and Objects of the TRIPS Agreement

* Why IP in trade regime? IP part of goods/services
* Why not just rely on WIPO?
  + WTO has more robust dispute settlement/sanctions
  + Types of rules – WTO has minimum standards along with things like MFN/NT
  + Shift who signs on – raises the stakes for not signing
* TRIPS doesn’t say what types of IP you should have, but just sets substantive baseline.
* Three Dimensions to TRIPS
  + Statutes and Regulations (what must be on the books) – e.g. copyright and trademark baselines
  + Enforcement
  + Remedies
* What are implications of discrepancy (i.e. not much REQUIRED for enforcement and remedies. Just require what needs to be made AVAILABLE)? See most cases under statutes and regulations.
* No general exception. There is a security exception. MFN exceptions listed.

#### Objectives and Principles of the TRIPS Agreement

* Objective of creating an equilibrium between rewarding creators of IP and protecting the public interest in disseminating IP
* Article 7. Objectives

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

* Article 8. Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

### Scope of Application of the TRIPS Agreement

#### Substantive Scope of Application

* Members must accord the treatment to “nationals’ of other Members.” TRIPS 1.3.
  + These persons are referred to as “nationals” but include persons, natural or legal, who have a close attachment to other Members without necessarily being nationals.
* IP rights covered
  + Those provided for in Sections 1-7 of Part II. TRIPS 1.2.
    - Copyright and related rights; trademarks; geographical indications; industrial design; patents; layout-designs of integrated circuits; protection of undisclosed information.
  + Rights provided for in the incorporated conventions that are the subject of those sections. AB, US- Section 211 Appropriations Act (2002)
    - E.g. trade names

#### Temporal Scope of Application

* Does not apply to retroactively to acts that occurred before its date of application for a Member. TRIPS 70.1.
  + An act is something that is done. Excludes existing rights and obligations that have not ended. AB, Canada – Patent Term (2000).
* Creates obligations in respect of subject-matter that existed at the date of application. TRIPS 70.2.

### General Provisions and Basic Principles of the TRIPS Agreement

* Sets a minimum level. Provides that Members are free, but not obliged to implement more extensive protection than that required by the TRIPS Agreement. TRIPS 1.1.

#### Relationship Between the TRIPS Agreement and WIPO Conventions

* Incorporates specific provisions of relevant conventions administered by World Intellectual Property Organization (WIPO).
* Supplements and innovates conventions
* TRIPS obliges Members to comply with certain provisions in conventions even if they were not parties to those conventions.

#### The National Treatment Obligation

* Article 3. National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

* + Aplies only to categories of IP rights covered by the TRIPS Agreement
  + Applies to “nationals” rather than “like products” or “like services or service providers” because IP rights are intangible and attach to an IP right holder.
* GATT III:4 case law “may be useful in interpreting the national treatment obligation in the TRIPS Agreement.” AB, US – Section 211 Appropriations Act (2002).
* Two-tier test (Panel, EC – Trademarks and Geographical Indications (US) (2005)):
  + The measure at issue must relate to the protection of intellectual property
  + The nationals of other Members must be accorded less favorable treatment than the nationals of the Member whose measure is challenged.

#### The Most-Favored-Nation Treatment Obligation

* Article 4. Most-Favoured-Nation Treatment

1. With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;

(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;

(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;

(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

* Applies to nationals rather than like products or like services or service providers
* Exceptions
  + Article 4.1 (a)-(d)
  + Article 5 – provides that Article 4 does not apply to procedures for the acquisition of IP rights that are protected under multilateral agreements negotiated under the auspices of WIPO (Berne, Rome, Paris)

#### Exhaustion of Intellectual Property Rights

* Doctrine of exhaustion - Determines when the IP right holder’s right to control the product in which the IP right is embodied ends.
  + Applies only to the right to control distribution (such as resale) of the product after it has been put on the market by or with the consent of the right holder.
  + Does not affect the essence of an IP right, namely, the right to exclude others from exploiting the IP right without the consent of the right holder.
* Three approaches
  + National exhaustion of rights – the first sale of a product exhausts IP rights to control the resale of the product only on the national market; the IP right holder retains these rights in other countries.
  + Regional exhaustion of rights – the first sale of a product in a country that is a party to a regional agreement exhausts IP rights to control further distribution in other parties to the regional agreement.
  + International exhaustion of rights – once a product is sold by or with the consent of the right holder, whether on the domestic market or on a foreign market, the IP rights to control the further distribution of the product are exhausted both domestically and internationally.
    - Allows parallel importation – permitted to import and resell
* Article 6 – Members not mandated to take a particular approach to the exhaustion of IP rights.

### Substantive Protection of Intellectual Property Rights

#### Copyright and Related Rights

* Incorporates Berne Convention Art. 1-21
  + News of day excluded from copyright protection
  + Protection of some categories is optional: applied art, political speeches, lectures, oral works
* Copyright protection covers two new types of works – computer programs and compilations of data. TRIPS 10.
* Scope – “Copyright protection shall extend to expressions and not to ideas, procedures, methods or operation or mathematical concepts as such.” TRIPS 9.2.
* Term of protection:
  + Minimum term of protection is life of the author plus 50 years. Berne 7.1 (inc. into TRIPS); or
  + 50 years after the work has been made available to the public with the author’s consent, or failing such an event, fifty years after the making; or
  + Photographs/applied art – at least 25 years from the making of such a work
* Three-step test – three cumulative requirements for limitations and exceptions to exclusive rights (TRIPS 13)
  + Confined to certain special cases
  + Not conflict with a normal exploitation of the work
  + Not unreasonably prejudice the legitimate interests of the right holder.

#### Trademarks

* Protectable subject matter (Art. 15.1): “1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.”
* Distinctiveness is required whether inherent or acquired through use. AB, US – Section 211 Appropriations Act (2002).
* Paris Convention Art. 6.1 – allows each part to determine conditions for the filing and registration of trademarks in its domestic legislation, provided that this is done consistently with the provisions of the Paris Convention.
* Protection for unlimited period, renewable indefinitely. TRIPS 18.
* Registration may be cancelled if Member requires use to maintain a registration. TRIPS 19.

#### Geographical Indications

* Definition: Article 22.1 – “Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”
* Several undertakings may use the same GI.
* Article 22.2

“In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

* Article 23 – enhanced GI protection for wines and spirits

#### Patents

* Patent protection must be granted to any invention in any field, provided three requirements: (1) the invention is new; (2) it involves an inventive step; (3) it is capable of industrial application. TRIPS 27.1.
* Prohibits discrimination regarding the availability and enjoyment of patent rights based on: (1) the place of invention; (2) the field of technology; and (3) whether products are imported or locally produced. TRIPS 27.1.
* Allows Members to exclude certain inventions from patentability – Articles 27.2 and 27.3.
* Exclusive rights of patent owners (Article 28):

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;

(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

### Enforcement of Intellectual Property Rights

#### General Obligations

* Article 41
* Requires Members to ensure that the enforcement procedure specified in Part III **“are available”** under their law “so as to permit effective action” against infringement of IP rights protected in the TRIPS Agreement. Article 41.1
* Enforcement procedures must be applied in a way that avoids creating barriers to legitimate trade and to provide safeguards against their abuse. Article 41.1.
* Due process requirements – Articles 41.1 to 41.4

#### Civil and Administrative Procedures and Remedies

* Initiation – request of or by the right holder
* Members are required to make available to right holders civil judicial procedures for the enforcement of any IP right covered in the TRIPS Agreement. Article 42. (Administrative enforcement procedures insufficient).

#### Provisional Measures and Border Measures

* Provisional Measures (Article 50) – aims to prevent the introduction of the infringing product into commerce after it has cleared customs
* Border Measures (Article 51) – addresses measures applied at the border before the release of the infringing product into free circulation by the customs authority.

#### Criminal Procedures

* Article 61
* Requires criminal procedures and penalties for infringement at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.

#### Acquisition and Maintenance of Intellectual Property Rights

* Acknowledge that Members may require compliance with reasonable procedures and formalities as a condition for the acquisition or maintenance of the IP rights provided for in the TRIPS Agreement, except copyright and undisclosed information. Article 62.1.
* Article 62 – sets out procedures and formalities for the acquisition and maintenance of IP rights.

### Institutional and Procedural Provisions of the TRIPS Agreement

#### Council for TRIPS

* Article 68

#### Transparency

* Article 63

#### Dispute Settlement

* Brings disputes regarding IP protection under the effective and enforceable mechanism for dispute settlement contained in the DSU.

### Special and Differential Treatment of Developing-Country Members

#### Transitional Periods

* Developed 🡪 1 year
* Developing 🡪 5 years (additional 5 years to extend patent protection to areas not so protectable)
* LDCs 🡪 Originally 2005 (extended to July 2021)

#### Technical Assistance and Transfer of Technology

* Obliges developed-country Members to provide technical and financial assistance to developing and least developed country members. Article 67.
* Developed country members are obliged to provide incentives to their enterprises and institutions to promote the transfer of technology to least-develop-country Members so that they can create a “sound and viable technological base.” Article 66.2.

## Case Study on Access to Pharmaceutical Drugs

### Patents

* Art. 27.1

### TRIPS and Pharmaceuticals

* Striking Balance
  + Intellectual property protection encourages inventors and creators because they can expect to earn some future benefits from their creativity.
  + The way intellectual property is protected can also serve social goals. For example, patented inventions have to be disclosed, allowing others to study the invention even while its patent is being protected. This helps technological progress and technology dissemination and transfer. After a period, the protection expires, which means that the invention becomes available for others to use. All of this avoids “re-inventing the wheel”.
  + The TRIPS Agreement provides flexibility for governments to fine tune the protection granted in order to meet social goals. For patents, it allows governments to make exceptions to patent holders’ rights such as in national emergencies, anti-competitive practices, or if the right-holder does not supply the invention, provided certain conditions are fulfilled. For pharmaceutical patents, the flexibility has been clarified and enhanced by the 2001 Doha Declaration on TRIPS and Public Health. The enhancement was put into practice in 2003 with a decision enabling countries that cannot make medicines themselves, to import pharmaceuticals made under compulsory licence. In 2005, members agreed to make this decision a permanent amendment to the TRIPS Agreement, which will take effect when two thirds of members accept it.
* Basic Patent Right – Patents provide the patent owner with the legal means to prevent others from making, using, or selling the new invention for a limited period of time, subject to a number of exceptions.
* Not a Permit to put Product on Market – A patent only gives an inventor the right to prevent others from using the patented invention. It says nothing about whether the product is safe for consumers and whether it can be supplied. Patented pharmaceuticals still have to go through rigorous testing and approval before they can be put on the market.
* Patenting: WTO members have to provide patent protection for any invention, whether a product (such as a medicine) or a process (such as a method of producing the chemical ingredients for a medicine), while allowing certain exceptions. Article 27.1.
* Patent protection has to last at least 20 years from the date the patent application was filed. Article 33
* Non-discrimination: Members cannot discriminate between different fields of technology in their patent regimes. Nor can they discriminate between the place of invention and whether products are imported or locally produced. Article 27.1
* Three criteria: To qualify for a patent, an invention has to be new (“novelty”), it must be an “inventive step” (i.e. it must not be obvious) and it must have “industrial applicability” (it must be useful). Article 27.1
* Disclosure: Details of the invention have to be described in the application and therefore have to be made public. Member governments have to require the patent applicant to disclose details of the invention and they may also require the applicant to reveal the best method for carrying it out. Article 29.1
* Exceptions
  + Governments can refuse to grant patents for three reasons that may relate to public health:
    - inventions whose commercial exploitation needs to be prevented to protect human, animal or plant life or health — Article 27.2
    - diagnostic, therapeutic and surgical methods for treating humans or animals — Article 27.3a
    - certain plant and animal inventions — Article 27.3b.
  + Under the TRIPS Agreement, governments can make limited exceptions to patent rights, provided certain conditions are met. For example, the exceptions must not “unreasonably” conflict with the “normal” exploitation of the patent. Article 30.
* Compulsory Licensing
  + General
    - Compulsory licensing is when a government allows someone else to produce the patented product or process without the consent of the patent owner. In current public discussion, this is usually associated with pharmaceuticals, but it could also apply to patents in any field.
    - But the term “compulsory licensing” does not appear in the TRIPS Agreement. Instead, the phrase “other use without authorization of the right holder” appears in the title of Article 31. Compulsory licensing is only part of this since “other use” includes use by governments for their own purposes.
  + How
    - Compulsory licensing and government use of a patent without the authorization of its owner can only be done under a number of conditions aimed at protecting the legitimate interests of the patent holder.
    - For example: Normally, the person or company applying for a licence must have first attempted, unsuccessfully, to obtain a voluntary licence from the right holder on reasonable commercial terms — Article 31b. If a compulsory licence is issued, adequate remuneration must still be paid to the patent holder — Article 31h.
    - However, for “national emergencies”, “other circumstances of extreme urgency” or “public non-commercial use” (or “government use”) or anti-competitive practices, there is no need to try for a voluntary licence — Article 31b.
    - Compulsory licensing must meet certain additional requirements. In particular, it cannot be given exclusively to licensees (e.g. the patent-holder can continue to produce), and usually it must be granted mainly to supply the domestic market.

### Doha Declaration on the TRIPS Agreement and Public Health

* Legal status – helps fill in the lines of how treaty should be interpreted
* A large part of this was settled at the Doha Ministerial Conference in November 2001. In the main Doha Ministerial Declaration of 14 November 2001, WTO member governments stressed that it is important to implement and interpret the TRIPS Agreement in a way that supports public health — by promoting both access to existing medicines and the creation of new medicines.
* They therefore adopted a separate declaration on TRIPS and Public Health. They agreed that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. They underscored countries’ ability to use the flexibilities that are built into the TRIPS Agreement, including compulsory licensing and parallel importing. And they agreed to extend exemptions on pharmaceutical patent protection for least-developed countries until 2016.
* On one remaining question, they assigned further work to the TRIPS Council — to sort out how to provide extra flexibility, so that countries unable to produce pharmaceuticals domestically can obtain supplies of copies of patented drugs from other countries. (This is sometimes called the “Paragraph 6” issue, because it comes under that paragraph in the separate Doha declaration on TRIPS and public health.)
  + Implementation on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: <https://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm>
* **Paragraph 5 – In order to make use of compulsory license, however, need someone in your country able to produce your drug. You can’t force the patent holder to give it to someone else elsewhere. What you need to work around this, is in Paragraph 6. So they instruct council for TRIPS to figure it out.**
* Paragraph 6 solution (Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health)
  + Exporting countries granted a waiver from Art. 31(f) TRIPS
  + Importing countries obligation of remuneration to patent holder is waived
  + Exporting constraints are waived for developing countries & LDCs within a regional trade agreement (so long as at least 1/2 of countries in RTA are LDCs)
* Paragraph 6 solution seems to solve the problem
  + However it is very rarely used
  + Pharmaceutical companies can retaliate against the compulsory licensing – they will stop putting drugs out in those countries

### Generic Drugs Problem

* TRIPS Art. 51 fn (13) enforcement)
* TRIPS 1.1. – just minimum standards
* GATT V – freedom of transit
* TRIPS Agreement – Preamble
* Brazil
  + GATT V – freedom of transit
  + Preamble
    - Doha: National emergency
* Wu says there is no tension between GATT and TRIPS so don’t need to choose between the two. However, question is whether they are in harmony…

## Moving Beyond TRIPS

### TPP Chapter 18: Intellectual Property

* Ratify other international agreements (Article 18.7)
* National Treatment (Article 18.8)
* Transparency (Article 18.9)
* Application (Article 18.10)
  + Does not apply to passed acts
  + Applies to “subject matter existing at the date of entry into force of this Agreement for a Party and that is protected on that date in the territory of a Party where protection is claimed, or that meets or comes subsequently to meet the criteria for protection under this Chapter.”
* Exhaustion (Article 18.11) – countries can decide on their own
* Patents (Section F)
  + Grace Period (Article 18.38)
    - TPP Parties also agree to adopt the best practice of allowing a grace period in which certain public disclosures of the invention (e.g., in papers published by university researchers or small inventors) will not be used to deny a patent application.
  + Cooperation and Transparency (Article 18.14)
    - Cooperation and transparency provisions on patenting in the IP chapter help facilitate the processing of patent applications in multiple jurisdictions, with a minimum of red tape. These features should particularly benefit small- and medium-sized enterprises.
  + Promoting the Development and Availability of Innovative and Generic Medicines
    - The Intellectual Property chapter also includes commitments to promote not only the development of innovative, life-saving drugs and treatments, but also robust generic medicine markets. Drawing on the principles underlying the “May 10, 2007” Congressional-Executive Agreement, included in agreements with Peru, Colombia, Panama, and Korea, the chapter includes transitions for certain pharmaceutical IP provisions, taking into account a Party’s level of development and capacity as well as its existing laws and international obligations.
  + Enabling Public Health Protections (Articles 18.3 and 18.6)
    - The chapter incorporates the Doha Declaration on the TRIPS Agreement and Public Health, and confirms that Parties are not prevented from taking measures to protect public health, including to respond to epidemics such as HIV/AIDS.
* Protection for Regulatory Test Data
  + Promoting Investments in the Development and Testing of Safe and Effective Medicines and Agrochemical Products (Article 18.50)
    - The Intellectual Property chapter includes commitments related to protection of undisclosed test and other data generated to obtain marketing approval of pharmaceuticals and agricultural chemicals.
* Trademarks (Section C)
  + Term – no less than 10 years
* Geographical Indications (Section E)
* Copyright (Section H)
  + Term – life of the author and 70 years
  + Internet Service Provider Safe Harbors (Article 18.82)
    - The Intellectual Property chapter requires Parties to establish copyright safe harbors for Internet Service Providers (ISPs). In the United States, safe harbors allow legitimate ISPs to develop their business, while also helping to address Internet copyright infringement in an effective manner. Safe harbors have contributed to the flourishing of the most vibrant Internet, entertainment and e-commerce industries in the world. TPP does not include any obligations on these ISPs to monitor content on their networks or systems. TPP also provides for safeguards against abuse of such safe harbor regimes.
* Trade Secrets (Article 18.78)
  + The Intellectual Property chapter requires TPP Parties to provide for the legal means to prevent misappropriation of trade secrets, including misappropriation conducted by State-owned enterprises. It also requires TPP Parties to establish criminal procedures and penalties for trade secret theft, including by means of cyber-theft.
* IP Enforcement
  + Effective IP Enforcement Systems
    - The IP chapter’s commitments on enforcement ensure the availability of mechanisms to enforce intellectual property rights, including civil and administrative procedures and remedies, provisional measures, border measures, and criminal enforcement. For example, these measures include disciplines on camcording in movie theaters and theft of encrypted program-carrying satellite and cable signals.
  + Counterfeit Goods in Cross-Border Supply Chains
    - The chapter includes robust commitments to tackle the challenges of trafficking in counterfeit trademark goods and pirated copyright goods within supply chains in the Asia-Pacific region. These provisions aim to close loopholes used by counterfeiters and to enhance penalties against trafficking in counterfeit trademark products that threaten health and safety.
  + Effective Border Protection
    - The chapter ensures that border officials may act on their own initiative to identify and seize imported and exported counterfeit trademark and pirated copyright goods
* New Features
  + Criminal Penalties for Trade Secret Theft
    - TPP is the first Free Trade Agreement (FTA) to require criminal penalties for trade secret theft, including by means of a computer system. This is a significant step forward for TPP Parties, and an important precedent in a region in which U.S. companies are facing significant challenges involving trade secret theft.
  + Clarifications Regarding State-Owned Enterprises
    - TPP is the first trade agreement to make clear that Parties cannot exclude State-owned enterprises from IP enforcement rules, including trade secret enforcement procedures, subject to certain TRIPS Agreement disciplines.
  + Tackling the Challenges of Asia-Pacific Counterfeit and Pirated Goods Supply Chains
    - TPP builds on previous U.S. FTAs that establish criminal penalties against trademark counterfeiting and copyright piracy consistent with U.S. law, breaking new ground by including new provisions aimed at addressing concerns about cross-border supply chains of counterfeit and pirated goods, including those activities that threaten consumer health and safety.
  + Enforcement in the Digital Environment
    - TPP is the first FTA to clarify that IPR enforcement should be available against infringement in the digital environment and not just against physical products. Some countries in the WTO have asserted that existing IP enforcement commitments do not apply online or to digital products.
  + Promoting New Online Business Models for Delivering Content
    - TPP takes additional steps toward promoting legitimate digital trade, including the delivery of movies, music, software, and books online. In particular, the ISP copyright safe harbor section helps to provide certainty and predictability about the scope of the safe harbors, as in prior FTAs, while also reflecting the diversity of approaches in the TPP countries, and ensuring that existing effective systems, such as ones upon which rights holders, ISPs, and consumers have come to rely in the course of digital trade, can stay in place. TPP also recognizes the important role of collective management societies for copyright and related rights in collecting and distributing royalties through fair, efficient, transparent, and accountable practices, which promote a rich and accessible digital marketplace for content.
  + Copyright Exceptions and Limitations
    - As a complement to the TPP provisions aimed at providing effective protection and enforcement of copyright in the digital age and those aimed at ensuring respect for the rights of creators, the TPP requires that Parties continuously seek to achieve an appropriate balance in their copyright systems through providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research.
  + Preventing Domain Name Cyber-Squatting (Article 18.28)
    - In an effort to reduce domain name cybersquatting, the TPP ensures that, in connection with a Party’s country-code top-level domain name registration system, appropriate remedies are available in cases of bad faith registration of domain names that are confusingly similar to registered trademarks.
  + Biologics and Pharmaceutical IP
    - The TPP includes additional specific rules related to biologic medicines, reflecting the growing importance of these cutting-edge technologies. These commitments are intended to promote innovation and promote access to affordable medicines in developing countries. TPP gives partner countries two ways to meet a strong standard for effective market protection. One way is to provide a minimum standard of 8 years of data protection; the other way is to deliver a comparable outcome through a combination of at least 5 years of data protection measures and a country’s other measures (e.g. regulatory procedures or administrative actions). Both paths will result in the first extended term of market protection for biologics medicines in a trade agreement, both paths create further incentive for innovators to develop lifesaving medicines, and both paths will meet the balance we have been seeking between innovation and access in TPP. TPP also specifies the types of biologic products subject to the enhanced protection, and ensures that the Parties can review the provisions to keep pace with technological changes and other developments and recommend modifications, if appropriate. None of these provisions will change any U.S. healthcare program or the data protection that’s in existing U.S. law.
  + Geographic Indications (GIs)
    - The TPP will enhance due process and other disciplines on the use of GIs to address growing concerns of U.S. exporters, whose access to foreign markets can be undermined through overly expansive GI protections advocated by certain countries whose agricultural producers compete with U.S. exporters.
  + Cooperation Activities
    - Building on cooperative work in other fora, the TPP Parties agree to endeavor to cooperate, including on IP issues relevant to small and medium-sized enterprises, technical assistance for developing countries, and exchanging information on patent office search and examination results.

# The Future of the Trade Regime

## Whither Multilateralism? Moving Forward on 21st Century Trade

* Why is the Doha Round stalled?
* What would the developed countries like for the WTO trade negotiations to encompass?
* What would developing countries like for the WTO trade negotiations to encompass?
* How does the rise of major emerging economies (China, India, Brazil, etc.) complicate?
* What is the strategy of the developed countries moving ahead?
* In what ways is the trade regime “fragmenting”? What will this mean for the future of trade governance?

Going forward: (1) mega-regional agreements; (2) very narrow agreements; (3) plurilateral agreements; (4)?

### Pascal Lamy Speech

* Thesis: Protectionism is bad but so is policy fragmentation.
* Rise of regionalism
  + When the GATT first came into being in 1948, regional arrangements were considered exceptional. Indeed, it was not until the beginnings of the European integration process in the 1950s that a significant part of international trade was to become preferential.
  + We can count almost 400 preferential trade agreements currently in existence, and each member of the WTO on average belongs to 13 separate agreements.
  + Reasons explaining rise of preferential trade agreements:
    - Serve political or strategic ends.
    - Countries may wish to go further and faster in the direction of economic integration than they have been able to do in the WTO.
    - Motivated by a fear of exclusion as competing countries secure better access to markets of interest.
    - An insurance policy against future protectionism.
    - Signalling device to attract foreign investment.
    - Serve as a vehicle for policy consolidation nationally, using an international obligation to make it harder for domestic interests to exert an influence over trade policy.
* Tariffs and PTAs
  + PTAs not just about securing tariff preferences.
  + Only about 15 per cent of global merchandise trade flows in 2008 enjoyed preferential tariff treatment.
* Deep integration, global value chains and non-tariff measures
  + Marked tendency for PTAs to go more deeply into policy areas that have been addressed less profoundly, or not addressed in the WTO.
  + One reason for deep integration has been the emergence of global value chains.
  + Trade in intermediate goods — a proxy for global value chain production — now comprises close to 60 per cent of total trade in goods, and continues to be a dynamic sector in international trade.
* The characteristics of NTMs and their motivations
  + If we understand preferential trade agreements, at least in some measure, as a desire to support and facilitate global value chains, and tariffs are not the real story behind them, we must then look towards non-tariff measures — NTMs — to analyse the significance of the relationship between multilateral and preferential approaches towards trade cooperation.
  + I do not think it is far-fetched to argue that the proper management of NTMs is among the greatest challenges we face in international cooperation. And levelling the playing field in this area raises challenges of a different nature to those related to tariffs.
* Multilateral approaches to achieving coherence among PTAs
  + How should we manage PTAs and the multilateral trading system in ways that support world trade?
    - Continue to negotiate and construct a multilateral framework that responds to those needs manifested in preferential agreements that can be met through a multilateral approach.
    - A process that builds gradually towards a better understanding among WTO members of preferential trade agreements, what motivates them, and how they are both similar and different. This would be not so much a negotiation as a conversation in the first instance, of the kind that could possibly be carried out under the Transparency Mechanism recently established as a forum for notifying and discussing PTAs. The ultimate objective of this exercise would be to build on those elements of commonality in preferential trade agreements that could be multilateralized on a non-discriminatory basis.

### Bali Package

* <http://www.tralac.org/discussions/article/5348-a-summary-of-the-bali-package.html>
* <http://www.ictsd.org/bridges-news/bridges/news/success-in-bali-sparks-questions-over-doha-wto-future>

### We are at the End of the Line on the Doha Round of Trade Talks

* Regional pacts are working. Groups of countries have struck sectoral deals.
* Only multilateralism — the attempt to reach a comprehensive global deal — is stuck. Getting it unstuck begins with acknowledging that Doha was designed in a different era, for a different era, and much has changed since.
* When Doha was launched in 2001, the focus was on US and EU agricultural subsidies, which have since been cut. Now, some emerging markets are the biggest providers of agricultural subsidies but would be exempt under Doha from cuts.
* If you are a poor farmer facing a global market distortion, it does not matter where the subsidies causing it came from. Artificial distinctions between developed and emerging economies make no economic sense.

### The WTO Lives On, the Doha Round Does Not

* Nairobi Package
  + Subjects of great interest to developing countries were resolved in their favour:
    - Developing members will be able to use a Special Safeguard Mechanism to escalate tariffs as needed to protect their farmers;
    - They will be able to maintain Public Stocks for Food Security Purposes without violating agricultural subsidy limits;
    - With a few exceptions, members will phase out their export subsidies on agricultural goods – advanced countries immediately, developing countries by 2018;
    - Advanced countries, and emerging countries that feel able (e.g. China), will open their cotton markets to least developed countries (LDCs) on a duty-free, quota-free basis;
    - Members are urged to write preferential rules of origin in free trade agreements (such as the TPP) in a manner that allows LDCs to have a larger quantity of third- country inputs in their qualifying exports;
    - Members are permitted to give LDCs preferential access to their service markets until 2030, without violating the members’ MFN obligations.
  + Three issues of great interest to the advanced countries:
    - Additional pledges were gathered to ratify and implement the Trade Facilitation Agreement – the crowning achievement of the 9th Ministerial in Bali in 2013;
    - A deal was sealed on the expanded Information Technology Agreement (ITA-2), a plurilateral pact among 53 WTO members accounting for about 90% of global ITC trade;
    - A work programme on electronic commerce was endorsed, and a no-duty pledge was reaffirmed through the 11th WTO Ministerial, to be held in 2017.