Introduction to WTO Basic Principles and Rules

OBJECTIVES

- Explain the non-discrimination rules: Most Favoured Nation (MFN) Principle and National Treatment (NT) Principle;
- Explain the market-access rules;
- Present WTO rules on trade remedies: Anti-dumping measures and subsidies and countervailing measures;
- Explain the exceptions to the basic principles.
PART I: BASIC PRINCIPLES IN THE WTO

I. INTRODUCTION

Multilateral rules and principles were agreed back in 1947 to govern trade in goods between GATT Contracting Parties. From 1947 to 1994, the GATT provided the forum for negotiating lower customs duty rates, as well as the reduction or elimination of other trade barriers. The text of the GATT contained important rules, particularly non-discrimination.

After the conclusion of the Uruguay Round and the entry into force of the WTO Agreement, the basic principles formulated in the GATT remained fundamentally unchanged. Since 1995, the updated GATT (called "GATT 1994") has become the general agreement for trade in goods. Other agreements also cover specific sectors such as agriculture, as well as with specific issues such as technical barriers to trade and subsidies.

The WTO Agreement also incorporated new disciplines beyond trade in goods, for example, the GATS and the agreement on trade in services (GATS) and the Agreement on trade related intellectual property rights (TRIPS Agreement).

In this section, you will study the non-discrimination principles and their specific exceptions with reference to the GATT, GATS and TRIPS Agreement.
II. RULES ON TRADE IN GOODS

II.A. NON-DISCRIMINATION PRINCIPLE

Non-discrimination is a fundamental principle of the multilateral trading system and is recognized in the Preamble to of the WTO Agreement as a key instrument to achieve the objectives of the WTO. In the Preamble, WTO members express their desire to eliminate discriminatory treatment in international trade relations. Non discrimination in the WTO is embodied by two principles, the most favoured nation (MFN) treatment obligation and the national treatment obligation.

The MFN principle applies to trade in goods, trade in services, and trade related aspects of intellectual property. According to the Appellate Body in the EU Tariff Preferences case (WT/DS246), the MFN obligation is a cornerstone of the GATT and one of the pillars of the WTO trading system (paragraph 101).

II.A.1. THE MFN PRINCIPLE WITH REGARD TO THE TRADE IN GOODS

IN BRIEF

Pursuant to the WTO agreements countries cannot normally discriminate between their trading partners. If a Member grants to a country a special favour (such as a lower customs duty on one of its products) it must grant the favour immediately and unconditionally to all WTO members.

IN DETAIL

Members of the WTO can be seen as members of a club. One of the fundamental rules of the club is that each member will grant any other member the best possible treatment it grants to any one else. Hence, each member of the club is guaranteed to receive the best possible treatment from each of its fellow-members.

For example, let us assume that Rauritania’s MFN duty (duty applicable to all WTO Members) for tomatoes is 10%. Medatia is a big tomato producer interested in increasing its exports of tomatoes to Rauritania.

If during a WTO negotiating round, the Government of Medatia initiates tariff negotiations on tomatoes with Rauritania. After long and difficult bilateral meetings, Rauritania agrees to give Medatia a duty free access (0%) for tomatoes. However, according to the MFN principle, Rauritania should extend the 0% duty on tomatoes to all WTO Members. This is because all WTO Members should enjoy the most favourable treatment for tomatoes granted by Rauritania.

For trade in goods, the MFN principle requires each Member to extend to all other Members, treatment no less favourable than it accords to imports from any other country.
II.A.2. GATT ARTICLE I:1

GATT Article I:1 contains the specific rules for MFN treatment for goods.

GATT Article I:1 General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member 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 Members.

The general effect of Article I.1 is to create the obligation among WTO Members to give each others’ like products the best existing market access opportunities without discrimination in law or in fact.

A detailed reading of the provision reveals that the key elements of the MFN principle are:

2. Like products.
3. The immediate and unconditional grant of the advantage at issue to the like products concerned.

ANY ADVANTAGE COVERED IN ARTICLE I:1

The advantages that a WTO Member must grant to all members’ like products without discrimination in fact or in law are listed in the first part of Article I.1. They are advantages in respect of the following measures:

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

The scope of the measures covered in Article I.1 is in practice, wide enough to cover a very broad range of measures in relation to exportation and importation as well as internal measures.
LIKE PRODUCTS

The MFN obligation applies to like products. The idea of "likeness" is very relative and is not defined in the GATT, therefore WTO case law has developed four criteria that should be considered in deciding if products are alike (see for example, Japan – Taxes on Alcoholic Beverages - WT/DS8, 10 and 11; and Canada – Autos WT/DS139 and 142). Such consideration should be assessed on a case by case basis but the said factors are as follows:

1. physical characteristics of the products;
2. end use of the products;
3. consumer preferences;
4. the classification of the products in Members' tariff laws.

THE IMMEDIATE AND UNCONDITIONAL GRANT OF THE ADVANTAGE TO THE LIKE PRODUCTS CONCERNED

Once a WTO Member has granted an advantage to imports from any country, it must immediately grant that advantage to imports from all WTO members and it cannot make the granting of that advantage to imports from all WTO members conditional upon receiving something in return. This obligation applies equally to exports, therefore advantages granted by a WTO Member to exports to any country must be granted immediately and unconditionally to exports to all WTO Members.

PROVISIONS THAT ALLOW DEROGATION FROM MFN

EXCEPTIONS

There are a number of provisions that allow WTO members to derogate from non-discrimination principles as well as from other WTO disciplines. These exceptions will be covered in more detail in Part IV of the module. These provisions include:

- general exceptions;
- security exceptions;
- balance of payment exceptions;
- waivers;
- regional integration exceptions.

SPECIFIC EXCEPTIONS RELATED TO THE MFN OBLIGATION CAN BE SUMMARIZED AS FOLLOWS:

Historical Preferences (GATT Article 1.2-4):

Frontier Traffic (GATT Article XXIV:3):
ILLUSTRATION

MFN Principle (for Goods)

Let us assume that Vanin, Medatia and Tristat are WTO Members and that Rauritania is not. The MFN principle would prohibit Vanin’s customs authorities from levying a customs duty of 10% for imported watches originating in Medatia, while levying a lower customs duty of 5% for imported watches originating in Tristat. The MFN principle requires that the WTO favourable treatment (5%), be granted automatically and unconditionally to imported watches originating from all WTO members (in this case, Medatia). The application of this principle would be the same if the "best treatment" had been initially granted to watches originating in Rauritania, which is not a WTO Member.

One relevant issue is whether watches from Medatia are "like products" vis-à-vis watches from Tristat. If they are not like products, then different treatment (customs duty) may be applied. However, assuming that they are like products, there would be a violation of the MFN obligation by Vanin.

However, if one of the permitted specific exceptions to the MFN or general WTO obligations applies, Vanin’s conduct can be considered a permitted derogation and would therefore be consistent with its WTO obligations.

EXERCISES:

1. GATT Article I.1 says: "With respect to customs duties ... any advantage ... granted by any Member to any product originating in or destined for any other COUNTRY shall be accorded immediately and unconditionally."

   Why did the drafters of Article I.1 of the GATT 1994 refer to "any other COUNTRY" and not "any other MEMBER"?
II.B. THE MFN PRINCIPLE UNDER GATS

Under Article II of the GATS, WTO members are held to extend immediately and unconditionally to services and service suppliers of all other members "treatment no less favourable than that accorded to like services and service suppliers of any other country". Therefore, the best access conditions that have been conceded to one country must be extended to all WTO members. This amounts to a prohibition, in principle, of preferential treatment among Members, or groups of Members, in individual sectors, or of reciprocity provisions which confine access benefits to trading partners granting similar treatment.

The MFN obligation is applicable to any measure that affects trade in services in any sector falling under the Agreement, whether specific commitments have been undertaken or not.

SPECIFIC EXEMPTIONS

- Derogations are possible in the form of Article II-Exemptions. WTO members were allowed to seek exemptions under the Annex on Article I Exemptions before the GATS entered into force. New exemptions can only be granted to new members at the time of accession or, in the case of current members, by way of a waiver under Article IX:3 of the WTO Agreement. All exemptions should in principle not last longer than 10 years and are subject to periodic review in the Council for Trade in Services;
- Exemptions in Maritime transport services are still possible (Annex on Negotiations on Maritime Transport Services and doc. S/L/24).

Note that the GATS allows groups of Members to enter into economic integration agreements (Article V) and to mutually recognize regulatory standards and certificates (Article VII), subject to certain conditions.

II.C. THE MFN PRINCIPLE UNDER TRIPS

The MFN Principle under the Agreement on Trade Related Aspects of Intellectual Property ("TRIPS Agreement") is found in Article 4 of the TRIPS Agreement. It requires that "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...".

The wording of Article 4 of the TRIPS Agreement is similar to that of GATT Article I. However, unlike the GATT, in which the subject of MFN treatment is goods, or GATS in which the subjects of MFN treatment is services or service suppliers, in the context of the TRIPS Agreement, the subject of MFN treatment is "nationals". The term national includes persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory. The MFN principle under TRIPS applies to any advantage conferred to the nationals of any other country, even if the benefited country is not a WTO Member.

Article 1.3 states that "when 'nationals' are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory". The footnote concerns only separate customs territory i.e., a minority of the Membership. For further information see the text of Article 1.3 itself.
SPECIFIC EXEMPTIONS

There are some important exemptions specifically related to the MFN Principle in the TRIPS Agreement. These are listed in Article 4 (a) - (d) of the TRIPS Agreement.

EXERCISES:

2. Most-favoured-nation treatment must be ensured for which types of services?
III. NATIONAL TREATMENT (ARTICLE III)

In this section, the National Treatment principle, which constitutes the second component of the non-discrimination pillar, will be discussed. The first component is the MFN principle, presented in the previous section.

IN BRIEF

Whilst the MFN principle seeks to ensure that a WTO Member does not discriminate between like products originating in or destined for other WTO Members the National Treatment principle addresses the treatment to be applied to imported products once they are in a Member's territory. The National Treatment principle prohibits a Member from favouring its domestic products over the imported products of other Member countries.

National Treatment principle is foreseen for trade in goods by GATT Article III; for trade in services by GATS Article XVII; and for trade-related aspects of intellectual property rights by Article 3 of the TRIPS Agreement.

III.A. THE NATIONAL TREATMENT PRINCIPLE IN RULES ON TRADE IN GOODS

According to the National Treatment principle, each trading partner should treat imports no less favourably than they treat like domestically produced goods.

The national treatment obligation for goods is provided in Article III of the GATT 1994. The relevant portions of GATT Article III are paragraphs 1, 2 and 4 as well as the explanatory Ad Note to Article III.

**GATT Article III**: National Treatment on Internal Taxation and Regulation

1. Members recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

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

3. ....

4. The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect
of all laws, regulations, transportation, and requirements affecting their internal sale, offering for sale, purchase, transportation distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

ARTICLE III:1 - THE GENERAL OBLIGATION

Article III:1 lays out the general objective and scope of the national treatment obligation.

The stated objective is to ensure that internal measures are not applied to domestic and imported products so as to afford protection to domestic production.

With regard to the scope of this provision, the national treatment obligation applies to internal measures as opposed to border measures. Thus, before seeking to apply Article III, it is important to ensure that the measure at issue is an internal measure and not a border measure, as the latter would fall under Articles II and XI and not Article III. Distinguishing between an internal measure and border measure is assisted by the Ad Note to Article III which provides the following:

AD NOTE: TO ARTICLE III

"Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1, which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III."

ARTICLE III:2 - INTERNAL TAXATION

Article III:2 applies the general non-discrimination principle set out in paragraph 1 to internal taxation. The first sentence deals with the internal taxation of like products, while the second sentence (by cross reference with the relevant Ad Note) deals with the internal taxation of directly competitive or substitutable products.

ARTICLE III:2 - FIRST SENTENCE

To establish an infringement of the first sentence, one must show that 2 elements are present:

1. The imported and domestic products are like products;
2. The imported products are taxed in excess of the domestic products.
(1) The imported and domestic products are like products

The determination of likeness for the purposes of the first sentence is to be made on a case by case basis but the following 4 criteria should be used to assist in the determination:

1. The product's end uses;
2. Consumer tastes and habits;
3. The product's properties nature and quality;
4. Tariff classification.

(2) The imported products are taxed in excess of the domestic products

The taxes levied on imported products can not be in excess of those levied on like domestic products. The slightest margin of excessive taxing will constitute an infringement, even if the margin is de minimis.

ARTICLE III:2 - SECOND SENTENCE

If either of the elements in the first sentence can not be established, one must still consider if there is an infringement of the second sentence, which casts a wider net.

To establish an infringement of the second sentence, one must show 3 elements:

1. The imported and domestic products are directly competitive or substitutable;
2. The domestic and imported products are not similarly taxed;
3. The dissimilar taxation is applied to give protection to domestic production.

(1) The imported and domestic products are directly competitive or substitutable

The second sentence of Article III:2 applies to competitive or directly substitutable products. This is a much broader concept than likeness in the first sentence because the first sentence applies only to products that are perfectly substitutable whereas the second sentence is broad enough to include products that are imperfectly substitutable.

(2) The domestic and imported products are not similarly taxed

In the first sentence, even the slightest difference in tax between imported and domestic products will lead to inconsistency with the national treatment obligation. This is not the case with regard to the second sentence where the requirement is that the product must be "similarly taxed" in that text the difference in tax must be more than de minimis to constitute an infringement of the national treatment obligation.

(3) The dissimilar taxation is applied to give protection to domestic production

If it is established that a dissimilar taxation is applied, it must thereafter be established that this was applied so as to afford protection to domestic production [is not a matter of intent].
ARTICLE III:4 - INTERNAL LAWS, REGULATIONS AND REQUIREMENTS

As opposed to Article III:2 which deals with internal taxation, the national treatment obligation in Article III:4 is concerned with internal laws, regulations and requirements. There are three elements that must be shown to establish an infringement of Article III:4. They are:

1. The measure is a law, regulation or requirement covered in Article III:4;
2. The imported and domestic products are like products;
3. The imported products are afforded less favourable treatment.

(1) The measure is a law, regulation or requirement covered in Article III:4

Article III:4 relates to all laws, regulations, and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.

(2) The imported and domestic products are like products

The scope of likeness in paragraph 4 is wider than in the first sentence of paragraph 2. This is because the scope of the first sentence must be read in light of its interpretive relationship with the second sentence, something that does not apply to Article III:4.

Determining if products are like for the purposes of Article III:4 should be made on a case by case basis, employing the following 4 criteria:

1. The physical properties of the products.
2. The extent to which the products are capable of serving the same or similar uses.
3. The extent to which consumers perceive and treat the goods as substitutable.
4. The international classification of the goods for tariff purposes.

(3) The imported products are afforded less favourable treatment

The national treatment obligation requires that imported and domestic products are given equal treatment in terms of competitive opportunities. Therefore, if a measure gives imported products less favourable treatment than it gives to like domestic products, the measure will be inconsistent with the national treatment obligation.

EXERCISES:

3. Member prohibits advertisements of foreign watches. Is this compatible with the GATT 1994?
III.B. EXCEPTIONS

As with MFN, there are general and specific exceptions to the principle of national treatment. General exceptions of a horizontal nature and protective measures which also constitute a derogation to other rules are examined in Part IV.

Specific exceptions only related to the National Treatment principle can be summarized as follows:

GOVERNMENT PROCUREMENT (GATT ARTICLE III:8A)

Advantages or preferences can be accorded to domestic products over imported ones if government agencies purchase such products for government purposes and not for commercial resale or use in the production of goods for commercial sale.

The Plurilateral Agreement on Government Procurement contains specific rules pertaining to the opening of the procurement process by government entities to international competition. Because of its plurilateral nature, the rights and obligations it contains only bind the members that have ratified it. The Plurilateral Agreement on Government Procurement originated among some GATT Contracting Parties in the Tokyo Round, and developed further in the Uruguay Round.

SUBSIDIES TO DOMESTIC PRODUCERS (GATT ARTICLE III:8B)

Governments can provide subsidies (including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of Article III) exclusively to domestic producers. GATT Contracting Parties and WTO Members considered that the practice of granting production subsidies was not necessarily illegal.

CINEMATOGRAPH FILMS (GATT ARTICLE III:10 AND ARTICLE IV)

As an exception to the National Treatment principle, negotiators of the GATT retained the possibility of giving preferences to products emanating from the national movie industry (exposed cinematograph films). National preferences are governed by the provisions of GATT Article IV, and take the form of internal quantitative regulations in "screen quotas".

This provision must now be read together with specific commitments taken by Members in the audiovisual sector in the GATS Agreement.
ILLUSTRATION

National Treatment (for Goods)

Let us assume that Vanin, Medatia and Tristat are WTO Members.

**GATT Article III** embodies the principle of National Treatment. It prohibits WTO members from discriminating in favour of domestically produced goods. The result is that once the applicable border duties (e.g. tariffs) have been paid, the importing Member cannot apply any further burdens on imports that are not applied to the like domestic products.

Article III applies to two types of internal measures. Article III.2 applies to "internal taxes or other internal charges", whilst Article III.4 applies to all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Therefore, Vanin would be prohibited from applying a sales tax of 5% on domestically produced watches, while applying a sales tax of 10% on imported watches from Medatia or Tristat. Based on the assumption that the domestic and imported watches are "like products", this sales tax would violate Article III.2 because the measure taxes imported products "in excess" of the applicable tax on domestic like products.

III.C. NATIONAL TREATMENT IN GATS

Article XVII of the GATS governs national treatment for services:

"1. 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. (10)

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."

National treatment under GATS Article XVII implies the absence of discriminatory measures that may modify the conditions of competition in favour of domestic services and service suppliers as compared to foreign like services and like service suppliers. Hence, WTO members are not to modify, in law or in fact, the conditions of competition in favour of their own service industry.

National treatment (as well as market access) in the GATS is not a general obligation, but is granted only in sectors which a Member lists in its national schedule of "specific commitments". To explain: each WTO Member is required to have a schedule of specific commitments that identifies the services for which the Member guarantees market access (Article XVI) and national treatment (Article XVII), and any limitations that
may be attached thereto. That is, limitations may be attached to specific commitments in order to reserve the right to apply measures inconsistent with full market access and/or national treatment.

Hence, the extension of national treatment in any sector may be made subject to conditions and qualifications. Limitations may be listed to provide cover for inconsistent measures, such as discriminatory subsidies and tax measures, residency requirements, etc. It is for the individual Member to ensure that all potentially relevant measures are listed (examples of frequently scheduled national treatment restrictions are in the Attachment 1 to document S/L/92).

This means that the GATS allows each Member to adjust the conditions of market entry and participation to its sector-specific objectives and constraints. Market access and national treatment specific commitments guarantee minimum levels of treatment, but do not prevent Members from being more open (or less discriminatory) in practice.

Note

At a glance, it may be difficult to understand why the national treatment obligation under the GATS is of a more limited in scope — confined to scheduled services and subject to possible limitations — than under the GATT where it applies across the board. The reason lies in the particular nature of services trade. Universal national treatment for goods does not necessarily imply free trade. Imports of foreign goods can still be controlled by tariffs which, in turn, may be bound in the country’s tariff schedule. By contrast, given the impossibility of operating tariff-type measures across intangible services transactions, regulatory distinctions are the only way to control the supply of foreign services. In these conditions, the general extension of national treatment in services would in practice be tantamount to guaranteeing free access.

III.D. NATIONAL TREATMENT IN TRIPS

National Treatment had long been a feature of intellectual property conventions. For trade-related aspects of intellectual property rights (TRIPS), the national treatment principle prohibits treatment of foreign nationals on less favourable terms than those accorded to nationals in the context of the implementation of national or international intellectual property laws or regulations.

The obligation is found both in Article 3 of the TRIPS Agreement itself and in the provisions of the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty) which are incorporated by reference in the TRIPS Agreement. These obligations are worded somewhat differently from Article 3 of TRIPS. Naturally, such national treatment obligations are limited in scope to the intellectual property covered by the pertinent convention.
SPECIFIC EXEMPTIONS

There are some exemptions specifically related to the national treatment principle in Article 3 of TRIPS. They refer to exceptions which are provided in the:

(1) Paris Convention (1967) for the Protection of Industrial Property;
(2) Berne Convention (1971) for the Protection of Literary and Artistic Works;
(3) Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; and the
IV. SUMMARY PART I

THE MAIN PRINCIPLES OF THE GATT

As you have seen there are two main principles of non-discrimination, the MFN and the national treatment principles.

GATT ARTICLES CONTAINING THE PRINCIPLES

- Most Favoured Nation – Article I
- National Treatment – Article III

GATS ARTICLES CONTAINING THE PRINCIPLES

- Most Favoured Nation – Article II:1
- National Treatment – Article XVII

TRIPS AGREEMENT ARTICLES CONTAINING THE PRINCIPLES

- Most Favoured Nation – Article 4
- National Treatment – Article 3 of the TRIPS Agreement

EXCEPTIONS AND DEROGATIONS TO THESE BASIC OBLIGATIONS

- Specific exceptions are included in the articles containing the principles
- There are also General Exceptions

Under the GATT, the subject of MFN treatment is goods and under the GATS the subjects are services and service providers, while in the context of the TRIPS Agreement, the subject of MFN treatment is “nationals”.

For goods, the MFN principle prohibits discrimination between imports irrespective of their origin or destination while the national treatment principle prohibits discrimination between imported and locally produced like products.

The MFN Principle for services obliges WTO Members to “…accord immediately and unconditionally to services and service providers of any other Member, treatment no less favourable than that it accords to like services and service providers of any other country”.

For intellectual property, any advantage, favour, privilege or immunity granted by a Member with regard to the protection of intellectual property, to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

For goods, whilst the MFN principle seeks to ensure that a WTO Member does not discriminate between like products originating in or destined for WTO Members, the national treatment principle prohibits a Member from favouring its domestic products over the imported products of other Members.

For services, the national treatment principle (as well as the provisions on market access) commit Members to giving no less favourable treatment to foreign services and service suppliers than provided for in the
relevant columns of their respective schedule of commitments.

For intellectual property, 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 addition to the specific exceptions that you have seen for the principles for goods, services and intellectual property rights, there are other exceptions of a horizontal nature, which also constitute a derogation to other rules. These horizontal exceptions and protective measures include the general and security exceptions provisions in the GATT, GATS and TRIPS Agreements.
PROPOSED ANSWERS:

1. If GATT Article I.1 referred to any other MEMBER, this would mean that members need only ensure that the best treatment, given to products originating in one of the members, be extended to the other members. This could therefore mean that a Member could grant an advantage to products originating in a country which is not a WTO Member without having to extend this MFN treatment to the other WTO Members. With the present text (using COUNTRY), the advantages given to products from one country must also be extended to products from all WTO members. Consequently, WTO members get the best treatment except for derogations permitted by the WTO Agreements.

2. For all services covered by GATS.

In the GATS, the MFN obligation (Article II) is applicable to any measure that affects trade in services in any sector falling under the Agreement, whether or not specific commitments have been made. Exemptions could have been sought at the time of the acceptance of the Agreement (for acceding countries: date of accession), or, in the case of current Members, by way of a waiver under Article IX:3 of the WTO Agreement. They are contained in country-specific lists, and their duration must not exceed ten years in principle.

3. The ban on advertising constitutes a measure "affecting the internal sale" of imported "like products" under GATT Article III.4. This measure would be a violation of Article III.4 if foreign and domestic watches are "like products" under Article III.4, because the prohibition on the advertising of foreign watches amounts to treating imported goods less favourably than "like" domestic goods.
PART II: BASIC PRINCIPLES RELATED TO MARKET ACCESS

I. INTRODUCTION

As you certainly imagine, there are many possible impediments to market access for goods, services and intellectual property. The two main categories of barriers to market access for goods are (1) tariff and (2) non-tariff barriers.

The reduction of tariff and non-tariff barriers to market access is, together with the elimination of discrimination, a key instrument to achieve the objectives of the WTO.

The various WTO agreements have rules on market access.
II. WHAT IS A TARIFF?

Tariffs, also called "customs duties", are the most common and widely used barrier to market access for goods. A tariff is a financial charge in the form of a tax, imposed on merchandise imports. Tariffs can also be imposed on exports.

Tariffs give a price advantage to similarly produced local goods and raise revenue for governments, as market access is conditional upon the payment of the custom duty. In addition, a tariff can be used to promote a rational allocation of scarce foreign exchange.

Tariffs can be specific, ad valorem, or mixed. A specific tariff is an amount based on the weight, volume or quantity of product, for example, US$ 7 per kilo. Ad valorem tariff refers to the tax levied as a percentage of value, for example, a 7% duty on cars. So the duty on a car worth US$ 7,000 would be £490. A mixed or compound tariff is made up of a specific and ad valorem tariff.

II.A. NEGOTIATIONS ON TARIFF REDUCTIONS

The WTO does not prohibit the use of tariffs, however, there is the recognition that they often constitute obstacles to trade, hence there is the obligation on members to negotiate on tariffs. Article XXVIIIbis of the GATT 1947 contains the original mandate on tariff negotiations. Current negotiations under the Doha Development Agenda focus on the reduction of tariffs in agriculture and non-agricultural market access.

One result of the Uruguay Round was countries' commitments to cut tariffs and to "bind" their customs duty rates to levels, which are difficult to increase. Countries made commitments on specific categories of goods. In the Uruguay Round, there was also a significant increase in the number of "bound" tariffs, or duty rates.

II.B. PRINCIPLES ON TARIFF NEGOTIATIONS

Tariff negotiations are based on (1) reciprocity and mutual advantage, and (2) the most favoured nation (MFN) treatment obligation.

II.B.1. RECIPROCITY AND MUTUAL ADVANTAGE

Article XXVIIIbis of the GATT 1994 provides for reciprocity and mutual advantage with regard to tariff negotiations. According to the principle, where a Member requests another Member to reduce its tariffs on certain products, it must also be prepared to reduce its own tariffs on products of export interest to the Member to whom the request is made.

However, the reciprocity and mutual advantage does not apply to negotiations between developed and developing countries. According to the Enabling Clause, developed-country members shall not seek, neither shall developing-country members be required to make concessions that are inconsistent with the latter's development, financial and trade needs. Similarly, the Enabling Clause instructs developed-country members to exercise the utmost restraint in seeking concessions from least-developed country Members in return for commitments to reduce or remove tariffs.
II.B.2. MFN TREATMENT

According to the MFN treatment obligation set out in Article I:1 of the GATT 1994, any tariff reduction a Member grants to any country, as a result of tariff negotiations with that country, must be granted to all WTO members immediately and unconditionally.

II.C. NATIONAL TARIFFS

The word "tariff" also has a second meaning. It sometimes refers to a structured list of products description and their corresponding customs duties. Most national tariffs reflect the structure in the Harmonized Commodity Description and Coding System - an international commodity classification system. This comes from the International Convention on the Harmonized Commodity Description and Coding System which entered into force on 1 January 1988 and to which most WTO members are a party.

II.D. SCHEDULE OF CONCESSION (ARTICLE II)

The schedules of tariff concessions are legal instruments attached to the Marrakesh Agreement - through the "Marrakesh Protocol" - and form an integral part of the legally binding commitments made by WTO members.

A thorough reading of the Schedule - including footnotes and head notes – is necessary for one to get a precise understanding of what was agreed by the WTO Member. Specific limitations or particular conditions may be agreed during the negotiations and inscribed as part of, or as limitation to, commitments in the schedule.

Each WTO Member has a Schedule, except for members that are part of a customs union; they sometimes have a schedule together with the other members of the union. GATT Article II regulates the goods schedule of tariff concessions. (See the Online Library for an example of a schedule)

GATT Article II.1b - first sentence: Schedule of Concessions.

1.b) "The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein ..."

The schedules consist of a list of products for which a maximum applicable customs duty has been agreed by the Member concerned. The product is identified by a code and its description is usually based on the Harmonized Commodity Description and Coding System of Classification (HS). This maximum applicable customs duty represents the "bound" level of the tariff.

The tariff concessions or "bindings" of each WTO Member are set out in that particular Member's Schedule of Tariff Concession. Each WTO Member may negotiate the "bound" level of an import duty for each product in the Schedule. Members are not obliged to bind tariffs on all imports of goods. However, after more than 50 years of GATT and WTO, many tariff levels are now bound.
WHAT IS A "BOUND TARIFF"?

A "bound tariff" is a tariff for which there is a legal commitment not to raise it above the bound level. The bound level of the tariff is the maximum level of customs duty to be levied on products imported into a Member. Each Member is responsible for negotiating its "bound levels".

The "bound levels" are agreed upon during "market access negotiations", which are often bilateral. The bound levels are sometimes determined by "target levels", or reduction objectives that are to be met by "tariff cuts". Acceding countries also have to negotiate their Schedule of Tariff Concessions in the market access negotiations (usually bilaterally), which take place during the accession process.

A bound tariff can differ from an applied tariff as a Member can apply a different (lower) tariff than the one it committed to apply as a maximum. Members can apply lower customs duties ("applied tariff level") but they cannot apply customs duty at a level higher than the one indicated in their Schedule of Tariff Concession (bound tariff level).

Article II of GATT applies to imported products. Consequently, economic operators are guaranteed that the ordinary customs duty which will be levied on their imports will not be higher than the level indicated as the "bound level" in the Schedule of Tariff Concessions of the importing Member.

EXERCISES:

1. What is a tariff?
2. List three purposes of tariffs/customs duties?
II.E.  RENEGOTIATION OF CONCESSIONS/MODIFICATION OF SCHEDULES

Renegotiation of concessions is governed by the rules and provisions in GATT Article XXVIII and GATT Article XXVIIIbis, GATT 1994 Understanding on the interpretation of Article XXVIII as well as the Note Ad Article XXVIII.

If a Member wishes to withdraw its previous commitment and impose a higher customs duty than the bound rate in its Schedule, two alternatives are available under GATT Article XXVIII:

1. the level of the tariff concession can be TEMPORARILY "waived" - where the Member has, under exceptional circumstances, received specific authorization from all the other Members;
2. the level of the tariff concession can be PERMANENTLY changed (decreased or increased).

The renegotiation of any tariff concession requires compensating the exporting Members.

II.F.  OTHER DUTIES & CHARGES

Article II of GATT states, "The products ... shall ... be exempt from ordinary customs duties ..."

The "bound rate" of customs duty indicated in the Schedule of Tariff Concessions represents the maximum customs duty that WTO members have committed to levy on imports from other members, under general WTO rules. However, "other duties and charges (ODCs)" may be imposed in addition to the "ordinary customs duty". In such circumstances charges can exceed the "bound level" inscribed in the Schedule of Tariff Concessions. However, for ODCs to be applicable, they MUST be registered in the Schedule and they must not exceed the level indicated therein. Other duties and charges are governed by GATT Article II:1 b - second sentence.

The Understanding on the Interpretation of GATT Article II.1.b, clarifies the types of duties and charges that can be collected in addition to the "ordinary customs duties".

Examples of these ODCs are:

- Import surcharge, i.e. a duty imposed on an imported product in addition to the ordinary custom's duties;
- Security deposit to be made on the importation of goods;
- Statistical tax imposed to finance the collection of statistical information; and
- Customs fee charged for processing the goods.

EXERCISES:

3. In Tristat's Schedule of Tariff Concessions, the bound duty for pocket watches set is 15%. Can Tristat apply a tariff different from the 15% listed in its Schedule?
III. NON-TARIFF BARRIERS

III.A. INTRODUCTION

Non-tariff barriers also restrict the market access of goods. Non-tariff barriers include quantitative restrictions (such as quotas) and other barriers (for example, lack of transparency in trade regulation, unfair and arbitrary application of trade regulations, customs formalities, technical barriers to trade and government procurement practices).

III.B. QUANTITATIVE RESTRICTIONS

What is a quantitative restriction (QR)? Can Members apply QRs?

There is no explicit definition of the term "quantitative restriction" in the WTO. An implicit definition is provided by GATT Article XI:1, which proscribes any prohibition or restriction other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures.

The Council for Trade in Goods, in a 1996 Decision (G/L/59, Annex) provides an illustrative list of quantitative restrictions. This list includes: prohibition, prohibition except under defined conditions, global quota, global quota allocated by country, bilateral quota (i.e. anything less than a global quota), automatic licensing, non automatic licensing, quantitative restriction made effective through state-trading operations, mixing regulation, minimum price triggering a quantitative restriction, and "voluntary" export restraints.

III.C. GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS (ARTICLE XI)

Quantitative restrictions are a ban on imports or exports after a determined quantity (the quota) has entered the territory. According to Article XI:1 of GATT, quantitative restrictions should not be maintained by WTO Members. The prohibition means that only import duties can be used to regulate goods trade at customs. The "General Elimination of Quantitative Restrictions (QRs) is regulated by GATT Article XI (for trade in goods) and GATS Article XVI (for trade in services).

Therefore, a WTO Member cannot, as a general rule, impose import or export prohibitions or restrictions in quantities or value on the goods of another Member. The only protective barriers that WTO Members can institute or maintain are "duties, taxes or other charges" compatible with the GATT rules already discussed. Consequently, quantitative restrictions, whether "quotas, import or export charges or other measures", are a violation of the rule in Article XI:1.

The list of measures in Article XI:1 is not exhaustive. Thus, if a measure would have an effect similar to those noted in Article XI, the measure might be prohibited under Article XI:1.

The general prohibition on quantitative restrictions applies equally to import and export measures. State trading enterprises (Article XVII) are also prohibited from imposing quantitative restrictions.
Finally, we must also note GATT Article XIII: Non-discriminatory Administration of Quantitative Restrictions

1. No prohibitions or restrictions shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, 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.

Where authorized by the GATT, quantitative restrictions must be imposed on a non-discriminatory basis. In other words, the Member imposing the quantitative restrictions is not allowed to favour any country over another. The Member is expected to impose them across the board.

2. In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions.

This provision focuses on the allocation of quotas between exporting Members and aims to ensure that when imposed, quantitative restrictions do not distort ordinary trade flows. In other words, quotas should be applied equally to goods from all origins and their allocations should correspond as closely as possible to the expected market shares that would have existed in the absence of quotas. Nevertheless, agreements between the importing Member and its principal suppliers are possible.

**SPECIFIC EXCEPTIONS**

The specific exceptions to the general prohibition against the use of QRs are to:

1. Prevent critical shortage of foodstuffs or other essential products ([GATT Article XI:2a](#));
2. Remove temporary surpluses of a domestic like product for which the imported product is a direct substitute ([GATT Article XI:2(c)(ii)](#));
3. Uphold import restrictions on agricultural and fisheries products ([GATT Article XI:2c](#)).

The drafters of the GATT realized that in specific circumstances (shortages or surplus of goods domestically produced) one could derogate from the "no Quantitative Restrictions" rules to prevent or deal with critical situations.

The exception contained in GATT Article XI:2(c) created a quasi-general derogation for agricultural policies and measures relating to fishery products and constituted the essential provision which led to the "special treatment" for agriculture before the Uruguay Round. The "agricultural exception" ended when the WTO Agreement on Agriculture entered into force. The WTO Agreement on Agriculture superseded GATT Article XI:2(c). Article 4 of the Agreement on Agriculture provides, among other things, that quotas must be transformed into tariffs (in a process called "tariffication").

Consequently, under the WTO agreements, quantitative restrictions remain possible only on fishery products.
III.D. TARIFF-QUOTA

One must distinguish between quotas, which are generally prohibited, and tariff-rate quotas (TRQs). TRQs are predetermined quantities of goods which can be imported at a "preferential" rate of customs duty ("in quota Tariff Rate"). Once the TRQ has been filled, one can continue to import the product without limitation – so it is not a quantitative restriction in the sense of GATT Article XI – but at a higher tariff rate ("out-of-quota Tariff Rate"). The "out-of-quota Tariff Rate" is generally the MFN rate. In a tariff-rate quota, specific quantities of goods may be imported at different tariff levels.

The allocation of the TRQ should follow the disciplines in GATT Article XIII (Non discriminatory Administration of Quantitative Restrictions) which provides that TRQs should be applied similarly to products from all origins, but allocations should also respond as closely as possible to the expected markets share that would have existed in the absence of TRQs. Agreements with principal suppliers are also possible. The following diagram shows how a tariff-quota might look like:

![Diagram showing in-quota and out-of-quota tariffs]

**Figure 1:** Tariff-Quota

Imports entering under the tariff-rate quota (up to 1,000 tons) are generally charged 10%. Imports entering outside the tariff-rate quota are charged 80%. After the Uruguay Round, the 1,000 tons would be based on actual imports in the base period or an agreed "minimum access" formula.
IV. OTHER NON–TARIFF BARRIERS

In addition to customs duties and other charges, as well as quantitative restrictions, trade in goods is also impeded by other non-tariff barriers that restrict market access.

Lack of transparency, unfair and arbitrary application of trade measures, customs formalities and procedures, and other measures or actions such as pre-shipment inspection, marks of origin, and measures relating to transit shipments, as well as other forms of inaction (failure to inform about applicable trade laws, regulations, procedures and practices, timely and accurately) may constitute a barrier to trade.

The main non-tariff barriers in the multilateral trade system are:

- Technical Regulations and Standards: The Agreement on Technical Barriers to Trade (TBT Agreement),
- Sanitary and Phytosanitary Measures: The Agreement on Sanitary and Phytosanitary Measures (or the "SPS Agreement"),
- Lack of Transparency, unfair and arbitrary Application of Trade Measures: GATT Article X:3(a)
- Customs Formalities and Procedures: Article VIII:1(c) AND Article VIII:3
- Pre-shipment Inspection: The Pre-shipment Inspection Agreement (PSI), Marks of Origin, Measures Relating to Transit Shipments
- Import Licensing Procedures: The Agreement on Import Licensing Procedures
V. MARKET ACCESS FOR SERVICES

In the case of trade in services, GATS Article XX contains a similar concept on market access to the GATT schedules for goods with some variations.

As with national treatment, market access for services is not a general obligation but a series of commitments made in national schedules. Thus, in the case of market access, each party "shall accord services and service providers of other Members, treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule". Commitments are undertaken with respect to each of the four different modes of service supply.

Market access is a negotiated commitment in specified sectors. The provisions of GATS, laid down in Article XVI, cover six types of restrictions that must not be maintained in the absence of limitations. The restrictions relate to the:

1. Limitations on the number of service suppliers;
2. On the total value of service transactions or assets;
3. Number of operations or quantity of output;
4. Number of natural persons supplying a service;
5. Type of legal entity or joint venture through which a service is provided;
6. Any foreign capital limitations relating to maximum levels of foreign participation are to be progressively eliminated.

The intention of the market-access provision is to progressively eliminate the following six types of measures mentioned above. These measures, except for (5) and (6), are not necessarily discriminatory, i.e. they may affect national as well as foreign services or service suppliers.

Part IV of GATS establishes the basis for progressive liberalization in the services area through successive rounds of negotiations and the development of national schedules. It also permits, after a period of three years, parties to withdraw or modify commitments made in their schedules. Where commitments are modified or withdrawn, negotiations should be undertaken with interested parties to agree on compensatory adjustments. Where agreement cannot be reached, compensation would be decided by arbitration.

They may assume additional commitments in the Schedule, for example, regarding, the implementation of specified standards or regulatory principles. Commitments are undertaken with respect to each of the four different modes of service supply.

The purpose of commitments is similar to tariff concessions under GATT and aims to ensure stability and predictability of trading conditions. However, commitments are not a straitjacket. They may be renegotiated against compensation of affected trading partners (Article XXI); and there are special provisions that allow for flexible responses, despite existing commitments, in specified circumstances (developed later in the course).

Therefore, commitments must not necessarily be complied with from the date of entry into force of a schedule. Rather, Members may specify in relevant part(s) of their schedule a timeframe for implementation. Such "pre commitments" are as legally valid as any other commitment.
VI. BARRIERS TO TRADE IN SERVICES

Since domestic regulations, not border measures, influence services trade, the GATS contains provisions mandating that such measures of general application should be administered in a reasonable, objective and impartial manner. Also, there is a requirement that parties establish the means for prompt reviews of administrative decisions relating to the supply of services.

The GATS also contains transparency requirements, among them the publication of all relevant laws and regulations. Furthermore, the provisions to facilitate the increased participation of developing countries in world services trade envisage negotiated commitments on access to technology, improvements in access to distribution channels and information networks and the liberalization of market access in sectors and modes of supply of export interest. The GATS contains obligations with respect to recognition requirements (educational background, for instance) for the purpose of securing authorizations, licenses or certification in the services area.

The GATS encourages recognition requirements achieved through harmonization and internationally-agreed criteria. Further provisions state that parties are required to ensure that monopolies and exclusive service providers do not abuse their positions. Restrictive business practices should be subject to consultations between parties with a view to their elimination.

While parties are normally obliged not to restrict international transfers and payments for current transactions relating to commitments under the Agreement, there are provisions allowing limited restrictions in the event of balance of payments difficulties. However, where such restrictions are imposed they would be subject to conditions; including that they are non-discriminatory, that they avoid unnecessary commercial damage to other parties and that they are of a temporary nature.

EXERCISES:

4. List the six types of restrictions that Members shall not maintain or adopt in sectors where market-access commitments are undertaken, unless otherwise specified in its Schedule as per GATS Article XVI?

5. Why are domestic regulation important to market access for services?
VII. SUMMARY PART II

Tariffs are the most common and widely used barrier to market access for goods. A tariff is a financial charge in the form of a tax, imposed on merchandise imports.

Tariff rates are listed in the Schedules of Tariff Concessions. WTO members are obliged to adhere to the bound tariff rates in their Schedules. However, WTO members can modify the concessions in the Schedules of Tariff Concessions by using the renegotiation procedures outlined in GATT Article XXVIII for trade in goods. Obligations on the bound tariff level can be found in GATT Article II, XXVIII, XXVIIIbis and the Understanding on Article XXVIII.

Non-tariff barriers also restrict market access. Hence, WTO rules prohibit the introduction or maintenance of quantitative restrictions. The rules on quantitative restrictions are governed by Articles XI and XIII. The only restrictions on free trade that the WTO permits are duties, taxes or other charges, and safeguards or emergency actions in limited circumstances.

They are also rules for other non-tariff barriers. For example, on SPS measures, or TBT measures.

For trade in services, each WTO member is required to have a Schedule of Specific Commitments that identifies the services for which the Member guarantees market access, national treatment, and any limitations that may be attached.

GATS Article XVI (Market Access) and XVII (national treatment) commit Members to giving no less favourable treatment to foreign services and service suppliers than provided for in the relevant columns of their Schedule. Commitments thus guarantee minimum levels of treatment, but do not prevent Members from being more open (or less discriminatory) in practice. Members may also modify pursuant to the provision in Article XXI of the GATS Agreement.

There are many rules, which allow derogations to these basic obligations on market access. In this Part, you studied the specific exemptions; you will see the general exemptions in Part IV.
PROPOSED ANSWERS:

1. A tariff is a financial charge in the form of a tax, imposed on merchandise imports. Tariffs can also be imposed on exports.

   The word "tariff" also refers to a structured list (the Harmonized Commodity Description) of products description and their corresponding customs duties.

2. (1) To give a price advantage to similarly produced local goods

   (2) To raise revenue for governments

   (3) To promote a rational allocation of scarce foreign resource.

3. Yes. Tristat can apply a tariff different than the one listed in its Schedule of Tariff Concessions in two circumstances.

   (1) Tristat may have an applied tariff lower than the bound tariff in its Schedule. However, if Tristat offers a lower rate to Vanin for example, it must apply this rate to all Members.

   (2) Tristat may charge a higher tariff that the bound rate in its Schedule to any non-Member, such as Rauritania, since WTO obligations do not extend to non-Members.

4. Limitations on:

   - the number of service suppliers;
   - the total value of service transactions or assets;
   - the number of operations or quantity of output;
   - the number of natural persons supplying a service;
   - the type of legal entity or joint venture through which a service is provided;
   - any foreign capital limitations relating to maximum levels of foreign participation are to be progressively eliminated.

5. In contrast to goods which is mostly imported in its physical form services cannot always be easily subjected to border measures. Hence, domestic regulations has a significant influence on trade in services.
PART III: TRADE REMEDIES

People sometimes refer to the two concepts studied in this Part at the same time — i.e. anti-dumping (AD) measures and countervailing duties (CVD) — but there are fundamental differences.

Dumping and subsidies share a number of similarities. Many countries handle the two under a single law, apply a similar process to deal with them and give a single authority responsibility for investigations. Occasionally, the two WTO committees responsible for these issues meet jointly.

The reaction to dumping and subsidies is often a special offsetting import tax (countervailing duty in the case of a subsidy). This is charged on products from specific countries and therefore it breaks the GATT principles of binding a tariff and treating trading partners equally (MFN). The agreements provide an escape clause, but they both also say that before imposing a duty, the importing country must conduct a detailed investigation that shows properly that domestic industry is being hurt.

Nevertheless, there are also fundamental differences, and these are reflected in the agreements.

Dumping is an action by private firms and it is not actually prohibited by the WTO provisions. With subsidies, it is the government or a government agency that acts, either by paying out subsidies directly or by requiring companies to subsidize certain customers.

Anti-dumping measures are the conditional right to take action to correct the effects caused by distorting practice of private firms called "dumping". The provisions regulate the right of the importing WTO Member to protect its domestic market against "unfairly" priced imports. The WTO is an organization of countries and their governments. The WTO does not deal with companies and cannot regulate companies' actions such as dumping. Therefore the Anti-dumping Agreement only concerns the actions governments may take against dumping.

Anti-dumping measures are disciplined by GATT Article VI and the Anti-dumping Agreement. Dumping takes place when a product of one firm is introduced into the commerce of another country at less than the normal value of the product. Investigations have to be conducted to determine the margin of dumping and to define the level of the anti-dumping duty.

With regard to subsidies, governments act on both sides: they subsidize and they act against each others' subsidies. Therefore the subsidies SCM Agreement disciplines both the subsidies and the reactions.

Subsidies are governed by the SCM Agreement. Subsidies on Agricultural products are governed by the Agreement on Agriculture. The SCM Agreement defines two categories of subsidies: prohibited and actionable. It originally contained a third category - non-actionable subsidies. This category existed for five years and ended on 31 December 1999.

The SCM Agreement regulates the actions countries can take to counter the effects of subsidies. The SCM Agreement further elaborated the basic principles in Article VI governing the investigation, determination and application of countervailing duties. A Member can also use a countervailing measure if it determines that its imports are subsidized, that the subsidized imports are causing injury to a domestic industry and there is a causal link between the subsidies and the injury to the domestic industry. The disciplines set out in the SCM Agreement govern only specific subsidies.

The SCM Agreement also allows Members to challenge – through the WTO dispute settlement mechanism – the consistency of any subsidy programme with the WTO rules.
PART IV: EXCEPTIONS TO THE BASIC PRINCIPLES

I. INTRODUCTION

This section illustrate the circumstances under which a WTO Member can invoke the general and security exceptions.

WTO members are obliged not to discriminate (MFN and national treatment) among themselves, to follow certain rules on market access, like for example, they cannot withdraw "liberalization commitments/concessions" that they made without following pre-determined rules, and there is a prohibition on the use of quantitative restrictions by Members.

Nevertheless, in certain circumstances, WTO members may derogate from these obligations, provided they comply with certain requirements. The category of exceptions discussed in this Part is horizontal in nature, i.e. they allow a Member to derogate from any of the GATT, GATS and TRIPS obligations.
II. GENERAL EXCEPTIONS

II.A. IN THE GATT

Article XX (General Exceptions) of GATT 1994 recognizes that governments may need to apply and enforce measures for purposes such as the protection of public morals; human animal or plant life and health; and the protection of national treasures.

The GATT 1994 does not prevent governments from adopting and enforcing such measures. However, any measure adopted under the general exceptions provisions must not constitute a means of arbitrary or unjustifiable discrimination nor should it be a disguised restrictions on international trade.

GATT Article XX provides the use of the General Exception for trade in goods:

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<tr>
<th>GATT Article XX: General Exceptions</th>
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<td>Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:</td>
</tr>
<tr>
<td>(a) necessary to protect public morals;</td>
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<td>(b) necessary to protect human, animal or plant life or health;</td>
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<td>(c) relating to the importations or exportations of gold or silver;</td>
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<td>(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;</td>
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<td>(e) relating to the products of prison labour;</td>
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<td>(f) imposed for the protection of national treasures or artistic, historic or archaeological value;</td>
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<td>(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;</td>
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<td>(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to Members and not disapproved by them or which is itself so submitted and not so disapproved;</td>
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<td>(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;</td>
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essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all Members are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The Members shall review the need for this sub paragraph no later than 30 June 1960.

GATT Article XX permits Members to take certain measures, otherwise prohibited by GATT provisions, subject to stipulated conditions.

1) The first condition is that the contemplated measure must fit under one of the 10 categories in sub paragraphs (a) - (j) of Article XX. For example, sub-paragraphs (a), (b), and (d) indicate that the measures sought to be taken by Members must be necessary either to, protect public morals; human, animal or plant life or health; or to secure compliance with certain laws or regulations.

For those three categories, there is an imperative "necessity" test that must be satisfied for the measures to be consistent with Article XX. The determination of whether a measure, though not indispensable, may nevertheless be considered "necessary", involves a weighing and balancing of factors, such as:

- The importance of the common interests or values protected by the measure;
- The efficacy of the measure in achieving the intended policies;
- The impact of the measure on imports especially vis-à-vis its like domestic products.

Specific case of WTO members invoking Article XX include reference to paragraph (a) (public morals) to justify import bans on religious grounds. Frequent references are also made to the exception governing measures aimed at protecting the environment in paragraphs (b) and (g).

Over the years, WTO jurisprudence has established that members have the right to determine the level of health or environmental protection they deem appropriate. This principle is reiterated in the TBT and SPS agreements for the measures covered by those agreements. Furthermore, there is no requirement in Article XX of the GATT 1994 to quantify the risk to human life or health. A risk may be evaluated in either quantitative or qualitative terms.

2) The second condition refers to the opening paragraph of Article XX (commonly referred to as the "chapeau of Article XX"). Measures covered under the General Exceptions must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

Consequently, before certain measures are used to derogate from GATT rules, they must meet the requirements of the chapeau i.e. they have to be "applied" in a manner that does not create "arbitrary or unjustifiable discrimination". The chapeau of Article XX of GATT aims to prevent the use of derogation measures to unjustifiably impede the market access rights of other WTO members.

The combined effect of the chapeau and the enumerated provisions of Article XX are to set out a two-level test that a proposed measure must pass before it is deemed consistent with Article XX, and therefore qualify as an exception to the obligations in the GATT:
- The first test is whether the policy fulfils the criteria in Article XX (a) (j);
- The second test is whether, when it fulfils those criteria, it satisfies the "Chapeau test". That is, if the measure is being applied "arbitrarily", "unjustifiably", or as a "disguised restriction on trade".

These provisions attempt to strike a “balance” between the market access rights of WTO members and the need to ensure that other members’ right to invoke these exceptions are not rendered illusory. While members have a prima facie right to maintain measures necessary to enforce health policies for example, criteria have been developed to ensure that Members demonstrate their good faith and not apply measures in a discriminatory manner or as a disguised restriction on trade.

II.B. IN GATS

Article XIV of the GATS permits members to maintain restrictions on services and service suppliers if the measure satisfies one of the policy purposes in sub-paragraphs (a) - (e). Furthermore, Article XIV GATS recognizes that members need to maintain a balance between trade measures and other legitimate policies and interests, such as the protection of the health of its citizens.

GATS Article XIV is very similar to GATT Article XX, which governs trade in goods. Certain measures, which would otherwise be prohibited by other provisions of the GATS, can still be taken provided two conditions are met:

1) The first condition is that the measure taken must fall into one of the five categories in sub-paragraphs (a) to (e). For example, sub-paragraphs (a), (b) and (c) indicate that the measures must, in similar terms to GATT Article XX, be "necessary" either to protect public morals, or to maintain public order (a specific definition of this latter term is in the accompanying footnote); to protect human health, animal or plant life or health; or to secure compliance with certain laws or regulations.

For these three categories, as in GATT, a "necessity" test must be passed.

The categories in letters (d) and (e) are specific to trade in services. Paragraph (d) mandates that members can still take measures, otherwise inconsistent with the National Treatment Principle (GATS Article XVII), if the measure facilitates the collection of direct taxes. Such differential treatment, which appear to be less favourable for foreign services or foreign service providers than for national ones, are authorized only where their purpose is to ensure that the imposition of direct taxes is "equitable and effective". According to paragraph (e), measures that do not conform with the MFN Principle (GATS Article II) can still be taken if their purpose is to put into effect agreements to avoid double-taxation, for example.

2) As with GATT Article XX governing trade in goods, the second condition is that the measure must satisfy the chapeau of Article XIV. Measures covered by the GATS General Exceptions provisions must not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevails, or a disguised restriction on trade in services...".

These provisions are because Members recognized that certain measures might be applied even if they derogate from some of the major GATS principles.
II.C. IN TRIPS

There are no general exceptions as such under the TRIPS Agreement. However, some provisions may apply to specify situations where protection is not required. See for example Arts. 27.2, 27.3, 30 and 31 (patents), Article 17 (trademarks), and Article 13 (copyrights and related rights).

ILLUSTRATION

Let us assume that Alba and Vanin are WTO Members and that Alba imposed market access restrictions on imports.

Alba, a WTO Member, has a prima facie right to impose market access restrictions on imports provided the criteria in GATT Article XX are satisfied. If Vanin challenges these measures, Alba may need to justify them. Assuming that Alba's measures violate a GATT market access provision (Articles I, II, III or XI), Alba would need to demonstrate that its measure is justified by one or more of the general exceptions in Article XX.

In order to demonstrate this, it is necessary for Alba to demonstrate, firstly that the measures fall within one of the exceptions in Article XX sub-paragraphs (a) – (j). If it is able to show that the measures are, for example, "necessary" to protect human health or the environment, then the measures are provisionally justified. The "necessity test" will often call for an examination of whether any other measure, reasonably available for Alba, would provide the same level of (or better) protection for the environment or human health but with less trade distortion (less trade restrictive alternative measure).

Secondly, Alba must fulfil the requirements in the introductory paragraph/chapeau of Article XX. Alba will need to show that the measure is not applied in an arbitrary manner, does not result in "arbitrary or unjustifiable discrimination between countries where the same conditions exist", and that the measure is not a disguised restriction on international trade. For instance, if the measure is applied in an inflexible and rigid manner, without taking into account the specific conditions of the exporting Members, this could constitute arbitrary or unjustifiable discrimination. The objective of the measures must be to protect health or the environment, and so forth, and not to discriminate between "like products".

If Alba fails to satisfy any of the requirements of Article XX (sub-paragraphs or chapeau), it cannot invoke the "General Exception" contained in Article XX to justify inconsistencies with other GATT provisions. In such circumstances, the Dispute Settlement Body will require Alba to eliminate the measures because they would be deemed a violation of GATT Articles I, II, III or XI and not "covered" by the General Exception provisions. Now let us examine how general exceptions are interpreted in the WTO dispute settlement procedure by studying a famous case. This case involved a measure that was applied to imports of shrimp and shrimp products, and the protection of sea turtles. The US - Shrimp Case illustrates the interaction between trade related measures and non-trade related concerns within the multilateral trade system.

EXERCISES:

1. Can Vanin maintain an environmental measure banning the imports from some, but not all WTO Members?
III. SECURITY EXCEPTIONS

III.A. IN THE GATT

IN BRIEF

A WTO Member is allowed to take any action which it considers necessary for the protection of its essential security interests or in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. Members are not required to furnish information the disclosure of which would be contrary to their essential security interests.

IN DETAIL

For trade in goods, GATT Article XXI governs the use of the "Security Exceptions".

GATT Article XXI: Security Exceptions

Nothing in this Agreement shall be construed: to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

GATT Article XXI allows certain security measures, which would otherwise be prohibited by GATT provisions, to be taken in two specific circumstances:

1) Sub-paragraph (a) refers to the disclosure of information that the WTO Member would consider contrary to its essential security interests. Sub-paragraph (b) prescribes the condition under which a Member may take action that it determines to be "necessary for the protection of its essential security interests" including those relating to either:

- the trade in fissionable materials; or
- traffic in arms, ammunition and other war-related trade.
Sub-paragraph (b)(iii) refers to measures taken not only in time of war, but also to measures taken in time of "other emergency in international relations". The term "emergency in international relations" is not defined in Article XXI.

2) Second, Members are allowed to implement measures, which are taken in pursuance of their obligations under the United Nations Charter (for the maintenance of international peace and security). This is a reference to economic sanctions.

Article XXI does not contain an obligation for Members to notify measures taken pursuant to the Security Exception. However, a Decision adopted by the GATT Contracting Parties in 1982 states that "subject to the exception in Article XXI(a), Contracting Parties (now WTO Members) should be informed to the fullest extent possible of trade measures taken under Article XXI".

III.B. IN GATS

For trade in services, GATS Article XIVbis governs the use of the "Security Exception". The wording of GATS Article XIVbis is almost identical to the security exception for trade in goods (GATT Article XXI) and the concepts do not differ in both instances. However, unlike in GATT Article XXI, there is a notification obligation in the security exception for trade in services (see paragraph 2). It is instructive to note that in the 1982 Decision (relating to GATT Article XXI) the wording used is "should", while in paragraph 2 of GATS Article XIVbis, the wording used is "shall", which implies an obligation.

III.C. IN TRIPS

For trade-related intellectual property rights, Article 73 of the TRIPS Agreement governs the use of the "Security Exception". The wording of Article 73 of the TRIPS Agreement is identical to the provision governing trade in goods (GATT Article XXI) and the application of the concept is the same as for trade in goods and trade in services. There is no explicit obligation in Article 73 to notify measures taken pursuant to the Security Exception.

EXERCISES:

2. What is a security exception?
IV. SAFEGUARD MEASURES

The WTO obligations not to discriminate, not to withdraw commitments and/or concessions may appear to restrict the sovereign rights of WTO members to exercise full autonomy in trade and economic matters. However, numerous exceptions allow members to derogate from these market access disciplines, either because:

1. Specific provisions within these disciplines permit them to do so; or
2. The horizontal exception enables them to do so.

There are general as well as security exceptions relating to goods, services and intellectual property. For example, Article XIV of the GATS Agreement allows members to take measures necessary for overriding policy concerns, including the protection of public morals or the protection of human, animal or plant life or health. However, such measures must not lead to arbitrary or unjustifiable discrimination or constitute a disguised restriction to trade. If essential security interests are at stake, Article XIVbis of the GATS Agreement provides cover.

GATT Contracting Parties and likewise WTO members have kept the possibility for members to take measures to safeguard their economic interest. Safeguard measures are taken to confront unforeseen circumstances. GATT rules on safeguards are in Article XIX (general safeguards) and XII (BOP provisions) of the GATT. Article XII of the GATT Agreement allows for the introduction of temporary restrictions to safeguard the balance-of-payments; and a so-called “prudential carve-out” in financial services permits Members to take measures in order, inter alia, to ensure the integrity and stability of their financial system (Annex on Financial Services, paragraph 2). However, the disciplines are not as developed as in the GATT. Members are currently negotiating to define rules on safeguards for trade in services.
V. WAIVERS

A WTO Member may be authorized by the other Members to derogate for a specific time and under certain conditions, from any provision contained in the WTO Agreements. These derogations are called "waivers". A waiver is a permission granted by WTO Membership allowing a particular WTO Member to not comply with its normal commitments.

Waivers are governed by Article IX of the Marrakesh Agreement (Establishing the WTO) and are applicable to trade in goods, trade in services and trade-related aspects of intellectual property rights.

In "exceptional circumstances", waivers are granted by the whole WTO Membership, through a decision of the Ministerial Conference or the General Council.

Waivers are time-bound. A definite time-period is set for termination of a waiver. Waivers have time limits and extensions have to be justified. They can be renewed annually by the Membership if the exceptional circumstances warranting its grant still exist.
VI. REGIONAL INTEGRATION

When a WTO Member enters into a RTA through which it grants more favourable conditions to its trade with other parties to that arrangement than to other WTO members’ trade, it departs from the guiding principle of non-discrimination defined in Article I of GATT, Article II of GATS, and elsewhere.

WTO members are however permitted to enter into RTAs under specific conditions which are spelled out in three sets of rules:

1. Paragraphs 4 to 10 of Article XXIV of GATT (as clarified in the Understanding on the Interpretation of Article XXIV of the GATT 1994) provide for the formation and operation of customs unions and free trade areas covering trade in goods;
2. the Enabling Clause (the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries)
3. Article V of GATS governs the conclusion of RTAs in the area of trade in services, for both developed and developing countries.
VII. S&D FOR DEVELOPING COUNTRIES

Part 4 of the GATT includes provisions on the concept of non reciprocity in trade negotiations between developed and developing countries, i.e. when developed countries grant trade concessions to developing countries they should not expect the developing countries to make matching offers in return.

The Enabling Clause is an exception to the MFN obligation that allows developed countries to offer more favourable tariff treatment to imports from developing and least developed countries without the obligation to extend that favourable treatment to other WTO members. It creates a permanent derogation from one of the key principles contained in GATT Article I, and is a concrete contribution to S&D treatment for developing countries.

The WTO agreements include numerous provisions giving developing and least-developed countries special rights or extra leniency — "special and differential treatment". Among these are provisions that allow developed countries to treat developing countries more favourably than other WTO members. Both GATT and the GATS allow developing countries some preferential treatment.

Other measures concerning developing countries in the WTO agreements include:

- extra time for developing countries to fulfil their commitments (in many of the WTO agreements);
- provisions designed to increase developing countries’ trading opportunities through greater market access (e.g. in services, technical barriers to trade);
- provisions requiring WTO members to safeguard the interests of developing countries when adopting some domestic or international measures (e.g. in anti-dumping, safeguards, technical barriers to trade);
- provisions for various means of helping developing countries (e.g. to deal with commitments on animal and plant health standards, technical standards, and in strengthening their domestic telecommunications sectors).
PROPOSED ANSWERS:

1. Vanin can, if the measure does not violate GATT Article I and/or XIII (MFN for quotas). Additionally in some circumstances and pursuant to Article XX a Member is able to maintain measures that otherwise violate provisions of the GATT.

   However, the Member would first need to show that the goal of the measure is recognized by one of the exceptions listed in sub-paragraphs (a) - (j) of Article XX.

   Provided the measure fulfils the criteria in sub-paragraphs (a) - (j) the Member would need to show, in addition, that the measure is applied in such a way that it does not violate the requirements of the opening paragraph/chapeau to Article XX. Namely, that the measure is not applied to cause arbitrary or unjustified discrimination between Members where the same conditions exist and is not applied to constitute a disguised restriction on trade.

2. A security exception allows a WTO Member to take any action which it considers necessary for the protection of its essential security interests or in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

   When Members utilize the exception they are not required to furnish any information, the disclosure of which would be contrary to their essential security interests.
Videos

Main features to the WTO - http://etraining.wto.org/admin/files/Course_278/Videos/Main_features.mp4

E-Learning short videos - Most-favoured nation (MFN) -
http://etraining.wto.org/admin/files/Course_278/Videos/MFN.mp4

E-Learning short videos - The National Treatment Principle -
http://etraining.wto.org/admin/files/Course_278/Videos/NT.mp4

E-Learning short videos - General Exceptions -
http://etraining.wto.org/admin/files/Course_278/Videos/General_exceptions.mp4

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