The WTO: Legal Underpinnings
Hello, my name is Gabrielle Marceau. I am a Counsellor in the Legal Affairs Division of the WTO - I have been working in the GATT/WTO Secretariat since September 1994.

In this presentation we will look at the basic legal underpinnings of the multilateral trade system so as to understand why the basic legal rules exist, how they function, how they have evolved throughout the 50 years of the GATT, and how they have been integrated into the WTO Agreement and adapted to the new sectors of trade in services and trade-related aspects of intellectual property rights.

When we speak of the GATT and the WTO, we hear about "non-discrimination" and "national treatment". In this presentation, we will see why we have these legal obligations. What were the problems at the time of the creation of the GATT and how did the negotiators try to tackle these problems? The basic principles of the GATT were also in the mind of the trade negotiators when they started negotiating additional provisions to cover trade in services and trade related aspects of intellectual property rights. The same GATT legal principles were used, but had to be adapted and some changes had to be made. We will look at these changes as well.

I hope you will find this module informative and useful to you.

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I. BACKGROUND

TRADE AND WAR

The ideas behind today's multilateral trading system date back to World War II when the United States, Great Britain and other states began discussions about the shape of the post-war international economy. At that time, many state leaders and economists believed that the Great Depression and to some extent, the Second World War, had been caused by "beggar-thy-neighbour" trade policies. It became clear that trade privileges had to be multilateralized. After the conclusion of the Bretton Woods Conference, where the International Monetary Fund and the World Bank were created, it became more and more evident that obstacles to trade also had to be reduced in order to stimulate economic growth.

THE BEGINNINGS

The United States then began a real campaign on the need for international trade rules. Its slogan to favour the negotiation of a world trade agreement is reported by Gardner to have been: "If goods don't cross the borders, soldiers will".¹ The United States in 1945 invited some countries to a multilateral tariff reduction negotiation, thereby sowing the seeds for what was going to become the future GATT. The following year, in 1946, the United States published its famous "Suggested Charter for an International Trade Organization – the ITO" which formed the basis for the negotiations that took place during the preparatory meetings. It was in the context of the negotiations for this international trade organization that the negotiations of the GATT were conducted.²

THE HAVANA CHARTER

The Draft for an International Trade Organization (often called the "Havana Charter" because it was signed in Havana) was completed by the end of August 1947. The ITO, created in Chapter VII of that Charter, was going to be the central organization of the United Nations responsible for co-ordinating the various aspects of international economic co-operation among States.

THE GATT

The negotiations for the General Agreement on Tariffs and Trade - the "GATT" - negotiations were concluded in the autumn of 1947, with the signature of 23 Contracting Parties. The GATT entered into force on a provisional basis on 1 January 1948. According to Professor Jackson, "the theory of the GATT was that it would be a specific

¹ Gardner R. Sterling Dollar Diplomacy, p. 3
² Professor Jackson wrote, "The preparatory work for GATT is unusually full and complex... and ... it is "mingled" with that of the ITO." Jackson (1969), p. 35.
trade agreement within the broader institutional context of the ITO Charter and that the ITO would furnish the necessary organizational and secretariat support for the GATT.  

THE STILLBORN ITO

But the ratification of the ITO ran into trouble. The new US Congress was not favourable to the ITO and in December 1950, the U.S. administration quietly issued a press release in which it stated that it would not be re-submitting the Charter to Congress for approval. There was, therefore, not much point in other countries continuing without the leading economic power. The demise of the ITO did not, however, signal the end of multilateral trade arrangements. For some fifty years, the GATT continued to grow not only in membership, but also in scope. Between the birth of the GATT and that of the WTO fifty years later, several rounds of GATT negotiations took place where tariff levels were reduced down. During the Tokyo Round, in particular, some Contracting Parties negotiated agreements (Tokyo Codes) additional to the GATT.

GATT 1947 VS. GATT 1994

Today, the old GATT is part of the WTO Agreement. The WTO Agreement is composed of three main sets of disciplines: one on trade in goods - the Annex 1A -, one on trade in services – the Annex 1B - and one on trade-related aspects of intellectual property rights (the TRIPS Agreement) – the Annex 1C. The first component of Annex 1A, which contains the rules on trade in goods, is the GATT 1994. The GATT 1994 is essentially composed of the text of the old GATT together with a series of decisions and waivers adopted during the 50 years of the GATT 47. For instance, the GATT contains an article on safeguard measures (Article XIX) and now Annex 1A contains an additional specific Agreement on Safeguards. Both are relevant and applicable. It is therefore important to understand the basic rules of the GATT which are still applicable today through the GATT 1994 and which have influenced the evolution of the GATT and the WTO Agreement.

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II. MARKET ACCESS

II.A. TARIFFS

WHAT ARE THE BASIC RULES OF THE GATT?

Now, let's look at the four basic "market access" rules of the GATT before we look at the exceptions and the special rules on fair competition. At the time of the first negotiation of the GATT, States realized that among the most obvious restrictions on trade were the border restrictions imposed by tariffs. In international law, States are sovereign. They do what they want. So if a state wanted to collect tariffs on the importation of goods, it was entitled to do so unless an existing bilateral treaty prohibited it from doing so. So the initial problem was that these tariff levels fluctuated and varied depending on the origin of the imported goods and the intentions of the importing State.

TYPES OF TARIFFS

Tariffs are usually expressed in the form of percentage on the value of the imported product – these are called ad valorem tariff duties - , or it can be a specific amount per good imported - these are called specific tariff duties and they tend to disappear. Let’s assume that a firm X in Country A produces tables which it sells for 10 dollars per table. That firm X wants to export its tables to Country B. Country B is a sovereign state, it can do what it wants and collect the tariffs it wants. Before the GATT, Country B could collect one day 150 per cent of tariffs on the value of each of these tables and the next day 300 per cent and maybe more, depending on the nationality of the exporter.

TARIFF BINDINGS: ARTICLE II

The first basic principle of the GATT can be considered to be Article II on "bindings of tariffs". Article II says that GATT Contracting Parties will not collect at the border tariffs at levels higher that the maximum level committed or the maximum binding or we say, the bound level. Countries negotiated "maximum" levels of tariffs on a given product which they bound and committed to respect. Once a Contracting Party had committed itself to a maximum level of tariffs for a specific product, we say that the tariff level for that product was "bound". For example, the negotiation goes as follows: "Country A" explains to "Country B" that when it exports tables to Country B, Country B (the importing state) has been collecting ad valorem tariff duties of 300, 150 or 200 per cent on the importation of each table coming from Country A. Country A then requests Country B to promise never to collect more than 125 per cent ad valorem tariff duty. Country B would hesitate of course. Why would Country B promise to limit its tariff collection to 150 per cent of the value of each table imported? In fact, Country B makes money with the tariff duties to build hospitals, roads, and schools.
Country B has also domestic producers of tables who are quite happy that their Government is collecting duties on foreign tables that compete with domestic tables. So why would Country B make a binding, a promise, not to collect more than 125 per cent on the importation of tables? This is because Country B will make a deal in another sector. For example: Country B could promise not to collect more than 125 per cent on the importation of tables if, in exchange, for instance, when Country B exports shoes to Country A, Country A promises not to collect more than 100 per cent ad valorem tariff duties on such imported shoes. It is simple, Country B has no interest in limiting its sovereignty and the domestic producers of tables in Country B do not want their government B to make this promise, but at the same time, the shoe producers in Country B will exercise pressure on the government of Country B to accept such a binding commitment on the importation of tables because, in exchange, Country A will also commit to a binding (maximum tariff levels) on the importation of shoes from Country B. The final decision is of course taken by each State as to how much they can open up a specific market such as tables and how much export opening they need in other sector such as shoes.

**RECIPROCITY**

Central to the negotiating framework for the reduction of tariff since the inception of GATT 1947 is the principle of "reciprocity". Reciprocity implies that during rounds of negotiations for the reduction of tariffs, each country will make equivalent tariff concessions. No provision in GATT provides guidance as to how reciprocity is to be established, and it has been left to each government to determine for itself the economic benefits and advantages of the exchange of concessions. During the early negotiations of the GATT a crude method was used but for the last three rounds of negotiations, negotiators developed a more sophisticated formula where the concept of "less than full reciprocity" has been accepted in respect of trade negotiations among developed and developing countries. This is elaborated in Part IV of the GATT 1994 as well as in the 1979 Decision of the CONTRACTING PARTIES known as the Enabling Clause. It means that developing countries should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs.

**APPLIED RATES AND BINDINGS**

Respecting binding commitments can be considered as the first GATT market access principle contained in Article II, which provides that Members cannot collect on imported products more than the level of tariffs they have bound, that is the bound rate. Of course, they can always collect less than the maximum, that becomes the applied rate. All these commitments are recorded in Members’ “schedules” and it is possible to have access to Members’ scheduled bindings for each products for which that Member has undertaken a binding as well as the list of their "applied" tariffs.
TARIFF NEGOTIATIONS AND RE-NEGOTIATIONS

Since the first GATT round of negotiations, every three years or so, GATT Contracting Parties have been negotiating their tariffs commitments down in the context of rounds of negotiations. Today, after fifty years, the average tariff on industrial goods in developed countries is less than 4 per cent. But tariff bindings can also be increased through re-negotiation. In this case, however, compensation would have to be paid to those exporting Members who suffer the most from a reduced market access.

II.B. MFN

MOST-FAVOURED NATION (MFN) PRINCIPLE: ARTICLE I

The GATT was created as a “Club” – a club where you give benefits to the members of the club that you don’t have to give to outsiders: this is the most-favoured-nation principle, the MFN. The most-favoured-nation obligation is a fundamental principle of the GATT, and today, of the GATS and TRIPS. The MFN principle goes this way: if you became a Contracting Party to the GATT, you had to treat imports from all GATT partners the way you treated imports from your most favoured trading partner or partners. The MFN obligation applies to all benefits and privileges that a GATT Contracting Party offers to another country, including tariff bindings.

HISTORICAL PERSPECTIVE

The origin of the MFN obligation in the GATT can also be explained from a historical perspective. As the world was coming out of the Second World War, many were saying that reasons for this atrocious war included the isolation of Germany, the existence of preferences among certain countries (such as the Commonwealth) and the unilateral actions of the United States who was already making bilateral deals with other states. States therefore wanted to favour multilateralism. States wanted to institutionalize the MFN principle.

MULTILATERALIZATION

In the context of the tariff negotiations, the MFN obligation applies as a means to “multilateralize” the results of bilateral tariff negotiations. This means, for instance, if we take the example we have been using so far, that if, in the context of a negotiation between Countries A and B, Country B committed to a binding of 125 per cent ad valorem on the importation of tables, the result of this negotiation must be multilateralized in favour of all exports of tables from all GATT Contracting Parties, now WTO Members – even if those other WTO Members did not participate in that specific bilateral negotiation, and even if at the time of that bilateral negotiation, such other Members were not producing any tables. The benefits of bilateral tariff negotiations are therefore given to all WTO Members’ exports of tables. So this brings the following consequences. If tomorrow Country Z, a Member of the WTO, starts exporting tables, Country Z has the right to require that its exports of tables to
Country B be subject to the same level of applied tariffs as the one applied on the importation of tables from Country A. Moreover, Country B cannot collect more than 125 per cent tariff on imported tables from any GATT Contracting Party/WTO Member, including Country Z.

**FREE-RIDING**

It is in this context that you hear about free-riding because exports of tables from Country Z will benefit from a binding of 125 per cent ad valorem in Country B, or even a lower applied tariff. And this even if no concessions were given by Country Z during the bilateral negotiations between Country A and Country B.

**II.C. QUOTAS & CO.**

**PROHIBITION OF QUANTITATIVE RESTRICTIONS: ARTICLE XI**

The third market access rule is that of Article XI of the GATT which prohibits border restrictions. Article XI is a complement to Article II. At their borders, GATT Contracting Parties and WTO Members are not entitled to maintain non-tariff restrictions; they can only maintain tariffs at levels below their binding levels.

**HISTORIC PERSPECTIVE**

This rule which generally prohibits border restriction makes sense if one looks at it from a historical perspective in the context of the initial tariff reduction exercise. Imagine that you represent Country A and you managed to get a deal: Country B has made a binding of 125 per cent ad valorem on the importation of tables from Country A. It is a great success and your government is delighted. Your producers of tables increase production convinced that they will be able to export more tables now that Country B tariffs on tables have been bound to 125% ad valorem. The following year, Country A wants to export tables to Country B: a boat arrives at the border of Country B full of tables. Customs officers of Country B say “yes, yes, we will respect our commitment, we will collect only 125 per cent ad valorem on each table, but this year we will only take three tables”. You would say “What do you mean only three tables? I have a boat full of tables! I don't want a limitation on the number of tables I export. I am willing and happy to pay the bound tariffs but that's it, no other restriction!”

**EXCEPTIONS**

Article XI:2 contains a series of exceptions, some of which have been set aside with the adoption of the new and more specific provisions of the WTO Agreement on Agriculture. For instance, Article XI:2 used to allow for certain import restrictions on fish and agricultural products. Now this provision can be read as allowing such restrictions on importation of fish (as fish are not covered by the provisions of the new WTO Agreement on
Agriculture), but trade in agricultural products is now governed by the Agreement on Agriculture which prohibits any form of border restrictions other than tariffs. Article XI:2 also allows Members to maintain temporary export restrictions to prevent shortage of necessary products.

ADMINISTRATION: ARTICLE XIII

Now, Article XIII provides that when quantitative restrictions can legally be imposed - for instance, as exception to Article XI or as a safeguard measure, an issue that we will discuss soon - such restrictions must be applied equally on exports from all GATT Contracting Parties/WTO Members; in other words, there is a MFN, a most favoured nations obligation for quotas and other forms of border restrictions. When applied, Article XIII: 2 provides that when "allocating" such quotas between exporters, the importing Member must aim at a "distribution of trade approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". In allocating such share among exporters, the importing Member must take into account a series of criteria including the interests of the principal suppliers, the trade share of suppliers in the previous representative period, the capacity utilization of the exporting Members, and the new WTO Agreement on Licensing adds that the interest of new importers and the desirability of issuing licences for products in economic quantities, should also be taken into account.

II.D. NATIONAL TREATMENT

NATIONAL TREATMENT: ARTICLE III

The fourth market access rule is called the national treatment obligation provided in Article III of the GATT. An obligation of national treatment also exists with adaptation, within the TRIPS Agreement and within the GATS. Article III of the GATT on national treatment provides that no domestic regulation can be so as to afford protection to the domestic production. In particular, Article III provides that once in the territory of a Member, products imported from other Members must not be treated, in respect of internal taxes and internal regulations, in a less favourable manner than similar domestically produced goods. If a country decides to impose a sales tax of 10 per cent on certain locally produced shoes, no "like", or "similar" shoes imported from any WTO Member may be subject to a sales tax higher than 10 per cent. The WTO Appellate Body has declared that the goal of Article III on national treatment is to avoid "protectionism". What would be the purpose of negotiating a binding from Country B on imported tables if, when Country A exports tables to Country B, Country B says: "yes, yes, I will collect only the tariff binding of 125% on such tables, but you will sell your tables only in this far-away village, only between midnight and 3 o'clock a.m. and in addition, consumers will have to pay a sales taxes of 200% when they buy imported tables while there is none of those restrictions on domestic tables." You will probably respond that the tariff negotiations were a waste of time!
LIKE PRODUCTS

Tables that arrive at the border will have to pay the tariff at the applied or bound level but once the tables are inside the importing country's territory, they cannot be treated less favourably than the domestic tables that are "like" the imported tables. In other words, the imported tables must be treated equally to the way domestic tables are treated. So far it's easy. Nobody would argue that imported tables should be treated like domestic cars. The national treatment obligation is simple – you must not treat imported products less favourably than domestic products that are "like" the imported product. But now when is it that imported and domestic products are "like"?

LIKENESS

In case of a dispute, the WTO panel or the Appellate Body (in other words the WTO tribunal) would have to determine whether the imported and domestically produced goods affected by the challenged regulation are "like", before being able to assess whether the national treatment obligation was respected. To do this, the panel would have to determine whether the imported and domestic products effectively belong to the same "market" and whether they "compete" with each other. This is so because if the imported and domestic products at issue are competing with each other, protectionism is possible and therefore should be controlled, through the discipline of national treatment. If consumers consider that the imported and domestic products are competing and are directly substitutable, then they are "like" for the purpose of Article III. If the imported and domestic products are like, then the obligation of national treatment applies and then the imported products cannot be treated less favourable than the domestic products with regard to all domestic regulations, fiscal or otherwise.

DETERMINING LIKENESS

With a view to assessing whether an importing Member is respecting its national treatment obligation, one must first determine whether the said imported products are "like" domestic products that are alleged to benefit from a more favourable treatment than the imported products. The GATT had identified four criteria to be used to determine whether imported and domestic products were "like". These criteria are the physical characteristics, the end-uses, the consumers' perception, including cross substitutability, and the tariff classification of the product. The WTO jurisprudence has now established that this "likeness determination" is essentially a determination of the relation of competitiveness between imported and domestic products determined in using, among others, the said four criteria. The Appellate Body insisted that the determination of whether there is competition between imported and domestic products is crucial, because, if there is competition between imported product and domestic products, then there is a risk of protectionism by the industry of the like domestic products threatened by the foreign competition. Since the purpose of Article III is
to fight and avoid protectionism, and since protectionism is possible when there is competition from imported products, in the absence of any competition between the imported and domestic products, there are no like products and thus Article III is of no relevance.

**TRADE AND ...**

National treatment and the determination of likeness or similarity between imported and domestic products is at the heart of the ongoing debate on trade and environment, trade and human rights, trade and labour, etc. For instance, NGOs and other activists would deny that a product that is processed in respect of environmental norms is "like" a product processed in violation of environmental norms, even if these two products are substitutable and competing. The same is true with reference to human rights and other considerations. Ultimately, the national treatment obligation is concerned with the discipline over regulatory distinctions made by government members between imported and domestic products that are otherwise competing.

II.E. DEVELOPING COUNTRIES

**DEVELOPING COUNTRY**

There are a number of provisions in the GATT and now in the WTO Agreement that foresee differential and more favourable treatment for developing countries. These provisions are an "integral part" of the rules and disciplines of the WTO and in that sense they cannot be applied as "exceptions" per se to the main rules – rather as an integral part of the WTO Agreement. In the aircraft dispute between Brazil and Canada, the panel and the Appellate Body concluded that since Brazil alleged to be a developing country (and this was not contested by Canada), it was for Canada to prove that Brazil did not comply with the provision that allowed special and differential treatment in favour of developing country and it was not for Brazil to prove that it benefited from the application of that special provision.

**ENABLING CLAUSE**

A deviation to Article I on the MFN obligation is contained in the 1979 Decision on *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* - this is the "Enabling Clause". The Enabling Clause was a decision of the GATT CONTRACTING PARTIES which is now part of GATT 1994. In 1979, the GATT Contracting Parties gave a waiver to developed countries and allowed them to favour imports from developing countries, contrary to the MFN obligation of Article I. Under the Enabling Clause, developed WTO Members are entitled to give tariff preferences to imports from developing countries which preferences they do not have to give to other WTO Members. Therefore, let's assume the following situation: the EC's binding on the importation of tables is 10 per cent. Pursuant to Articles I and II of the GATT, the EC cannot collect more that 10 per cent on the importation of tables from any GATT/WTO Member.
The Enabling Clause, and as we have said, this decision is now part of GATT 1994, enables the EC to say that if tables come from developing countries the tariff will be zero, and it also enables the EC to do that without the risk or the threat of having any developed country request the respect of MFN for its exports of similar tables. Note that the Enabling Clause applies only to **trade in goods** and does not apply to trade in services and would not justify discrimination in TRIPS. You will see in the GATS language parallel to that of the Enabling Clause where the drafters tried to provide the same flexibility in favour of services and service providers from developing countries.

**NON-DISCRIMINATION UNDER THE ENABLING CLAUSE**

According to recent WTO jurisprudence, donor countries maintaining GSP schemes under the Enabling Clause must treat "similarly" developing countries in "similar conditions" on the basis of objective criteria which can be determined, *inter alia*, in light of international standards and norms dictated by international organizations. So the Appellate Body said that the requirement of non-discrimination under the Enabling Clause obliges donor countries to treat developing countries that are in a similar situation in light of their development needs similarly.

**PART IV OF THE GATT AND THE ENABLING CLAUSE**

To which extent is the Enabling Clause different from Part IV of the GATT? Is the Enabling Clause a special protocol which should clarify things? Part IV of the GATT is an amendment of the GATT – it is an additional section to the GATT. But if you read Part IV, you will see that the wording does not authorize any deviation from Articles I, II, III, and XI. Paragraph 8 of Article XXXVI merits special attention. It states that developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries. An interpretative note clarifies the sentence "do not expect reciprocity" to mean that developed countries do not expect developing countries, in the course of trade negotiations, to make contributions that are inconsistent with their individual development, financial and trade needs. So in the negotiation of tariff reduction and other types of commitment, developing countries should not be expected to offer the same level of market opening as developed countries do. Note that this is relevant in the "negotiation" process. But once the negotiation is finalized the MFN obligation, the most favoured nations obligation would ensure that any negotiated concession must be given "immediately and unconditionally" to all imports from all GATT Contracting Parties/WTO Members.
III. EXCEPTIONS

III.A. SAFEGUARDS

SAFEGUARD MEASURES: A CONDITIONAL RIGHT

Article XIX of the GATT has always allowed GATT Contracting Parties to ignore the basic market access rules for a certain period under certain conditions, when the volume of imports increased drastically. We now have a WTO Agreement on Safeguards that has developed and expanded the disciplines on the use of safeguard measures. The provisions of Article XIX of the GATT allow for the following situation. Let's take my example on tables for which the importing Member B has a binding at 150 per cent ad valorem. Although Country B is committed under Article II not to collect more than 150 per cent on importation of tables from WTO Members, Article XIX of the GATT and the new WTO Agreement on Safeguards allows Country B, in situation of surge of imports, to either raise its tariff bindings (in deviation from Article II), or impose a quota (contrary to Article XI) for a limited period of time under the WTO 4 to 8 years. In other words, Article XIX of the GATT allows Country B, the importing Member, to set aside the application of Articles II and XI in a situation of surge of imports. The non-discrimination obligations of Articles I and XIII remain, however, applicable. That is to say that if and when a safeguard measure is applied, it must be imposed on all imported like products from all WTO Members.

ART. XIX: HOW DOES IT WORK?

Let's take an example. For instance, in 2003 and in 2004, Country B imported 500 tables and in the same years, producers in Country B manufactured 1000 tables. Now, let's assume that in the six first months of 2005, already 900 tables have been imported from Country A into Country B. So the producers of tables in Country B start getting worried - they have already received 900 tables from Country A in six months - the volume of imported tables is too high and the industry in that Country B needs a "break" to adjust and avoid suffering from the situation. Country B would then claim that it finds itself in the situation covered by Article XIX on Safeguards and that it is entitled to ignore its binding on tables and to collect more than 150 per cent, or to ignore its obligation under Article XI and impose a border quantitative restriction. In such a situation, all concerned WTO Members will consult on this issue in the Committee on Safeguards. In the absence of an agreement, and if Country B goes ahead, it is possible that interested WTO Members exporting to Country B may initiate dispute settlement proceedings. The point to make is simply that Article XIX of GATT has existed from day one and has provided for the importing country the right, under certain conditions, to impose a safeguard action in the form of a deviation to obligations under Article II or Article XI.
EXPORTS OF DEVELOPING COUNTRIES AND SAFEGUARDS

Now, under the new WTO Agreement on Safeguards, imports from a developing country can be exempted from the application of a safeguard measure if that developing country's market share in the country of import is less than 3 per cent and if developing countries collectively have less than 9 per cent of the market share of that importing country. This new provision in favour of developing countries exports is an example of an important change brought by the Uruguay Round on the basic provisions of the GATT on safeguards.

BALANCE-OF-PAYMENTS SAFEGUARDS

There is also a similar mechanism for balance-of-payment problems. That is to say that when Country B has a balance-of-payment problem, there are provisions that allow this Member to raise its flag and say: "Sorry, for a while I will need to violate Article XI or Article II and to collect duties that are higher than my bindings on that product or I will need to impose a border restriction". Then there will be a meeting (or more) where the Members will consult on the level and duration of such balance-of-payment safeguards. If consultations do not lead to an agreement among Members on the application of those safeguard measures, it will be for the affected WTO Members to initiate a dispute settlement case against Member B that has imposed a balance-of-payment safeguard measure.

INFANT INDUSTRY SAFEGUARDS

There is also a provision for developing countries in relation to the development of so-called "infant industries". Article XVIII of the GATT 1994, as interpreted by various declarations and Decisions over time, allows developing countries to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular new industry. Article XVIII:C of GATT 1994 entitles developing countries to take any measure not consistent with other provisions of GATT in order to promote the establishment of a particular infant industry. However, deviations from the obligations of GATT 1994 is subject to prior consultations with affected Members in case the product is not subject to a tariff concession, and to prior concurrence of the General Council when the said safeguard measure involves impairment of a tariff concession, and adherence to time limits.

SECTOR-SPECIFIC SAFEGUARDS

Finally, the WTO Agreement on Agriculture also contains provisions for specific safeguard measures on the importation of agricultural goods which are triggered more easily than the general safeguards. The WTO Agreement on Textiles and Clothing has now been phased out, but it also contained provisions for transitional specific safeguards on textiles products.
III.B. GENERAL EXCEPTIONS

ARTICLE XX

Article XX of the GATT contains general exceptions and has been there for 50 years. Now, how does Article XX work? Article XX tells you that nothing prevents Members from adopting measures and policies "necessary to" or "relating to" a list of specific policy objectives. The first sub-paragraph (a) covers public morals and states: "measures necessary for the protection of public morals". The second sub-paragraph covers measures "necessary for the protection of health of animals, plants and human" while sub-paragraph (g) refers to "measures relating to the conservation of natural resources...". The WTO jurisprudence has determined that the "necessity test" of Article XX calls for a balancing of three variables: the value at issue, the efficacy of the chosen measure and the trade restrictiveness of the said measure.

THE "CHAPEAU" OF ARTICLE XX

The "chapeau", that is the introductory paragraph, of Article XX says that as long as these measures are not disguised restrictions to trade, and as long as these measures do not evidence unjustifiable or arbitrary discrimination between countries in similar conditions, nothing prevents Members from adopting those measures listed in the various sub-paragraphs of Article XX. In other words, the chapeau of Article XX controls the "good faith" of the Member imposing the exception measure.

JURISPRUDENCE ON ARTICLE XX

What is important in Article XX is that there is, through the disciplines of the chapeau of Article XX, a GATT/WTO control of the good faith of the Member that invokes the justification of Article XX. The WTO jurisprudence has determined that for the justifying protection of Article XX to be extended to it, the measure at issue must not only come under one of the subparagraphs, particular exceptions listed under Article XX - it must also satisfy the requirements imposed by the opening clause of Article XX.

TRADE AND ENVIRONMENT: PPMS

One issue that is concerned both with the likeness of imported and domestically produced goods and with the exception provision contained in Article XX is that of the "production and process methods" the so-called PPM issue. Some are of the view that the criteria developed by the jurisprudence to determine similarity or likeness between imported and domestic goods should not be based on the competitive relationship between imported and domestic products. For some, goods that are produced in respect of existing environment treaties and goods not produced in respect of such international norms are not LIKE, not SIMILAR even if those goods "compete" with each other. However, the WTO jurisprudence is now clear: when imported and domestic goods
compete with each other, there is a risk of protectionism. The goods are thus like and the specific measure at issue is considered to be subject to the national treatment obligation. However, since the US – Shrimp dispute it seems that PPM considerations could be used to justify the application of an Article XX exception.

Let's take an example: Country B has a domestic regulation on pollution. For example, this regulation would say that cars in Country B must have parts that are 50 per cent recyclable. Let's assume that this is a normal standard. Under that domestic regulation, cars in Country B must comply with this regulation and must be composed with at least 50 per cent recyclable parts. Article III on national treatment tells us that once imported cars arrive in Country B, they cannot be treated less favourably than the like domestic cars. The reason why Article III has traditionally banned a priori regulatory distinctions based on policies and process methods is the following: assume that Country A exports an environmental friendly car to Country B. At the border of Country B the tariff is paid and the imported cars are checked and they comply with the said regulation of Country B. You would agree that to the extent that this car is "like" cars produced in Country B, the car from Country A should be allowed to come in, into Country B and benefit from the same advantages as the domestic cars. Now, what if Country B says that even if those imported cars are "like" their national cars, the fact that the exporting Country A also produces polluting cars that it exports into Country Z suffices to disqualify all cars coming from Country A. Country B says these imported cars will be subject to a higher sales tax because of the bad environmental policy of Country A and because this Country A also produces polluting cars exported somewhere else. Traditionally, this type of distinction was considered to be prohibited because WTO Members cannot treat differently goods that are otherwise like and competing. In fact, PPMs distinctions are feared because of the abuses that foresee. Think of the extremes. What would happen if tomorrow an importing Member says "Yes, your car is like my domestic car, but I don't like the way you speak English so I don't treat your cars the same way that I treat my domestic cars". You would probably answer: "But what's the link or the relationship?" Under the WTO jurisprudence, Article XX has been interpreted and applied to allow distinctions between competing goods on the basis of policies that would relate to the policies listed in Article XX.

THE US SHRIMP CASE

This was confirmed in the famous US – Shrimp dispute. In that dispute the facts were the following: When fishing shrimps, fishermen in Asia throw their nets out and in this process turtles may get caught as well. The US Congress adopted a law that aims at the protection of species of turtles which are disappearing. The US law imposed a ban on importation of shrimps from countries which do not fish shrimp in a turtles-protected manner. Four WTO Members initiated dispute settlement proceedings against the United States and alleged a violation of Article XI of the GATT, quota restriction. The first time the Appellate Body said that the United States had the "right" to adopt a measure pursuant to sub-paragraph (g) of Article XX, that is a measure "for the conservation of natural resources", but that this US measure had not been "applied" in conformity with the
requirements of the chapeau of Article XX. And this for a number of reasons including the fact that not enough “flexibility” was left to the exporting countries to prove that they were fishing shrimps in a manner that protects turtles. For the Appellate Body, there was evidence that the domestic regulation implementing the US programme was protectionist or a disguised restriction on trade and an unjustifiable discrimination contrary to the chapeau of Article XX because, although some fishermen were able to prove that when they were fishing, they were not killing turtles, the United States would refuse to certify them, because the certification related to the country as a whole. The United States changed its regulation and provided more flexibility to its officials to certify exporting Members that would have fishing techniques that would guarantee the respect of turtles.

III.C. REGIONAL TRADE AGREEMENTS

ART. XXIV: A CONDITIONAL RIGHT

Although non-discrimination is a core principle of the GATT/WTO, the GATT has always authorized Contracting Parties and now WTO Members to form preferential trade agreements among some Members. Regional Trade Agreements, called RTAs, existed when the GATT was created and could not be ignored. Still today RTAs are a fundamental feature of the current international trading system. Regional Trade Agreements as such are neither good nor bad for international trade and most economists agree that it is only when such an agreement is implemented that its real impact can be determined.

NOTIFICATION, REVIEW AND THE POSSIBILITY OF DISPUTE SETTLEMENT

When Members form a RTA, a Regional Trade Agreement they must notify it to the WTO membership; the Committee on Regional Trade Agreements (CRTA) will then “review” the compatibility of such Regional Trade Agreements with the requirements of Article XXIV. But this is a complex process, especially because many questions arise about what exactly Article XXIV requires. Moreover, since decisions in the Committee on Regional Trade Agreements are taken by consensus, Members generally do not agree on the results of such review process. So a report is adopted noting all Members’ positions. If Members believe that an RTA is not consistent with the WTO or that a measure taken in the context of such an RTA is not WTO consistent, such unsatisfied Members may have recourse to the dispute settlement system procedure. The WTO Appellate Body has declared that it is for the Member invoking Article XXIV on RTAs as a defence or justification for violation of basic GATT obligations it is for that Member to demonstrate that the regional trade agreement at issue is fully compatible with Article XXIV and that the measure challenged was necessary for the formation of the regional trade agreement.
CRITERIA AND CONDITIONS

Article XXIV of the GATT provides Members with the conditional right to form free-trade areas and customs unions at certain conditions. Indeed Article XXIV paragraph 4 states explicitly that RTAs are "desirable" but that the purpose of such RTAs should be to facilitate trade between constituent states but not to raise barriers to trade of other Members with the constituent territories. Article XXIV thus imposes conditions to ensure that regional groupings created within the framework of the WTO/GATT contribute overall to developing trade. There are internal and external requirements. Externally, the RTA must comply with Article XXIV paragraph 5 which provides the test of the impact of a customs union on the whole vis-à-vis third parties. In general terms, the duties and regulations of commerce in place after the formation of the RTA should not be on the whole more restrictive than before the formation of the RTA. Moreover, when forming a customs union, constituent Members must have "substantially the same duties and other regulations of commerce" with regard to the trade of territories not included in the customs union. It is generally said that such customs union, states must "harmonize" their trade policies. Finally internally, a free-trade area or a customs union must cover "substantially all the trade" between the constituents' states.

TRADE IN SERVICES: ARTICLE V

The General Agreement on Trade in Services, the GATS also contains a provision allowing Members to liberalize trade in services among them. Article V of the GATS governs these economic integration agreements for both developed and developing countries. Contrary to the goods area, the special and differential treatment provided for developing countries is contained in the body of this Article of the GATS itself.

III.D. OTHER EXCEPTIONS

SECURITY EXCEPTIONS: ARTICLE XXI

Article XXI of the GATT also allows Members to deviate from the obligations of the GATT when such Members consider that measures are necessary for the protection of their security interest. There is no jurisprudence on this provision which has been formally invoked only in a few situations. Remember that there is no need to obtain a WTO permission when invoking an exception, whatever the exception, and it is only if other Members disagree and trigger the dispute settlement mechanism that a Panel, or the Appellate Body would examine the meaning of Article XXI and whether a particular Member properly invoked this exception in any specific factual circumstances.
WAIVERS

It is also possible for Members to obtain a decision from the other Members, from the entire Membership, a permission to derogate from its GATT/WTO obligations at certain conditions and for a certain period of time. These decisions are called "waivers". Upon request by a Member or a group of Members, the General Council or the Ministerial Conference of the WTO may authorize such Member(s) for a specific period of time to ignore identified GATT/WTO obligations. Such waivers are generally reviewed annually and in principle they should not last more than two years.
IV. UNDISTORTED COMPETITION

IV.A. DUMPING

PROTECTION OF THE TARIFF CONCESSIONS AGAINST UNFAIR PRACTICES BY FIRMS: ARTICLE VI

We have just seen that in order to ensure the efficacy of tariffs negotiations and concessions, Contracting Parties established the national treatment obligation and the general prohibition on quotas. But other actions by States and firms can also be used to circumvent the effects of the tariff concessions granted. We usually include as part of such disciplines on unfair or undistorted competition those dealing with "dumping" by firms, those relating to subsidization and the rules on state-trading enterprises.

WHAT IS DUMPING?

Now, dumping is quite special – it is an action by firms while the GATT generally deals with actions by states. Let's take an example. In Country A, the cost of production of a table by firm Z is, say, 8 euros, with 2 euros of profit, so the table goes for sale, let's say at 10 euros. There is "dumping" when the firm Z in Country A exports a table in Country B at 7 euros while it sells the same tables at 10 euros in the home country. Why do we say that there is dumping? There is dumping because there is a price difference, a price discrimination for the same product between Country A (the price there is called normal value) and Country B (the price there is called export price). Here we would say, in that example, that the margin on dumping is three (3) euros, that is the difference between 10 Euros (normal value) and 7 Euros (the export price). WTO Members are not obliged to impose anti-dumping duties against dumped exports, but in situation of dumped imports, the importing Member is entitled to protect itself against such dumped imports in imposing antidumping duties.

WHY DO FIRMS DUMP?

But why would a firm Z dump its exports into Country B? That is because in this way Firm Z believes that consumers in Country B will buy its table (at 7 euros) instead of the locally made tables that sell at 10 euros. In this way, tables from firm Z will be able to find a niche or a share of the tables-market in Country B.

WHY IS DUMPING FEARED?

It is usually considered that dumping is an unfair action by firms that threaten unfairly the domestic industry of tables in Country B. Dumping is feared because if this firm Z exports and sells its tables at 7 Euros in Country B, all the consumers will buy these tables because they are cheaper. There is a risk that the national industry
producing more expensive table will disappear because the domestic industry won't be able to sell tables
anymore. Then, the Country B would be able to offer only tables Z from Country A. There is a risk that once
Firm Z has managed to exterminate the domestic competitor in Country B, Firm Z will begin, as a monopolistic
provider in Country B, to raise the price of its table from 7 Euros to 10 Euros and even higher. To avoid this
situation, Article VI of the GATT allows the importing country to impose a surtax at the border covering the
difference in price covering the margin of dumping.

ANTI-DUMPING DUTIES

If there is dumping that causes injury to the domestic industry of the like products, Article VI of the GATT and
the new WTO Antidumping Agreement allow WTO Members to collect a surtax – an anti-dumping duty -
representing the margin of dumping. Members are not obliged to impose antidumping duties when there is
dumping but they are entitled to protect themselves against dumped exports. Recall that antidumping duties
are imposed in addition to and independently from the tariff duties that are collected on the importation of
tables pursuant to Article II of the GATT.

DUMPING: ECONOMIC IMPACT

Some people would say that dumping is not prejudicial and antidumping duties are not necessary, because, if
imports come in at a cheap price, this will benefit consumers and the fear of an elimination of domestic
competitors is not realistic. They argue that when the foreign firm Z starts raising the price of its tables
initially sold at 7, but now above 10 euros (after having eliminated the domestic industry of local tables), the
domestic industry should get back into business again and ensure that the price of imported and domestic
tables never exceeds 10 euros. Yet, if the domestic industry fades away, jobs will get lost and social peace will
be disrupted. Moreover, if it is true that the domestic industry could go back into business to fight firm Z and
its increased prices on tables, the domestic industry will need investment, this may take time. Therefore there
maybe situations where anti-dumping duties may be needed.

A POSSIBILITY, NOT AN OBLIGATION

At the end of the day, the point is that the GATT and today the WTO contain disciplines that allow importing
countries to protect themselves against dumping that is causing injury (or threat of injury) to the domestic
industry. It should be noted that the GATT does not address pricing practices of private firms and does not
condemn dumping as such. The GATT and the WTO only permits the importing Member to protect itself in
allowing a surtax at the border which covers the dumping margin if injury is caused to domestic industry
producing products like those dumped imports.
IV.B. SUBSIDIES

ARTICLES VI AND XVI AND THE SCM AGREEMENT

There are also disciplines with respect to the distortion caused by illegal subsidies. Under the GATT, disciplines on subsidies were not very detailed. Article XVI used to prohibit a limited type of export subsidies and Article VI of the GATT authorized importing Members to protect themselves against subsidized imports through the use of anti-subsidies duties called "countervailing duties". The Agreement on Subsidies and Countervailing Measures (called the "SCM Agreement") contains now a definition of subsidy and introduces the concept of "specificity" of a subsidy - for the most part, a subsidy available only to an enterprise or industry or group of enterprises or industries within the jurisdiction of the government granting the subsidy. Only specific subsidies will be subject to the disciplines set out in the SCM Agreement.

TYPES OF SUBSIDIES

The SCM Agreement establishes three categories of subsidies. First, it deems the following subsidies to be "prohibited", these so-called red subsidies: that is, those contingents, in law or in fact, upon export performance; and the subsidies contingent upon the use of domestic over imported goods. The second category is "actionable" subsidies, the so-called yellow subsidies. The SCM Agreement stipulates that no Member should cause, through the use of subsidies, adverse effects to the interests of other Members. WTO Members affected by actionable subsidies may refer the matter to the Dispute Settlement Body and trigger dispute proceedings. The third category included the so-called non-actionable subsidies or green subsidies, involving assistance to industrial research, assistance to disadvantaged regions, assistance for adapting existing facilities to new environmental requirements. But at the end of 1999 WTO Members decided to abolish this third category. We now have two basic types of subsidies: the prohibited subsidies and the actionable subsidies.

TWO RECOURSES AGAINST SUBSIDIZATION

Members affected by subsidies provided by other Members have a choice between two recourses. In addition to raising matters before the SCM Committee, such affected Members can either initiate a direct action against the Member providing the subsidies asking for the reduction or termination of the said subsidization programme but alternatively an importing Member can decide to protect itself against subsidized imports through the use of "anti-subsidies" or countervailing duties representing the level of subsidies or the injury caused by such subsidies.
COUNTERVAILING DUTIES

As mentioned, the SCM Agreement provides rules dealing with the unilateral application of "anti-subsidies duties", called "countervailing duties" as initially envisaged in Article VI of the GATT. When the trade in tables in Country B is affected or distorted by the subsidies provided by Country A on tables exported to Country B, Country B is entitled to collect at its border (in addition to the applied tariff) a surtax representing the amount of subsidies or the level of injury caused to the domestic industry of like tables in Country B. For example, let's say that a table sells at 10 Euros in Country A, but the cost of production is 12 Euros and there is an export subsidy of 2 Euros. Without this subsidy, the price of the table would be 12 Euros and would go for export at 12 Euros, but with the subsidy this table from Country A is exported to Country B at 10 Euros. Article VI of the GATT allows Country B, upon a complaint from its industry, to open an investigation to try to see if such imports benefit from a WTO inconsistent subsidy – that is for instance an export subsidy or an actionable subsidy that causes adverse effects to the domestic industry of like products in Country B.

DIRECT ACTION AGAINST A SUBSIDY

It is also possible for Country B as mentioned to initiate a direct complaint against Country A alleging that the subsidy programme at issue should be modified or terminated. In this situation, Country B is NOT imposing an anti-subsidy duty at its border on the importation of tables. This direct recourse can also be used when the market at issue is neither Country A nor Country B, but rather Country C where tables from A, B and C are competing. There again upon a complaint from its industry, Country B can initiate a direct recourse against the subsidy programme of Country A in favour of tables sold in Country C, a third market.

SUBSIDIES IN AGRICULTURAL PRODUCTS

In agricultural goods, subsidies were too big, in particular export subsidies were too big, to subject them immediately to the general rules of the SCM Agreement which among others prohibit completely export subsidies. So the Agreement on Agriculture contains a special regime for subsidies on certain agricultural products. Therefore, export subsidies and production subsidies on agriculture goods are not necessarily WTO inconsistent. During the Uruguay Round, states were asked to record their existing export subsidies, product by product, and they were then committed to reduce them annually according to an agreed reduction scheme. Exports subsidies on goods were thus possible if provided below the annual level of commitment. During the Uruguay Round Members were also asked to record their respective total amount of trade-distorting domestic support subsidies (also called production subsidies) which were then subjected to scheduling and annual reduction commitments. In other words, the WTO Members that had scheduled export subsidies and domestic support subsidies were entitled to maintain them as long as those subsidies were provided below the commitment levels (in value and in volume). But the reduction commitments contained in Members schedules had been agreed only until 2000. In the context of the ongoing Doha negotiations, WTO Members decided in
July 2004 that exports subsidies on agricultural products should eventually not only be reduced but should be abolished and Members are also now negotiating how to further reduce protection in trade in agricultural products.
V. TRANSPARENCY

PUBLICATION: ARTICLE X

In the GATT context, transparency is discussed with reference to the obligation of Members (and before that GATT Contracting Parties) to publish domestically any regulation or laws that may affect international trade. This obligation of publication is contained in Article X. The first paragraph obligates Members to publish promptly, in their own language, any measure (that is laws, regulations, judicial decisions) relating to GATT matters as well as any international agreement affecting international trade policy so as to allow government and trading entities to become familiar with them.

NOTIFICATION REQUIREMENTS

Another transparency requirement refers to the obligation of Members to notify other Members, through the GATT/WTO Secretariat, all laws and regulations of general application. Members are also obliged to notify any specific measure that affects matters covered by WTO provisions. The GATT 1947 contained many notification requirements for measures of general application. This obligation, which binds only Member governments, ensures for transparency at two levels: first domestically, individuals and civil society may have access to their own government documents and papers notified to GATT/WTO. For instance in the United States, the government is obliged to make available to the public most of its position papers and other submissions to WTO bodies at the WTO level, most documents notified to the WTO are circulated to all Members, and, since the adoption of the Decision on Derestriction, these documents are accessible to anyone who request a copy and are posted on the WTO website. Both these domestic publication and WTO notification obligations have been expanded in the various multilateral trade agreements of the WTO.

JUDICIAL, ARBITRAL OR ADMINISTRATIVE TRIBUNALS OR PROCEDURES

Article X also obliges each Member to maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures have to be independent of the agencies entrusted with administrative enforcement. This ensures due process by the importing Member when assessing whether imports comply with WTO requirements. Now WTO multilateral trade agreements, such as the Agreement on Anti-dumping and the Agreement on Subsidies, contain more detailed and specific requirements for judicial, arbitral or administrative tribunals or procedures.
TRADE POLICY REVIEW

Moreover, in this context of transparency, the WTO has set up a new "trade policy review mechanism". This review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. The TPRM Review is not, however, intended to serve as a basis for the enforcement of specific obligations under the WTO Agreement or for dispute settlement procedures, or to impose new policy commitments on Members. Its main purpose is to ensure the "smoother functioning of the multilateral trading system by achieving greater transparency in, and understanding of, trade policies and practices of Members..."
VI. DISPUTE SETTLEMENT

ENFORCING GATT RIGHTS AND OBLIGATION

The force of the GATT has always been that it provided a dispute settlement mechanism that allowed a Contracting Party to ask the Membership, that is the CONTRACTING PARTIES to determine whether another Contracting Party was in violation of its GATT obligation.

CONSULTATIONS: ART. XXII

The GATT contained provisions on consultations that could be triggered when a Contracting Party considered that another Contracting Party's measure was inconsistent with the GATT. If consultations failed, the unsatisfied Contracting Party could request the Membership to determine whether such measure was inconsistent with GATT.

NULLIFICATION OR IMPAIRMENT-ADJUDICATION: ART. XXIII

The GATT also contained provisions allowing a Contracting Party to ask the Membership to determine whether another Contracting Party was in violation of its obligation. Slowly throughout the years this process became more adversarial and more technical. The dispute settlement system of the GATT was however subject to the consensus rule; that is, the dispute settlement process and the adoption of panel reports assessing whether such challenged measures were consistent with the GATT, needed the support or the consensus of all Contracting Parties to function. This led to the blocking of the adoption of several politically sensitive panel reports.

THE REVERSE OR NEGATIVE CONSENSUS

With the Uruguay Round, this requirement for a positive consensus was modified in favour of the so-called reverse or negative consensus. As mentioned, consensus was the rule in GATT and still is the general rule in the WTO: decisions are taken by consensus – that is to say that you cannot go ahead if one Member objects. During the Uruguay Round, states wanted to maintain the consensus under WTO, but they did not want consensus in dispute settlement. They did not want this consensus because they wanted to avoid the blocking power of powerful States which, when they lost cases, could refuse to participate in the consensus to adopt such panel report which was detrimental to their own trade interest. So WTO Members invented the so-called reverse consensus, or negative consensus. With the reverse consensus, the process is almost automatic and, for example, the panel and Appellate Body reports will be adopted unless by consensus (including the agreement of the winning Member) all Members decide NOT to adopt those Reports. With the consequence that now any small country can initiate a dispute settlement process against another Member alleging that a specific
measure is WTO inconsistent and unless that complaining Member agrees to do so, the dispute proceedings will proceed automatically along predetermined procedures and then such Member could obtain a binding ruling which will be enforced through sanctions if the loosing country does not comply with the conclusions of the panel or Appellate Body reports.
VII. FROM GATT TO THE WTO

THE SCOPE OF THE WTO IS MUCH BROADER THAN THAT OF GATT

As mentioned before, the text of GATT negotiated in 1947 is now a component of the "GATT 1994". When negotiators decided to expand the coverage of the GATT to include trade in services and trade-related aspects of intellectual property rights, these negotiators had in mind the rules of the GATT, but they had to adapt them to the reality of those new sectors of trade. Let's look briefly at how the General Agreement on Trade in Services (the GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS) have integrated those basic principles into the text of these new agreements.

THE GATS

Indeed if the WTO Agreement was the occasion to agree on a series of improved provisions for the regulation of commerce of goods, it was also and importantly the occasion for States to agree on the General Agreement on Trade in Services (the GATS), contained in Annex 1B of the WTO Agreement.

THE TRIPS AGREEMENT

The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement) is contained in Annex 1C of the WTO Agreement. The TRIPS Agreement has brought under the scope of the WTO a series of norms and standards from other existing intellectual property international conventions. While the GATT focuses on goods and the GATS focuses on services and services suppliers, the TRIPS Agreement is concerned with intellectually property rights held by "persons".
VIII. TRADE IN SERVICES

PROGRESSIVE LIBERALIZATION, NOT DEREGULATION: ARTICLE XIX OF THE GATS

The GATS is the first set of multilaterally-agreed and legally enforceable rules to cover international trade in services. The GATS is designed to secure progressively higher levels of liberalization of trade in services through successive rounds of negotiations, which should aim at promoting the interests of all Members of the WTO and securing an overall balance of rights and obligations.

THE STRUCTURE OF THE GATS

The structure of the GATS is strongly influenced by that of the GATT. The GATS, as GATT does, contains rules on transparency, national treatment and on most-favoured-nation. But because of the specificity of services activities, and in particular the fact that services are intangible and not storable, the GATS deals with issues other than border measures. Therefore, while referring to the GATT basic principles (such as national treatment, most-favoured nation principle or transparency...) the GATS had to adapt and modify these principles so as to adjust to the commercial reality of trade in services.

GATS SPECIFIC COMMITMENT AND RELATED OBLIGATIONS

Now specific commitments under the GATS are registered in Members’ schedules. Each Member of the WTO is required to submit such a schedule which specifies inter alia market access and national treatment commitments vis-à-vis services and service suppliers of other Members for given service sectors. In its schedule, a Member thus guarantees other Members specified levels of market access and national treatment. In that sense, the GATS schedules are comparable to GATT tariff schedules: the GATS schedules consolidate negotiated (minimum) levels of market opening. As under the GATT, commitments can only be withdrawn or modified after negotiation and agreement with other Members on compensatory commitments; however, new commitments or improvements to existing ones can be added at any time.

NATIONAL TREATMENT (SPECIFIC COMMITMENT): ARTICLE XVII OF GATS

Basically, in sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each WTO Member must accord to services and like service suppliers of any other Member, treatment no less favourable than that it accords to its own like services and service suppliers. As with the GATT, the GATS contains a national treatment obligation which is, however, applicable only in sectors for which Members have scheduled a specific commitment and subject to the terms and conditions provided for in that Member’s Schedule. In other words, a Member undertaking a national treatment commitment can subject its national treatment commitment to various limitations as long as they are expressly scheduled.
MARKET ACCESS (SPECIFIC COMMITMENT): ARTICLE XVI OF GATS

Now, Article XVI of the GATS deals with market access and provides that each Member shall accord to 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. Article XVI:2 of the GATS lists six categories of restrictions which may not be adopted or maintained unless they are specified in that Member’s Schedule. They comprise four types of quantitative restrictions as well as limitations on foreign equity participation and on the types of legal entity permitted. All scheduled limitations on market access must fall within one of these categories.

MFN OBLIGATION (GENERAL AND UNCONDITIONAL OBLIGATION): ARTICLE II

As in goods, the GATS contain an MFN obligation that is applicable at all times and in all sectors independently of any scheduled commitments. In other words, even for sectors for which a Member has not undertaken any commitment, if that Member decides to accept foreign services or service suppliers that Member must then do so on a non-discriminatory (MFN) basis.

MFN EXEMPTION

But here are MFN exemptions. It was also possible for Members to schedule exceptions to Article II MFN obligation of the GATS. The purpose of such exemptions is to grant more favourable treatment to some countries than others, but this is intended to be temporary. All exemptions were subject to review within five years of the entry into force of the GATS, and these exemptions should in principle be eliminated after ten years.

TRANSPARENCY: ARTICLE III OF THE GATS

Services activities are typically subject to a strong element of governmental regulation and control. It would not be possible to achieve effective liberalization of trade in services without ensuring that suppliers of services can obtain the necessary information concerning all the rules which they have to comply with. Therefore, in the GATS, there is a general unconditional obligation of transparency. Article III (as does Article X on the GATT on goods) requires Members to publish all measures of general application affecting the operation of the GATS. There are also more stringent transparency requirements in sectors in which there are specific commitments.

ENQUIRY POINTS

As part of this transparency requirement, each Member is required to establish, within two years from the date of entry into force of the GATS, one or more enquiry points to provide information on laws and regulations.
affecting trade in services. While enquiry points are expected to respond promptly to any request for information, they need not be depositories of laws and regulations.

INCREASED DISCIPLINES ON DOMESTIC REGULATIONS

Services trade in most sectors is heavily regulated and the need to regulate is likely to increase as competition develops. The GATS explicitly recognizes “the right of Members to regulate, and introduce new regulations, on the supply of services within their territories in order to meet national policy objectives”. The GATS does not seek to influence policy objectives, but rather establishes a framework of rules to ensure that services regulations are administered in a reasonable, objective and impartial manner, and are not more burdensome than necessary. For this reason the GATS contains discipline on domestic regulations.

GENERAL EXCEPTIONS, REGIONAL TRADE AGREEMENTS, SAFEGUARDS, SUBSIDIES...

The GATS also contains provisions allowing Members to form preferential integration agreements also called Regional Trade Agreements. There are also provisions for general exceptions and security exceptions similar to that of the GATT. In the area of subsidies, safeguards and government procurement Members were only able to agree to continue to negotiate.
IX. TRIPS AGREEMENT

EXISTING INTERNATIONAL IP STANDARDS

Inadequate protection of intellectual property rights (that is patents, copyrights, trademarks and other proprietary rights awarded to creative activities of human intellect) can often hamper the free flow of trade in goods and services. Widely varying standards in the protection and enforcement of intellectual property rights and the lack of multilateral disciplines dealing with international trade in counterfeit goods were a growing source of tension in international economic relations at the beginning of the Uruguay Round.

THE GOAL OF THE TRIPS AGREEMENT

The goal of the TRIPS Agreement contained in its Preamble include the reduction of distortions and impediments to international trade, promotion of effective and adequate protection of intellectual property rights, and ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.

OBJECTIVES AND PRINCIPLES OF THE TRIPS AGREEMENT: ARTICLES 7 AND 8 OF THE TRIPS AGREEMENT

The general goals contained in the Preamble of the TRIPS should be read in conjunction with Article 7 of the TRIPS Agreement, entitled "Objectives", according to which the protection and enforcement of intellectual property rights should "contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." Article 8, entitled "Principles", recognizes the right of Members to adopt measures for public health and other public interest reasons and to prevent the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement.

THE APPLICATION OF THE TRIPS AGREEMENT

The TRIPS Agreement sets out minimum standards for all intellectual property rights, building on relevant international intellectual property agreements administered under the auspices of the World Intellectual Property Organization (WIPO). To these sectors of intellectual property rights, the TRIPS Agreement adds minimum standards for effective procedures in cases of infringement, and the dispute settlement system of the WTO. The TRIPS Agreement also maintains transition implementation arrangements for least-developed countries. As for GATT, the TRIPS Agreement contains rules on transparency, on national treatment, and on most-favoured-nation.
NATIONAL TREATMENT AND MFN

Pursuant to Article 3 of the TRIPS Agreement, 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. Moreover Article 4 provides 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.

EXCEPTIONS

In respect of the national treatment obligation, the exceptions allowed under the pre-existing intellectual property conventions of WIPO are also allowed under TRIPS. Other limited exceptions to the MFN treatment are also permitted.

OTHER BASIC PRINCIPLES

The TRIPS Agreement, however, does not contain any provision on safeguards, Regional Trade Agreements or any general exceptions although it does provides for specific exceptions available in respect of intellectual property rights.
X. A SUMMARY

THE GATT

Well we have reviewed the basic legal underpinning of the GATT and now the WTO system. The general purpose of the GATT was to introduce disciplines on restriction to trade so as to favour the liberalization of trade with a view to raising people's standard of living. As we have seen in this module, tariffs are to be reduced through reciprocal concessions and applied on a non-discriminatory manner, that is independently of the origin of the goods – that is the “most-favoured-nation” principle. These two basic principles -- that is negotiated tariffs applied on an MFN basis -- are contained in PART I of the GATT while PART II is devoted to provisions needed to preserve the value of the tariff concessions negotiated among the parties. The most fundamental of these obligations are two: the national treatment clause and the prohibition against the use of quantitative restrictions at the border. As a general rule, only tariffs are an “acceptable” form of protection for the national industry against foreign competition. However, in order to ensure the pragmatic feasibility and respect of such market access rules, the GATT has always included provisions allowing a given Contracting Party to deviate from these rules in specific circumstances. The temporary use of safeguards, the establishment of Regional Trade Agreements, the application of antidumping and countervailing measures against unfair trade, the protection of health and the environment are some examples of this flexibility. Special treatment for developing countries was introduced into PART IV of the GATT in 1964-65 and was reinforced in the Enabling Clause and the specific provisions for developing countries that are now included into the WTO Agreement. In addition, institutional provisions on transparency and dispute settlement ensure that GATT provisions would effectively be respected under the surveillance of all GATT Contracting Parties.

THE WTO

Under the WTO, these basic market access principles and the related exceptions as well as institutional provisions were adapted to the specificity of trade in services and trade related aspects of intellectual property rights. In the Preamble to the Agreement Establishing the WTO, the objectives of this new Organization are stated "with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development".
Thanks! We have now come to the conclusion of this presentation on the legal underpinnings of the WTO. You do not yet know all the intricacies of the rules governing the multilateral trading system, but familiarity with the basic principles, that we have reviewed in this module, should help you in understanding better the legal obligations contained in the WTO Agreements.
Frequently Asked Questions

BACKGROUND

1. **Are the GATT 1994 and the WTO Agreement new international agreements?**

The WTO Agreement is a new treaty which entered into force on 1 January 1995. The WTO Agreement is a "Single Undertaking" that is a single treaty composed of various parts so when a state becomes a WTO Member, it must comply with all provisions of the WTO Agreement. One of the important components of the WTO Agreement, is the GATT 1994, which is composed of the text of the old GATT of 1947 together with a series of decisions and waivers adopted during the 50 years of the GATT 1947.

MARKET ACCESS: TARIFFS

2. **Protectio has negotiated a binding of 8 % tariff on imports of spruce, pine and fir ("SPF") dimension lumber whereas its binding on imports of other types of dimension lumber is zero. Patria claims that having differing tariff rates to different types of dimension lumber is inconsistent with Article I:1 because SPF dimension lumber and dimension lumber of other types are "like products" within the meaning of Article I:1. Can Patria have negotiated different tariff bindings for SPF dimension lumber and for other dimension lumber?**

The GATT 1994 leaves wide discretion to the WTO Members in relation to the structure of national tariffs and the classification of goods in the framework of such structure. Where a claim of likeness is raised in relation to the tariff treatment of goods, such a claim must be based on the classification structure of the importing country. Members generally follow the classification of the Harmonized System. But a tariff classification going beyond the Harmonized System's structure is a legitimate means of adapting the tariff scheme to each Member's trade policy interests, so long as the differentiation does not grant more favourable tariff treatment to imports of one Member's products than to the like products of another WTO Member.

MARKET ACCESS: MFN

3. **Can a WTO Member Patria refuse to respect its tariff binding commitment on computer chips originating in other WTO Member countries for the reason that this other WTO Members impose restrictions on imports of electronic equipment from Patria?**

This action by Patria is contrary to the requirement of immediate and unconditional most-favoured-nation treatment of Article I of the GATT. Reciprocity is relevant when "negotiating" tariff bindings (that is I give you this if you give me that), but the absence of reciprocity cannot be invoked as a justification for violating the MFN obligation of Article I of the GATT applicable to all "like imports". Therefore as a general rule, WTO Members must provide the same advantages to all products from all WTO Members.
4. **Patria** has an import tariff for cattle of 20 per cent. **Patria**, following trade negotiations with **Tramontana** (a South American country in the mountains region), introduces an additional special import tariff of 5 per cent for "cattle reared at a spot at least 300 metres above sea level and having at least one month's grazing each year at a spot at least 800 metres above sea level".

Under Article I of the GATT, **Patria** must give the tariff advantages granted to cattle from **Tramontana** to all "like" products originating in the territories of other Contracting Parties/WTO Members. Cattle reared in the mountains and other cattle would normally be viewed as "like" products because they are identical in their physical characteristics and domestic use etc..

**MARKET ACCESS: QUOTAS**

5. **Can Protectio**, a WTO developing country Member, introduce a system of quota restrictions according to which imports from each Member are limited in amount to Protectio's exports to that Member in the preceding year?

Protectio's import quota is contrary to GATT Article XI:1 which prohibits the maintenance of quantitative restrictions. Because of its discriminatory nature, this restriction also contrary to GATT Article XIII. Note however the possible exceptions to this principle of non-discriminatory application of quotas for situations covered by the second paragraph of Article XI.

**MARKET ACCESS: NATIONAL TREATMENT**

6. **Can Patria**, a WTO Member, impose a domestic tax on petroleum products at a higher rate on imported than on domestic products - to finance a pollution cleanup fund?

Here we are faced with a domestic regulation so the issue is whether **Patria** has respected its national treatment obligation pursuant to Article III of GATT. The obligation of national treatment prohibits WTO Members from providing less favourable treatment on imported products than on domestic products when imported and domestic products are like or directly competitive or substitutable. To the extent that imported petroleum products are "like" or "competing with" domestic petroleum products, they cannot be subjected to a tax that would afford protection to the domestic production, that is the domestic petroleum products. Here **Patria** seems to be in violation of its national treatment obligation.

7. **Vezu**, a WTO developed country Member, prohibits advertisements for alcoholic beverages, except for wine and whisky, alleging the need to combat alcoholism within **Patria**. **Is Vezu** allowed to prohibit advertisements for alcoholic beverages, except for wine and whisky?

The advertising regulation constitutes a measure "affecting the internal sale" of imported products under Article III:4 of national treatment. This regulation would be a violation of Article III:4 if vodka, whisky, wine and spirits can be argued to constitute "like products" under Article III:4, because any regulatory distinction which is less favourable to imported products than that imposed on domestic like products would constitute a violation of Article III:4.
Vezu may grant a preferential tariff of 30 per cent on imports of vodka from developing countries under the provisions of the Enabling Clause, a decision of the GATT Contracting Parties which permits developed countries to give preferential and more favourable treatment to imports from developing countries. The Enabling Clause is an exception to the MFN provision. Vezu is, however, not obliged to include whisky and wine in its Generalized System of Preferences (GSP) scheme. Although the Enabling Clause suggests that GSP benefits are supposed to be "generalized, non-reciprocal and non-discriminatory", in practice they have often not been extended to all products and from all developing countries.

EXCEPTIONS: SAFEGUARDS

9. Protectio, a developing country WTO Member, has to cope with a severe balance-of-payments crisis. It hesitates between imposing an import deposit scheme or an import quota. What can you advise?

First the import deposit scheme is not an internal measure because it is levied only in connection with importation. A panel found a similar scheme to be a charge within the meaning of Article II that says only tariffs can be collectible. So for bound items, the scheme is inconsistent with Article II because it was not scheduled and it will lead to collecting tariffs at level above bindings.

It is however possible that Protectio be able to invoke its balance of payment difficulties to justify such a safeguard measure. Article XVIII:B – which authorize balance-of-payment safeguard restrictions for developing countries and would appear to allow only quantitative restrictions, not surcharges. However, over the past 25 years many surcharges have been tolerated because the exporter would usually prefer a deposit scheme or a surcharge to a quantitative restriction. Moreover, the WTO Understanding on Balance-of-Payments Provisions clearly states that a preference for price-based measures, including deposit requirements is to be used when evoking Article XXII or XVIII on balance of payments.

10. Country A, a developed country WTO Member, has put in place a safeguard measures against the importation of salmons, alleging the sudden increase of such imports. Tania, a developing country is a small exporter of fresh salmons to country A and wants to know whether its exports will be restricted.

Pursuant to Article XIX of the GATT 1994 and the WTO Agreement on Safeguards, a WTO Member, such as country A, is entitled to impose a temporary safeguard measure if due to unforeseen circumstances, salmon is imported in such increased quantities and under such conditions so as to cause or threaten serious injury to the domestic industry of like products. The measure should then be imposed but only to the extent and for the period necessary to prevent or remedy such injury.
So Tania could consider that country A has not complied with those requirements and may initiate dispute settlement procedures. In addition, if Tania’s exports to country A represent less than 3 per cent of country A’s total imports and at the same time, total exports from all developing countries are less than 9 per cent of the country A’s total imports, Tania’s exports should be exempted from the application of the safeguard measure.

GENERAL EXCEPTIONS

11. Can Vezu subject imports of powdered milk from countries which do not follow its domestic processing regulations to stricter controls, alleging the need to protect the health of people in Vezu?

Article III of GATT 1994 prohibits a WTO Member from imposing a less favourable treatment on imported goods which are like domestic goods. The issue is therefore whether domestic powder milk which follows Vezu’s processing regulation is "like" imported powdered milk which does not. Under Article III if imported and domestic powder milk compete with each other, they are considered to be "like" and the imported powder milk cannot be treated less favourably than the domestic powder milk. If this analysis is followed, processing requirements would appear not to affect likeness and therefore since imported powder milk is subject to more stringent requirements than domestic powder milk it is subject to less favourable treatment, contrary to Article III.

REGIONAL TRADE AGREEMENTS

12. As a member of a free-trade agreement, Vezu grants a preferential tariff of zero duty to other members of the free trade agreement on vodka only. Is this compatible with GATT 1994?

In order for a Regional Trade Agreement to be invoked as a justification for its members not to grant MFN treatment to other WTO Members, the Regional Trade Agreement must provide for the elimination of all restrictions among Members of the free-trade agreement on substantially all trade between these countries. Therefore, since only vodka is covered by this free-trade agreement, it would not be compatible with the requirement of Article XXIV. If Vezu was a developing country, it could also grant, on the basis of the Enabling Clause, preferential tariff concessions to other developing countries in connection with regional or global arrangements for the mutual reduction of tariffs without offering such concessions to other WTO Members. On the other hand, developed countries cannot grant each other tariff advantages except on an MFN basis or in the context of a free trade agreement or customs union qualifying for the Article XXIV exception.

UNDISTORTED COMPETITION: DUMPING

13. Company Ziza, located in Country A, a WTO Member, sells shoes on its domestic market for 10.00 $ US per pair. Its costs of production are 8.00$ per pair of shoes (with a profit of 2.00 $ per pair of shoes). Company Ziza decides to exports its shoes to Country B at a price of 7.00$ - it wants to penetrate the market in Country B and attract consumers. The local producers of similar shoes in Country B panic and are asking you whether they can do anything against these cheap imported shoes.
In the present situation Company Ziza seems to be dumping its shoes into Country B because the export price of the said shoes is 7.00$ that is lower than the domestic price of the same shoes. Here, the margin of dumping would be for 3.00$ per pair of shoes. In situation of dumping the importing country, upon the complain by its domestic industry is entitled to open an investigation to assess whether or not there is dumping. If there is dumping that causes injury to the domestic industry of the like products, Article VI of the GATT and the WTO Agreement on Antidumping allow WTO Members to collect a surtax on such dumped imports – an anti-dumping duty - representing the margin of dumping. WTO Members are not obliged to impose antidumping duties when there is dumping but they are entitled to protect themselves against dumped exports. Recall that antidumping duties are imposed in addition to, and independently from, the tariff duties that are collected at the border.

**UNDISTORTED COMPETITION: SUBSIDIES**

14. **Producers of vodka in Xenia receive payments from the government of 15 cents per bottle sold abroad. Section II of Part IV of Xenia’s Schedule ("export subsidy commitments for agricultural products") states “Nil”. Are these payments consistent with the WTO Agreement.**

This situation involves a subsidy from the Government Xenia. When faced with a subsidy one must first assess whether it is an agricultural subsidy subject to the special rules on the Agreement on Agriculture.

In the present situation, there is a financial contribution by a government, in the form of a direct transfer of funds, and it is specific, so this is a subsidy within the meaning of the Subsidies Agreement. In the present case, Xenia’s vodka producers receive 15 cents from the government per bottle sold abroad. It would therefore appear that the subsidy is contingent or conditional on export performance; this is an export subsidy. Such export subsidies are prohibited by Article 3 of the Subsidies Agreement, except as provided in the Agreement on Agriculture. Under the Agreement on Agriculture Members may provide export subsidies on specific products if they had scheduled such export subsidy and if the level of such export subsidy is maintained below the reduced commitment level of the Member.

Since Xenia has not specified the export subsidy given to vodka in its Schedule, the subsidy does not fall within the Agreement on Agriculture. Therefore this export subsidy is inconsistent with Article 3 of the Subsidies Agreement that prohibits the export subsidies.

**TRANSPARENCY**

15. **Which are the main transparency obligations of WTO Members?**

All WTO Members are obliged to publish domestically any regulation or laws that may affect international trade. Another transparency requirement refers to the obligation of Members to notify other Members, through the WTO Secretariat, all laws and regulations of general application. Now, Members have increased notification obligations pursuant to the new WTO multilateral trade agreements.
DISPUTE SETTLEMENT

16. **Patria exports canned mushrooms to Tramontana.** In order to protect itself the domestic mushroom growers’ association in Tramontana sets up a campaign discouraging consumers in Tramontana from buying imported canned mushrooms. Patria comes and ask you what it can do.

The GATT and the WTO dispute settlement system is available only to governments and can be used only to challenge governmental measures. The issue here is whether this ban constitutes an import restriction contrary to Article XI. Is it a “measure” that is a governmental measure that can be challenged under the WTO dispute settlement mechanism. In the GATT dispute on Japan Semiconductor the Panel found that a non-governmental measure can nonetheless be considered a challengeable measure if there are reasonable grounds to believe that sufficient incentives or disincentives exist for the norm to take effect, and that the operation of the norm is essentially dependent on government action or intervention. In the present dispute, the government of Tramontana does not seem to be involved at all in the setting up of this ban. Therefore this ban would not constitute a governmental measure and could not be challenged under the WTO dispute settlement understanding. If the governmental somehow sponsored or encouraged such measures the situation would be different and arguably the ban could then be considered a governmental measure.

TRADE IN SERVICES

17. **What is a List of Specific Commitments pursuant to the GATS?**

A WTO Members' List of Specific Commitment is a national list which contains the specific commitments in identified sectors or sub-sectors where that Member has decided to assume market access and national treatment commitments.

Each WTO Member is required to have a Schedule of Specific Commitments which identifies the services for which that Member guarantees market access and national treatment as well as any limitations.

TRIPS

18. **What is the scope and object of the TRIPS Agreement?**

The TRIPS Agreement refers mainly to provisions related to minimum requirements and standards for the protection of intellectual property rights.