**1.The theory of liberalized trade and history**

* **Globalization** – the closer integration of the countries and people of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge and people across borders.
* There are two main forces of globalization:
  + Technology – makes feasible
  + Liberalization of trade and foreign direct investment – makes it happen
* *However, there are also opponents of globalization, since they suppose that there is an excessive emphasis on the economic interests of transnational corporations. The social, cultural and environmental interests and the interests of developing countries are not sufficiently taken into account.*
* There exists two main theories:
  + Absolute advantage – Adam Smith
  + Comparative advantage – David Ricardo – the gains from trade via specialization.
* One more advantage of trade is peace. Peace is the natural effect of trade. Two nations who traffic with each other become reciprocally dependent; for if one has an interest in buying, the other has an interesting in selling; and thus their union is founded mutual necessities.
* **Reasons and excuses for protectionist trade policies**:
  + A reason - is to protect a domestic industry, and employment in that industry from competition arising from imported products, foreign services and suppliers.
  + Infant industry protection - The supposition that emerging domestic industries need protection against international competition until they become mature and stable. In economics, an infant industry is one that is new and in its early stages of development, and not yet capable of competing against established industry competitors.
  + Optimal tariff argument – when a country is in a position to lower the price it pays for imports by restricting its imports, national decision-makers of that country may also be tempted to adopt trade restrictive measures. If a country can reduce world demand for a product, by raising the tariff on that product, it may make economic sense to raise the tariff, and thus restrict trade, because this will lead to the cutting of the world price of the product concerned. But, to do so, it must be a big, industrialized country. Nevertheless, there might be replies from the other countries.
  + Strategic trade policy - Governments can use trade policy instruments to shift profits from foreign to domestically owned firms, thereby raising national economic welfare at the expense of other countries.
  + Trade-restrictive measures, and in particular, customs duties, have also been and still are imposed to generate *revenue for government*. Taxing trade is an easy method to collect revenue.
  + Public morals, public health, consumer safety, a clean environment and cultural identity.
* To ensure economic globalization and trade liberalization the followings should be gulfilled:
  + Better governance
  + Reduction of trade barriers
  + More development aid
  + Better international cooperation
* **To realize all the gains** of trade there has to be a legal system and political order.
* **There are basically four related reasons why there is a need for international trade rules:**
* **The origins of the WTO** lie in the General Agreement on Tariffs and Trade of 1947, commonly referred to as the GATT 1947.
  + Countries must be restrained from adopting trade-restrictive measures both in their own interest and in that of the world economy.
  + The need of the security and predictability for traders and investors.
  + National governments alone simply cannot cope with the challenges presented by economic globalization.
  + The need to achieve a greater measure of equity in international economic relations.
* Article XVI:1 of the WTO agreement:
  + Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947.
* The history of GATT:
  + The WTO's predecessor, the GATT, was established on a provisional basis after the Second World War in the wake of other new multilateral institutions dedicated to international economic cooperation - notably the "Bretton Woods" institutions now known as the World Bank and the International Monetary Fund.

The original 23 GATT countries were among over 50 which agreed a draft Charter for an International Trade Organization (ITO) - a new specialised agency of the United Nations. The Charter was intended to provide not only world trade disciplines but also contained rules relating to employment, commodity agreements, restrictive business practices, international investment and services.

In an effort to give an early boost to trade liberalization after the Second World War - and to begin to correct the large overhang of protectionist measures which remained in place from the early 1930s - tariff negotiations were opened among the 23 founding GATT "contracting parties" in 1946. This first round of negotiations resulted in 45,000 tariff concessions affecting $10 billion - or about one-fifth - of world trade. It was also agreed that the value of these concessions should be protected by early - and largely "provisional" - acceptance of some of the trade rules in the draft ITO Charter. The tariff concessions and rules together became known as the General Agreement on Tariffs and Trade and entered into force in January 1948.

* + The first five negotiating rounds (Geneva 1947, Annecy 1949, Torquay 1951, Geneva 1956 and Dillon 1960-1) focused on **the reduction of tariffs**. Kennedy Round (1964-7) increasingly **focused on non-tariff barriers** (this round produced very few results on non-tariff barriers). The Tokyo Round (1973-9) produced better results. The Tokyo Round agreements were plulateral rather than multilateral, in nature and did not bind Contracting Parties. Uruguay Round (1986) was the 8th round of multilateral trade negotiations (MTN) conducted within the framework of the General Agreement on Tariffs and Trade (GATT), spanning from 1986 to 1994 and embracing 123 countries as "contracting parties". The Round transformed the GATT into the World Trade Organization. The Round came into effect in 1995 and has been implemented over the period to 2000 (2004 in the case of developing country contracting parties) under the administrative direction of the newly created World Trade Organization (WTO). The Uruguay Round Agreement on Agriculture, administered by the WTO, brings agricultural trade more fully under the GATT. It provides for converting quantitative restrictions to tariffs and for a phased reduction of tariffs. The agreement also imposes rules and disciplines on agricultural export subsidies, domestic subsidies, and sanitary and phytosanitary (SPS) measures.

**2. sources, members, institutions and decision-making**

* The principal source of WTO law is the ***Marrakesh Agreement Establishing World Trade Organization*** (16 articles and other agreements included in the four annexes (1, 2 and 3 annexes are binding, the 4 is plulateral)), concluded on 15 April 1994 and in force since 1 January 1995.
* Other sources of WTO:
  + WTO dispute settlement reports
  + Acts of WTO body reports
  + Agreements concluded in the context of the WTO
  + Customary international law
  + General principles of law
  + Other international agreements
  + Subsequent practice of WTO Members
  + Teachings of the most highly qualified publicists
  + The negotiating history.
* The GATT 1994 in the Annex 1A sets out the basic rules for trade in goods.
* There is also the Marrakesh Protocol, which contains the National Schedule of Concessions of all WTO Members. In these national schedules, the commitments to eliminate or reduce customs duties applicable to trade in goods are recorded. The Protocol is over 25000 pages long.
* Other multilateral agreements: (page 47)
  + The Agreement on Agriculture
  + The Agreement on the Application of Sanitary and Phytosanitary Measures
  + The Agreement on Textiles and Clothing
  + The Agreement on Technical Barriers to Trade
  + The Agreement on Trade-Related Investment Measures (The TRIMS Agreement)
  + The anti-dumping agreement
  + The Customs Valuation Agreement
  + The Agreement on Preshipment Inspection
  + The Agreement on Rules of Origin
  + The Agreement on Licensing Procedures
  + The Agreement on Subsidies and Countervailing Measures
  + The Agreement on Safeguards
* In the event of conflict between a provision of the GATT 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the WTO, the provisions of the other agreements shall prevail to the extent of the conflict.
* The GATS covers all measures of Members affecting trade in services. Trade in services is defined in Article I:2 of the GATS as the supply of a service:
  + From the territory of one Member into the territory of any other Member (cross-border supply)
  + In the territory of one Member to the service consumer of any other Member (consumption abroad)
  + By a service of one Member, through a commercial presence in the territory of any other Member (supply through a commercial presence)
  + By a service supplier of one Member, through the presence of natural persons of a Member in the territory of any Member (supply through the presence of natural persons).
* ‘Services’ include any service in any sector except services supplied in the exercise of governmental authority. The supply of services includes the production, distribution, marketing, sale and delivery of a service.
* Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is largely determined by the idea, design or the invention incorporated by Members. Intellectual properties:
  + Copyright and related rights, trademarks, geographical indication, industrial designs, patents, layout-designs (topographies) of integrated circuits and undisclosed information, including trade secrets.
  + Furthermore, TRIPS requires WTO Members to ensure that enforcement procedures and remedies are available to permit effective action against any act of infringement of the intellectual property rights referred to above, including civil and administrative procedures and remedies, provisional measures and criminal procedures.
* Understanding on Rules and Procedures for the Settlement of Disputes (DSU) – provides for rules on the coverage scope of the dispute settlement system, its administration, its objectives and its operation.
* **The ultimate objectives of the WTO are**:
  + The increase of standards of living
  + The attainment of full employment
  + The growth of real income and effective demand
  + The expansion of production of and trade in, goods and services
* However, it is clear from the Preamble that in pursuing these objectives the WTO must take into account the need for preservation of the environment and the needs of developing countries.
* **There are two main instruments** to achieve the objectives given above:
  + The reduction of tariff barriers and other barriers to trade
  + The elimination of discriminatory treatment in international trade relations
* **Functions of the WTO**:
  + The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.
  + The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
  + The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the “Dispute Settlement Understanding” or “DSU”) in Annex 2 to this Agreement. (**369 disputes have been brought to the WTO system since 1 January 1995**)
  + The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the “TPRM”) provided for in Annex 3 to this Agreement.
    - The purpose of TPRM is:
      * To achieve greater transparency in, and understanding of, the trade policies and practices of Members;
      * To contribute, in this way, to improved adherence by all Members to rules, disciplines and commitments made under the WTO agreements.
    - Under the TPRM, the trade policies and practices of all Members are subject to *periodic review*. The frequency of review is determined by reference to each Member’s share of world trade. (the largest more frequently) There are 193 reviews since 1 January 1995.
    - Plus, the Director-General presents an *annual report* setting out the major activities of the WTO and highlight significant policy issues affecting the trading system.
  + With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.
    - Mainly with IMF and World Bank, also with World Intellectual Property Organization (WIPO), United Nations Conference on Trade and development (UNCTAD), International Trade Centre (ITC).
    - The WTO, the IMF and the World Bank now cooperate quite closely on a day-to-day basis, in particular in the area of technical assistance to developing countries.
  + *And in addition to render technical assistance to developing-country Members, to allow the latter to integrate into the world trading system.*
    - * General seminars on the multilateral trading system and the WTO;
      * Technical seminars and workshops focusing on a particular area of trade law or policy; and
      * Technical missions to assist developing-country Members on specific tasks related to the implementation of obligations under the WTO agreements, to provide support to mainstream trade into national plans for economic development and to assist in their strategies for poverty reduction.
* 164 members.
* Both the European Communities and all its members are full members of WTO.
* **Accession.** The WTO agreement initially provided two ways of becoming a WTO Member:
  + The first, ‘original membership’, was provided for in Article XI of the WTO Agreement, by: a) accepting the terms of the WTO Agreement and the Multilateral Trade Agreements; b) making concessions and commitments for both trade in goods and services. This way of becoming a TWO Member was only available until March 1997.
  + The second way of becoming a WTO Member is through accession. The procedure for accession is set out in Article XII of the WTO Agreement:
    - First phase – ‘tell us about yourself’ – the State or customs territory applying for membership has to report on all aspects of its trade and economic policies that are relevant to the obligations under the WTO agreement, and to submit memorandum on these policies to the WTO.
    - Second phase – ‘work with us individually what you have to offer’ – parallel bilateral negotiations on market access begin between the candidate for membership and individual Members. But it should be recalled that the new Member’s market access commitments and concessions will eventually apply equally to all WTO Members as a result of the MFN treatment obligations.
    - The third phase – ‘let’s draft membership terms’ – the working party finalizes the terms of accession which are set out in a report, a draft membership treaty and lists of the market access commitments and concessions of the candidate for membership. This package is submitted to the Ministerial Conference or the General Council.
    - The fourth phase – ‘decision’ – the Ministerial Conference or the General Council decides by consensus or, if consensus cannot be achieved, by two-thirds majority of WTO Members, on the application for membership. If the results are positive, the candidate must deposit the protocol of accession and after 30 day this State is a new member of WTO.
* Article XVI of the WTO Agreement:
  + Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.
* A waiver of obligations – when a Member finds it difficult, if not impossible, to meet an obligation under one of the WTO agreements, that Member can request the WTO to waive the ‘problematic’ obligation. Pursuant to Article IX:3 of the Agreement, ‘exceptional circumstances’ may justify such a waiver. Any waiver granted for a period of more than one year shall be reviewed annually.
* ‘Non-application clause’ – for political or other reasons, a Member may not want the WTO rules to apply to its trade relations with another Member. The decision to not apply must be notified to the ministerial Conference before the latter decides on the accession.
* Any Member may, at any time, unilaterally withdraw from the WTO. A withdrawal only takes effect, however, upon the expiration of six months from the notification of the decision to withdraw. When a Member withdraws from the WTO, it cannot remain a party to the Multilateral Trade Agreements.

**3. STRUCTURE**. At the highest level, the Ministerial Conference, at the second level, the General Council, DSB and Trade policy Review Body, and at lower levels, specialized councils, committees and working parties. Furthermore, this structure includes quasi-judicial (ad hoc panels and appellate body) and other non-political bodies, as well as the WTO Secretariat.

* **Ministerial Conference** - The topmost decision-making body of the WTO is the Ministerial Conference, which usually meets every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements.
  + Adopting authoritative interpretations of the WTO agreements
  + Granting waivers
  + Adopting amendments
  + Making decisions on accession
  + Appointing the Director-General and adopting staff regulations.
* **General Council** – The General Council is the WTO’s highest-level decision-making body in Geneva, meeting regularly to carry out the functions of the WTO. It has representatives (usually ambassadors or equivalent) from all member governments and has the authority to act on behalf of the ministerial conference which only meets about every two years.
* **There are three specialized councils:**
  + THE council for trade in Goods (CTG)
  + The Council for trade in Services (CTS)
  + The Council for TRIPS
* **The Main duties of the WTO Secretariat:**
  + To provide technical and professional support for the various WTO bodies
  + To provide technical assistance to developing-country Members
  + To monitor and analyze developments in world trade
  + To advise governments of countries wishing to become Members of the WTO
  + To provide information to the public and the media
  + To provide admin. support and legal assistance for the WTO dispute settlement panels.
* **Decision-making in the WTO**.
* Decision-making by consensus. No voting takes place. Decision-making by consensus gives all Members veto power.
* Decision-making by majority voting.
* Special procedures:
  + Decision-making by the DSB shall be done by consensus.
  + Accessions – 2/3
  + Waivers – ¾
  + Amendments – consensus, if not reached, and then a two-third
  + Annual budget and financial regulations – by a two-thirds majority comprising more than half of the Members of the WTO.
* NGO involvement into the WTO:
  + Pros:
    - Will enhance WTO decision-making process
    - Will increase the legitimacy of the WTO
    - The WTO would hear about important issues which are international in nature
  + Cons:
    - Will make negotiations and decision-making even more difficult.
* ‘External transparency’ – the issue of the participation of civil society/ NGOs in the work of the WTO.
* The General Council adopted a set of Guidelines regarding the relations of the WTO with non-govenrmental organizations.

**4. The DSU**

* Each dispute settlement process must start with consultations (or attempt to have consultations) between the parties to the dispute. In 16 percent of disputes, it has been possible to resolve the dispute amicably as the parties succeeded in reaching a solution acceptable to all. In 8 percent, the dispute was otherwise amicably resolved without resort to adjudication.
* Methods of WTO dispute settlement:
  + Consultations or negotiations
  + Adjudication by panels and the Appellate Body
  + Arbitration
  + Good offices, conciliation and mediation (may continue while the panel process proceeds)
* WTO jurisdiction is:
  + Compulsory, it compulsory in nature
  + Exclusive, once has been chosen, it excludes of any other system
  + Contentious, the WTO dispute settlement system is called upon to clarify WTO law only in the context of an actual dispute.
* Types of complaint:
  + ‘violation’ complaint
  + ‘non-violation’ complaint
  + ‘situation’ complaint
    - In the case of a ‘non-violation’ or a ‘situation’ complaint, the complainant must demonstrate that there is nullification or impairment of a benefit or that the achievement of an objective is impeded. There was no success to date.
* Amicus curiae briefs (‘friend of the court’) – written briefs by individuals, companies or organizations. ***Australia – Salmon***, where the Panel accepted and considered a letter from ‘Concerned Fishermen and Processors’ in South Australia. In ***EC – Sardines***, Morocco was the first WTO Member to file amicus curiae brief.
* ‘Indirect access’ for private parties – in ***Japan – Film***, it was Kodak which masterminded and actively supported the US claims against Japan. In EC law, this possibility is provided for under the Trade Barriers Regulation; in US law, under Section 301 of the 1974 Trade Act.
* Dispute Settlement Body – administers the WTO dispute settlement system (more political in nature). DSB must always take a decision by consensus. In taking decision regarding:
  + The decision on the establishment of panels
  + The adoption of panel and Appellate Body Reports and
  + The authorization of suspension of concession and other obligations,
    - The consensus requirement is in fact a ‘reserve’ or ‘negative’ consensus requirement.
* Dispute Settlement Panels are not standing bodies, but ad hoc. The complainant must request the DSB to establish a panel. Panel request must be made in writing and must:
  + Indicate whether consultations were held
  + Identify the specific measures at issue
  + Provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.
* Panel usually consists of 3 members. Once a panel is established by the DSB, the parties to the dispute will try to reach an agreement on the composition of the panel. The Secretariat shall propose nominations for the panel to the parties to the dispute. If the parties are unable to agree within 20 days of its establishment by the DSB, either party may request the Director-General of the WTO to determine the composition of the panel.
* Terms of reference of a panel – a panel may consider only those claims that it has authority to consider under its terms of reference. Therefore, a panel is bound by its terms of reference. Parties can agree on special terms of reference (occurs barely), but if fails within 20 days, the standard terms of reference is used.
* The function of panel is ‘to make an objective assessment of the facts before it’.
* Panels are restricted to the claims falling within their terms of reference but they are not restricted to the legal arguments and reasoning submitted or developed by the parties.
* A panel submits its findings and conclusions on the WTO consistency of the measure at issue in the form of a written report to the DSB. This report typically includes a section on the following:
  + Procedural aspects of the dispute
  + Factual aspects of the dispute
  + The claims of parties
  + Summary of the arguments of the parties and third parties
  + The interim review
  + The panel’s findings
  + The panel’s conclusions.
* A panel report must, at a minimum, set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.
* Where a panel concludes that a Member’s measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring that measure into conformity with that agreement. The recommendations and rulings of a panel are not legally binding by themselves. They become legally binding only when they are adopted by the DSB and thus have become the recommendations and rulings of the DSB.
* Panel reports are not circulated until all three (English, French and Spanish) language versions are available; afterwards they are available to the public.
* The Appellate Body is standing, permanent body. (was created in February 1995)
* The Appellate Body is composed of 7 persons. They are appointed by DSB for 4 year term, with possibility to be re-appointed once. The DSB takes the decision on the appointment of Appellate Body Members by consensus.
* The Appellate Body hears and decides appeals in division of three Members. Members are selected on the basis of rotation, taking into account the principles of random selection and unpredictability and opportunity for all Members to serve, regardless of their nationality. Unlike in the process for panelist selection, the nationality of Appellate Body Members is irrelevant. The Members of a division select their Presiding member, who coordinates the overall conduct of the appellate proceedings.
* The decision is taken by consensus. However, if this attempt is failed, the decision will be taken by majority voting. Individual Members may express dissenting opinions in the report, which shall be anonymous. (To date, only twice, in ***EC – Asbestos, and EC – Tariff Preferences***, did and Appellate Body Member expresses an individual opinion in the Appellate Body Report).
* Of all panel reports circulated since 1995, 68 percent have been appealed to date.
* An appeal shall be limited to issue of law in the panel report and legal interpretations developed by the panel. A Panel’s weighting and assessment is not subject to appellate review.
* The Appellate Body may *uphold, modify and reverse* the legal findings and conclusions of the panel.
* The stages of the WTO dispute settlement:
  + Consultations
  + Panel proceedings
  + Appellate review proceedings
  + Implementation and enforcement of the recommendations and rulings of the panel and/or Appellate Body, as adopted by the DSB.
* All WTO Members may request consultations with other Member. A request for consultations, giving the reason for the request, must be submitted in writing and must identify:
  + The measure at issue; and
  + The legal basis for the complaint.
* When consultations are unsuccessful, the complainant may request the establishment of a panel. The DSB will usually establish the panel by reverse consensus at the meeting following that at which the panel request first appeared on the DSB’s agenda.
* The working procedure might be made flexible with the consent of the parties.
* Each of the parties to a dispute submits two written submissions to the panel:
  + A ‘first written submission’(the parties present the facts of the case as they see them and their arguments relating to the alleged inconsistencies with WTO law); and
  + A ‘rebuttal submission’ (they reply to the arguments and evidence submitted by the other party).
* Panel may consult with the individual experts, international organizations and expert review group.
* Having completed a draft of the descriptive (facts and arguments) sections of its report, the panel issues this draft to the parties for their comments. Following the expiration of the time period for comments, the panel subsequently issues an interim report to the parties, including both the descriptive sections and the panel’s findings and conclusions.
* The Appellate Body also has its working procedure which is set out in the Working Procedures for Appellate Review.
* Appellate review proceedings commence with a party’s notification in writing to the DSB of its decision to appeal and the simultaneous filing of a notice of appeal with the Appellate Body. The notice of appeal must adequately identify the findings or legal interpretations pf the panel which are being appealed as erroneous.
* A Member may also withdraw an appeal at any stage, which will lead to the termination of Appellate Review.
* As for the implementation and enforcement are concerned, if parties did not reach an agreement, it must be a ‘reasonable period of time for implementation’. To identify the reasonable time, the arbitration must be held.
* The member concerned must provide the DSB with a status report on its progress in the implementation of the recommendations or rulings after six months of establishment of the reasonable time of period for implementation.
* If the respondent failed to implement the recommendations and ruling adopted by the DSB correctly within the reasonable period of time agreed by the parties or determined by an arbitrator, the respondent will, at the request of the complainant, enter into negotiations with the latter party in order to come to an agreement on mutually acceptable compensation. If satisfactory compensation does not agreed, the complainant may request authorization from the DSB to suspend the application of concessions or other obligations to the respondent, under the covered agreement. In other words, it may seek authorization to retaliate, which is decided by DSB using reverse consensus.

**5.Basic WTO principles: Most Favored Nation under the GATT**

* There are two main principles of non-discrimination in WTO law:
  + The most-favored nation treatment obligation
  + National treatment obligation
* The MFN treatment obligation prohibits a country from discriminating between other countries; the national treatment obligation prohibits a country from discriminating against other countries.
* Article I:1 of the GATT 1994 sets out a three-tier test of consistency. Three questions must be answered to determine whether there is a violation of the MFN treatment obligation of Article I:1:
  + Whether the measure at issue confers a trade ‘advantage’ of the kind covered by Article I:1;
  + Whether the products concerned are ‘like products’; and
  + Whether the advantage at issue is granted ‘immediately and unconditionally’ to all like products concerned.
* The MFN treatment obligation requires that any advantage granted by a Member to any product from or for another country be immediately and unconditionally granted to all like products from or for all other Members.
* The MFN treatment obligation concerns any advantages granted by any Member with respect to:
  + Customs duties, other charges on imports and exports and other customs matters;
  + Internal taxes; and
  + Internal regulations affecting the sale, distribution and use of products.
* If a Member grants an advantage to a non-Member, Article I:1 obliges the Member to grant that advantage also to all WTO Members.
* It is only between ‘like products’ that the MFN treatment obligation applies and discrimination within the meaning of Article I:1 of the GATT 1994 may occur.
* ***Article II:1 of the GATS*** prohibits discrimination between like services and service suppliers from different countries.
* Each member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.
* To identify whether or not a measure violates the MFN treatment of Article II:1 of the GATS the three-tier test must be used:
  + Whether the measure at issue is a measure covered by the GATS
    - To be covered by GATS the following criteria shall be met:
      * A measure by a Member
      * A measure affecting trade in service
        + Whether there is ‘trade in services’ in the sense of Article I:2

From the territory of one Member into the territory of any other Member (cross-border supply)

In the territory of one Member to the service consumer of any other Member (consumption abroad)

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

By a service supplier of one Member, through the presence of natural persons of a Member in the territory of any Member (supply through the presence of natural persons).

* + - * + Whether the measure in issue ‘affects’ such trade in services within the meaning of Article I:1
  + Whether the service or service suppliers concerned are ‘like services’ or ‘like service suppliers’; and
    - ‘likeliness’ is based - among other relevant factors – on:
      * The characterization of the service or the service supplier
      * The classification and description of the service in the United Nations Central Product Classification (CPC) system; and
      * Consumer habits and preferences regarding the service or the eservice supplier.
  + Whether less favorable treatment is accorded to the services or services or service suppliers of a Member.
* The two suppliers that supply a like service are not necessarily ‘like service suppliers’. Factors such as the size of the service suppliers, their assets, their use of technology and the nature and extent of their expertise must all be taken into account.
* The WTO law, in particular, GATT 1994, does not prohibit the imposition of customs duties.
* The basic principles and rules governing tariff negotiations are:
  + The principle of reciprocity and mutual advantage (when a Member requests another Member to reduce its customs duties on certain products, it must be ready to reduce its own customs duties on products which the other Member exports or wish to export).
  + The most-favored-nation treatment obligation (any reduction will be granted to other Members).
* Ways of tariff negotiations:
  + On a selective product-by-product basis (through bilateral or plurilateral negotiations)
  + By the application of such multilateral procedures as may be accepted by the Members concerned.
    - There are also:
      * Linear reduction approach (Members will reduce the same percent)
      * Harmonization formula approach (the highest percentage will be reduced and harmonized with others)

**6. Cases:**

* In ***Spain- Unroasted Coffee*** case , the Panel has to decide whether various types of unroasted coffee (‘Colombian mild’, ‘other mild’, ‘unwashed Arabica’, ‘Robusta’ and ‘other’) were ‘like products’ within the meaning of Article I:1. Spain did not apply custom duties on ‘Columbia mild’ and ‘other mild’; while it imposed a seven percent customs duty on the other three types of unroasted coffee. Brazil, which exported mainly ‘unwashed Arabica’, claimed that the Spanish tariff regime was inconsistent with Article I:1. In examining whether the various types of unroasted coffee were ‘like products’ to which the MFN treatment obligation applied, the Panel considered:
  + the characteristics of the products;
  + their end-use and
  + Tariff regime of other members.
* The panel stated as follows: “The Panel examined all arguments that had been advanced during the proceedings for the justification of a different tariff treatment for various groups and types of unroasted coffee. It noted that these arguments mainly related to organoleptic differences resulting from geographical factors, cultivation methods, the processing of the bean, and the generic factor. The Panel did not consider that such differences were sufficient reason to allow for a different tariff treatment. It pointed out that it was not unusual in the case of agricultural products that the taste and aroma of the end product would differ because of one or several of the above mentioned factors. The Panel furthermore found relevant to its examination of the matter that unroasted coffee was mainly, if not exclusively, sold in the form of blends, combining various types of coffee, and that coffee in its end use, was universally regarded as a well-defined and single product intended for drinking. The Panel noted that no other contracting party applied its tariff regime in respect of unroasted, non-decaffeinated coffee in such a way that different types of coffee were subject to different tariff rates. In the light of the foregoing, the Panel concluded that unroasted, non-decaffeinated coffee beans listed in the Spanish Customs Tariff…should be considered as “ like products” within the meaning of Article I:1”.
* ***EC – Bananas III*** (first) DS 27 –
  + Complaints by Ecuador, Guatemala, Honduras, Mexico and the United States.
  + The complainants in this case other than Ecuador had requested consultations with the European Communities on the same issue on 28 September 1995 (DS16). After Ecuador’s accession to the WTO, the current complainants again requested consultations with the European Communities on 5 February 1996. The complainants alleged that the European Communities’ regime for importation, sale and distribution of bananas is inconsistent with Articles I, II, III, X, XI and XIII of the GATT 1994 as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the TRIMs Agreement and the GATS.
  + The panel report was circulated to Members on 22 May 1997. The panel found that the European Communities’ banana import regime and the licensing procedures for the importation of bananas in this regime are inconsistent with the GATT 1994. The panel further found that the Lomé waiver waives the inconsistency with Article XIII of the GATT 1994, but found no inconsistencies arising from the licensing system.
  + On 11 June 1997, the European Communities notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The Appellate Body report was circulated to Members on 9 September 1997. The Appellate Body mostly upheld the panel’s findings, but reversed the panel’s findings that the inconsistency with Article XIII of the GATT 1994 is waived by the Lomé waiver, and that certain aspects of the licensing regime violated Article X of GATT 1994 and the Import Licensing Agreement.
* ***Indonesia – Autos*** DS54 –
  + In accordance with Article 9.1 of the DSU, the DSB decided that a single panel will examine (for EC, Japan and US claims) this dispute together with WT/DS54, WT/DS55 and WT/DS64. India and Korea reserved their third party rights.
  + "The 1993 Programme" that provided import duty reductions or exemptions on imports of automotive parts based on the local content percent;
* ***Canada – Autos*** DS139, DS142 –
  + Complainants: Japan and EC
  + The measure maintained by Canada accords the import duty exemption to certain motor vehicles entering Canada from certain countries. These privileged motor vehicles are imported by a limited number of designated manufacturers who are required to meet certain performance conditions.
  + In practice, this measure does not accord the same import duty exemption immediately and unconditionally to like motor vehicles of *all* other Members, as required under Article I:1 of the GATT 1994. The advantage of the import duty exemption is accorded to some motor vehicles originating in certain countries without being accorded to like motor vehicles from *all* other Members. Accordingly, we find that this measure is not consistent with Canada's obligations under Article I:1 of the GATT 1994.
* Mexico – Telecoms, DS204 –
  + the interpretation made by the Panel regarding cross‐border services on elecommunications is rather important. In order to provide telecommunications services, it is not necessary for a supplier of these services to have a physical presence in the territory of a WTO member that has made commitments under this sector. As previously mentioned, a phone call originated in the country of one WTO member and terminated in the territory of another WTO member is deemed to be a cross‐border service.

**7. Basic WTO Principles II: National Treatment**

* Article III of the GATT 1994 prohibits discrimination against imported products.
* Generally speaking, it prohibits Members from treating imported products less favorable than like domestic products once the imported product has entered the domestic market.
* The purpose of Article III, as defined in ***Korea – Alcoholic Beverages***, is:
  + Avoid protectionism, require equality of competitive conditions and protect expectations of equal competitive relationships.
* Article III only applies to internal measures, not to border measures.
* Article III:2 distinguish two non-discrimination obligations:
  + Relating to internal taxation of ‘like products’;
  + Relating to internal taxation of ‘directly competitive or substitutable products’.
* **National requirement test for internal taxation on like products**
  + The two-tier test for the consistency of internal taxation with Article III:2, first sentence, requires the examination of:
    - Whether the imported and domestic products are like products; and
      * It is identified on a case by-case basis. The basic approach is to determine:
        + The product’s end-use in a given market
        + Consumers’ tastes and habits
        + The product’s properties, nature and quality.

However, the Appellate Body stated in ***Japan –Alcoholic Beverages II*** that:

***‘panels should also apply other relevant criteria to reach its best judgement’***

* + - Whether the imported products are taxed in excess of the domestic products.
* **National treatment test for internal taxation on directly competitive or substitutable products**
  + Internal taxes or internal charges should not be applied to imported products so as to afford protection to domestic production.
  + Article III:2, second sentence, of the GATT 1994 requires an examination of:
    - Whether the imported products are directly competitive or substitutable;
      * This may be identified by the following criteria:
        + Common characteristics, end-uses and channels of distribution and prices, current consumer preferences, competitive conditions in the relevant market.
    - Whether these products are not similarly taxed; and
      * The taxe differential has to be more than de minimis to support a conclusion that the internal tax imposed on imported products are GATT-inconsistent.
    - Whether the dissimilar taxation is applied so as to afford protection to domestic production.
* **Article III:4 – National treatment test *for internal regulation***:
  + The three-tier test is used:
    - The measure at issue is a law, regulation or requirement covered by Article III:4
    - The imported and domestic products are like products; and
    - The imported products are accorded less favorable treatment.

**As for the National treatment obligation in the GATS is concerned**, national treatment obligation under GATS does not have general application to all measures affecting service, that’s why applies only to the extent that WTO Members have explicitly committed themselves to grant ‘national treatment’ in respect of specific service sectors. Members set out such commitments in the national treatment column of their ‘Schedule of Specific Commitments’.

* After first having established that a national treatment commitment was made in respect of the relevant service sector, the three0tier test of consistency under Article XVII of the GATS requires the examination of:
  + Whether the measure at issue is a measure by a Member affecting trade in services;
    - Whether there is ‘trade in services’ in the sense of Article I:2
    - Whether the measure in issue ‘affects’ such trade in services within the meaning of Article I:1
      * This Agreement applies to measures by Members affecting trade in services.
  + Whether the foreign and domestic services or service suppliers are ‘like service’ or ‘like service suppliers’; and
    - * The characterization of the service or the service supplier
      * The classification and description of the service in the United Nations Central Product Classification (CPC) system; and
      * Consumer habits and preferences regarding the service or the eservice supplier.
  + Whether the foreign services or service suppliers are granted treatment no less favorable.

**8.Cases:**

* ***Korea – Various Measures on Beef:***
  + The dispute measure was a dual retail distribution system for the sale of beef under which imported beef was, inter alia, to be sold in specialist stores selling only imported beef or in separate sections of supermarkets.
* ***Japan – Alcoholic Beverages II:***
  + Complainant: European Communities
  + The disputed measure was tax legislation that provided for higher taxes on vodka (domestic and imported) than on shochu (domestic and imported).
  + The complainants claimed that spirits exported to Japan were discriminated against under the Japanese liquor tax system which, in their view, levies a substantially lower tax on “shochu” than on whisky, cognac and white spirits.
  + The report of the panel, which found the Japanese tax system to be inconsistent with GATT Article III:2, was circulated to Members on 11 July 1996.
* ***EC – Bananas III***:
  + The Appellate Body agreed with the Panel that the EC procedures and requirements for the distribution of licenses for importing bananas from non-traditional ACP suppliers were inconsistent with Art. III:4.
* ***EC – Asbestos:***
  + Complainant: Canada
  + On 28 May 1998, Canada requested consultations with the EC in respect of measures imposed by France, in particular Decree of 24 December 1996, with respect to the prohibition of asbestos and products containing asbestos, including a ban on imports of such goods. Canada alleged that these measures violate Articles 2, 3 and 5 of the SPS Agreement, Article 2 of the TBT Agreement, and Articles III, XI and XIII of GATT 1994. Canada also alleged nullification and impairment of benefits accruing to it under the various agreements cited.
  + Having found insufficient the Panel's likeness analysis between asbestos and PCG fibres and between cement-based products containing asbestos and those containing PCG fibres, the Appellate Body reversed the Panel's findings that the products at issue were like and that the measure was inconsistent with Art. III:4. (The Appellate Body emphasized a competitive relationship between products as an important factor in determining likeness in the context of Art. III:4 (c.f. separate concurring opinion by one Appellate Body Member.) Then, having completed the like product analysis, the Appellate Body concluded that Canada had failed to demonstrate the likeness between either set of products, and, thus, to prove that the measure was inconsistent with Art. III:4.

**9. Basic WTO Principles III: Market Access**

* There are two main categories of barriers to market access:
  + Tariff barriers (customs duties or tariffs); and
  + Nontariff barriers (quantitative restrictions, such as quotas, and other non-tariff barriers).
* **A customs duty, or tariff**, is a financial charge, in the form of tax, imposed on products at the time of, and/or because of, their importation.
* The purpose of customs duties or tariffs:
  + Customs duties are a source of revenue for governments. (this is less important for industrialized countries)
  + Customs duties are used to protect domestic industries. The customs duties imposed on imported products make the like domestic products relatively cheaper, giving them a price advantage and thus some degree of protection from import competition.
  + Customs duties can be used to promote a rational allocation of scarce foreign exchange.
* Tariff concession, or tariff binding, is a commitment not to raise the customs duty on a certain product above an agreed level.
* The tariff concession or binding of a Member are set out in that member’s Schedule of Concessions. Each member of the WTO has a schedule, except when the Member is part of customs union, in which case the Member has a common schedule with the other members of the customs union.
* Article II:1(b), first sentence, provides that products described in Part 1 of the Schedule of any Member shall, on importation, be exempt from ordinary customs duties in excess of those set out in the Schedule.
* As the Appellate Body noted in ***Argentina – Textiles and Apparel***:
  + *‘A tariff binding in member’s Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to impose a duty that is less than that provided for in its Schedule’.*
* A Member may, by negotiation and agreement modify or withdraw a concession included in the appropriate schedule annexed to this Agreement, only with:
  + The Members that hold so-called ‘Initial Negotiating Rights’ (Members with which the concession was bilaterally negotiated, initially);
  + Any other member that has a ‘principal supplying interest’
* As for the other duties and charges imposed on products subject to a tariff binding are concerned, Article II:1 (b) requires Members to record in their Schedules all these other duties and charges. And these other charges and duties must not exceed the recorded level in the Schedule. As an exception might be the situations where the exceeded amount is commensurate with the cost of the service rendered (but must not exceed approximate cost of service).
* A Member also can modify or withdraw the market access commitments for services in the Schedule. To that end:
  + Three years must be elapsed from the date on which the commitment entered into force;
  + Must notify to the Council for Trade in Services;
  + To negotiate with any affecting Member as to compensatory adjustment, but if agreement was not reached; the arbitration may be conducted after the request of the affecting Member. However, if Arbitration does not requested, the Member free to modify and withdraw the market access commitments in the Schedule.

***Cases:***

* ***EC - Computer Equipment:***
  + Complainant – United States
  + These are in respect of the alleged reclassification by the European Communities, for tariff purposes, of certain Local Area Network (LAN) adapter equipment and personal computers with multimedia capability. The US alleged that these measures violate Article II of GATT 1994.
  + The Panel found that the action of EC violated, however the Appellate Body reversed the decision.
* ***Argentina – Textiles:***
  + Complainant – United States
  + The US requested consultations with Argentina concerning the imposition of specific duties on these items in excess of the bound rate and other measures by Argentina.
  + he Panel found that the minimum specific duties imposed by Argentina on textiles and apparel are inconsistent with the requirements of Article II of GATT, and that the statistical tax of three per cent ad valorem imposed by Argentina on imports is inconsistent with the requirements of Article VIII of GATT.
  + The Appellate Body upheld the Panel’s decision
* ***US – Gambling:***
  + Complainants – Antiqua and Barbuda
  + Antigua and Barbuda requested consultations with the US regarding measures applied by central, regional and local authorities in the US which affect the cross-border supply of gambling and betting services. Antigua and Barbuda considered that the cumulative impact of the US measures is to prevent the supply of gambling and betting services from another WTO Member to the United States on a cross-border basis.
  + According to Antigua and Barbuda, the measures at issue may be inconsistent with the US obligations under the GATS, and in particular Articles II, VI, VIII, XI, XVI and XVII thereof, and the US Schedule of Specific Commitments annexed to the GATS.
  + The Appellate Body upheld the Panel’s finding that the United States acts inconsistently with Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2 by maintaining certain limitations on market access not specified in its Schedule.
* ***China – Electronic Payment Services:***
  + Complainant: United States
  + China failed to comply with its commitments under the Schedule.

**10.UNDERSTANDING THE WTO: DEVELOPING COUNTRIES**

* The WTO agreements contain special provisions on developing countries
* The Committee on Trade and Development is the main body focusing on work in this area in the WTO, with some others dealing with specific topics such as trade and debt, and technology transfer
* The WTO Secretariat provides technical assistance (mainly training of various kinds) for developing countries.

In the agreements: more time, better terms

The WTO agreements include numerous provisions giving developing and least-developed countries special rights or extra leniency — “special and differential treatment”. Among these are provisions that allow developed countries to treat developing countries more favourably than other WTO members.

The General Agreement on Tariffs and Trade (GATT, which deals with trade in goods) has a special section (Part 4) on Trade and Development which includes provisions on the concept of non-reciprocity in trade negotiations between developed and developing countries — when developed countries grant trade concessions to developing countries they should not expect the developing countries to make matching offers in return.

Both GATT and the General Agreement on Trade in Services (GATS) allow developing countries some preferential treatment.

Other measures concerning developing countries in the WTO agreements include:

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

Legal assistance: a Secretariat service

The WTO Secretariat has special legal advisers for assisting developing countries in any WTO dispute and for giving them legal counsel. The service is offered by the WTO’s Training and Technical Cooperation Institute. Developing countries regularly make use of it.

Furthermore, in 2001, 32 WTO governments set up an Advisory Centre on WTO law. Its members consist of countries contributing to the funding, and those receiving legal advice. All least-developed countries are automatically eligible for advice. Other developing countries and transition economies have to be fee-paying members in order to receive advice.

Least-developed countries: special focus

The least-developed countries receive extra attention in the WTO. All the WTO agreements recognize that they must benefit from the greatest possible flexibility, and better-off members must make extra efforts to lower import barriers on least-developed countries’ exports.

Since the Uruguay Round agreements were signed in 1994, several decisions in favour of least-developed countries have been taken.

Meeting in Singapore in 1996, WTO ministers agreed on a “Plan of Action for Least-Developed Countries”. This included technical assistance to enable them to participate better in the multilateral system and a pledge from developed countries to improved market access for least-developed countries’ products.

A year later, in October 1997, six international organizations — the International Monetary Fund, the International Trade Centre, the United Nations Conference for Trade and Development, the United Nations Development Programme, the World Bank and the WTO — launched the “Integrated Framework”, a joint technical assistance programme exclusively for least-developed countries.

In 2002, the WTO adopted a work programme for least-developed countries. It contains several broad elements: improved market access; more technical assistance; support for agencies working on the diversification of least-developed countries’ economies; help in following the work of the WTO; and a speedier membership process for least-developed countries negotiating to join the WTO.

At the same time, more and more member governments have unilaterally scrapped import duties and import quotas on all exports from least-developed countries.

Market access considered crucial for predictable growth – can be impeded through *tariff barriers and non-tariff barriers*. **Tariff barriers include** *customs duties, and are of importance to trade in services***,** and **non-tariff barriers include** *quantitative restrictions (quotas), lack of transparency in regulation of trade, unfair and arbitrary applications of trade regs, customs formalities, technical barriers to trade and government procurement practices*. Also includes *other non-tariff barriers*, which include the most diverse sub-category.

Objectives listed in the Preamble include *higher standards of living, full employment, growth and sustainability through entering into reciprocal and mutually advantageous agreements directed to* ***substantial reduction of tariffs and other barriers to trade***.

This could be achieved by the liberalisation of trade to develop economies and eliminating customs duties in both goods and services rendered can do this. Quantitative restrictions on goods are prohibited but customs are allowed limited to what was agreed upon between parties.

A *customs duty or tariff* is a financial charge, in the form of a tax imposed on products at the time of and or because of their importation. Could be *specific, ad valorem or mixed*. **Specific is based on weight, volume or quantity of the product**. **Ad valorem is based on the value of the product, and mixed, where ad valorem is mixed with a specific duty**.

The most common type of duty is the *ad valorem*. Preferable as they are considered more transparent. All three duties can be *MFN, Preferential or neither*. MFN Duties are applicable to all WTO members under the MFN obligation, and preferential duties are those applicable under certain agreements such as the EU and ACP customs duties.

They are used because:

* *Source of government revenue for industrialised countries and developing ones,*
* *Used to protect domestic industries,*
* *Can be used to promote a rational allocation of scarce foreign exchange –* encouraging import of capital goods such as machinery and discouraging luxury goods by imposing higher tariffs on them.

Tariff negotiations include the principles of *reciprocity and mutual advantage and most favoured nation treatment*. Assessment of *acceptability* of outcomes of tariff negotiations is *political in nature*. Must be able to get something in return for what is given.

Tariff Negotiations can be carried out on a *product-by-product basis or by the application of a multilateral procedure as may be accepted by members –* ***Art. XXVIII bis* of the GATT 1994**. Previously it used to be a *product-by-product request and offer approach* but it was not really used after the Kennedy Round, and now they have adopted a *linear reduction approach*. But members with lower customs duties could not be expected to adopt it, as it would apply on all products, for instance. They could not cut down to that extent, so a *harmonization formula approach* was applied to only the higher customs duties to be reduced.

**ITA –** *eliminated almost ALL customs duties on IT products*. *Non-Agricultural Market Access (NAMA)* – tariff negotiations on non-agricultural market access and adopted the *Swiss Formula*.

The results of these negotiations are known as *Tariff concessions or tariff bindings*. It is a commitment not to raise the customs duty of a certain product above an agreed level. Tariff concessions or bindings of a certain member are listed in the *Schedule of Concessions*. *Vienna Convention –* purpose is to ascertain the common intention of the parties. Member’s schedules are an integral part of the GATT, as they are considered *covered agreements under the DSU*.

Countries haggle not over tariffs but over *tariff ceilings*. There are big gaps between *actual tariffs and allowable ones*.

**Agreements to modify or withdraw tariff concessions:**

*Members with Initial Negotiating Rights* – these are the members with which the concession was **bilaterally** negotiated;

*Members with Principal Supplying Interest* – these are members with the highest ratio of exports affected by the concession of the product to the market of the member modifying or withdrawing the concession to its total experts shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or principal supplying interest as provided for in the article. Any member wishing to modify or withdraw must consult any member with a *substantial interest in such a concession*. The substantial interest is usually considered to be 10% of the market of the member seeking to modify or alter.

When a concession is modified or withdrawn, a new concession must be granted to ensure treatment no less favourable to trade.

When customs duties are to be imposed, three determinations must be made:

1. *Proper classification of the goods;*
2. *Customs value of the imported good;*
3. *Origin of the imported good.*

No obligation under GATT to follow a certain specified classification system and contracting parties are free to introduce such a system as appropriate so long as the same tariff treatment applied to *like products.*

Customs valuation – products must be based on the *actual value of the product on which duty is assessed* – “actual price” is the price *at which the goods or like goods are sold or offered for sale in the ordinary course of trade under fully competitive conditions –***Para 2(b) Art. VII**.

Members can add as part of the duty price – *commissions and brokerage, packaging costs, royalties and license fees, insurance, etc*.

Determining origin of a good: WTO Agreement on Rules of Origin – *Non-preferential rules and preferential rules*. The first are rules used in non-preferential trade policy instruments relating to MFN treatment, safeguard measures countervailing etc. The latter are rules applied by members to determine whether goods qualify for preferential treatment under contractual or autonomous trade regimes, leading to grant of tariff preferences beyond the application of MFN.

Harmonization Work Programme in progress.

**11.GATS SCHEDULES OF SPECIFIC COMMITMENTS**

Includes terms, conditions and limitations on market access agreed in negotiations on liberalization on trade in services. Divided into

*Horizontal Commitments:* apply to all sectors includes in the schedule to avoid repeating in relation to each sector contained in the schedule and usually concern two modes: *commercial presence and natural persons*.

*Sectoral Commitments:* apply to specific sectors and sub-sectors. There are twelve broad sectors that are further divided into 150 sub sectors. The sectors include business services, communication services, construction, distribution etc. This classification is based on the UN CPC.

Members indicate in the second column of their schedule the presence or absence of limitations on market access commitments. There can be 4 different situations relating to each mode of supply:

* *Full Commitment:* member does not seek in any way to limit market access in a given sector.
* *Commitment with limitations:* member wants to limit market access through market access barriers.
* *No commitment*: member wants to remain free in a given sector to introduce or maintain market access limitations.
* *No commitment technically feasible*: when particular modes of supply not technically possible like cross-border supply of hairdressing services.

Members may *modify or withdraw* their commitments after **3 years** have elapsed from the date on which that commitment entered into force. Must inform the *Council for Trade in Services* and enter into negotiations with a view to reach compensatory adjustment. If no compensatory adjustment can be reached the matter may be referred to arbitration.

**12. Basic WTO Principles IV: Non-Tariff Barriers**

* Quantitative restriction is a measure that limits the quantity of a product that may be imported or exported. Quantitative restrictions might be imposed per amount (certain tones allowed) and per unit.
* Quantitative restrictions might be – a prohibition or import ban, a quota (only certain amount), automatic and non-automatic licensing, and others.
* WTO Members are required to notify the WTO Secretariat of any quantitative restrictions which they maintain and of any changes in these restrictions, as and when they occur. This information will be kept in the WTO Secretariat QR Database.
* The WTO has a clear preference for customs duties over quantitative restrictions and this preference is reflected in the relevant provisions of the GATT 1994. There are several reasons for that:
  + Quantitative restriction increases the price due to the limited amount of goods
  + The price increase resulting from customs duties goes to the government, the price increase resulting from quantitative restrictions ordinarily benefits importers.
  + The administration of quantitative restrictions is more open to corruption than the administration of customs duties.
  + Quantitative restrictions impose absolute limits on imports, while customs duties do not.
* **Tariff quotas** are not a quantitative restriction. A tariff quota is a quantity which can be imported at a certain duty. (a Member may allow the importation 50 tone of bananas for 10 percent ad valorem, and the above number of tones of bananas will be subject to the higher percentage, 30 percent).
* **Voluntarily export restraints** – are generally prohibited by WTO Agreement on Safeguards, furthermore all voluntarily export restraints had to phased out (or brought into compliance with the agreement on Safeguards) before the end of 1999.
* Article XI:1 of the GATT 1994 prohibits quantitative restrictions. There are, however, exceptions to this prohibition of Article XI:1.
  + Article XIII Administration of quantitative restrictions, permit restrictions if they are negotiated and not discriminate rights of any Member. If a Member imposes a quantitative RESTRICTION ON PRODUCTS TO OR FROM ANOTHER MEMBER, PRODUCTS TO OR FROM ALL OTHER COUNTRIES ARE ‘SIMILAR PROHIBITED OR RESTRICTED’. (***EEC – Apples I (Chile***), where European communities restricted the apples from Argentina, Australia, New Zealand and South Africa through the negotiated voluntary restraint agreements, but failed to reach agreements with Chile. Subsequent restriction measures of apple importation from Chile was was in breach of Article XIII:1 because it was not restriction similar to the voluntary restraint agreement negotiated with other countries.)
* A trader who wishes to import a product that is subject to a quota and tariff quota must apply for an import license, i.e. a permit to import. The procedures for the submission of applications for import licenses must be published in such a manner so as to enable Members and traders to become acquainted with them.
* *Import licensing can be defined as administrative procedures requiring the submission of an application or other documentation (other than those required for customs purposes) to the relevant administrative body as a prior condition for importation of goods.*
  + - Automatic import licensing - (licensing maintained to collect statistical and other factual information on imports) is defined as import licensing where the approval of the application is granted in all cases
    - Non-automatic import licensing - is defined as licensing not falling within the definition of automatic import licensing. Non-automatic licensing is used to administer trade restrictions such as quantitative restrictions which are justified within the WTO legal framework.
* Barriers to trade in services are primarily the result of domestic regulations. The terms, limitations and conditions on market access of trade in services are set out in Schedules of Specific Commitments of each country.

***Cases:***

* + ***US – Shrimp:***
    - The Panel found that the US acted inconsistently with Article XI:1 by imposing an import on shrimp and shrimp products harvested by vessels of foreign nations not certified by the US authorities as using methods not leading to the accidental killing of sea turtles above certain levels.
  + ***Japan – Semi-conductors:***
    - The Panel found that non-mandatory measures of the Japanese Government, restricting the export of certain semi-conductors at below-cost price, were nevertheless ‘restrictions’ within the meaning of Article XI:1.

**13. Exceptions to Basic WTO Principles I: Article XX and Article XIV**

* **General exceptions under the GATT 1994 are written in Article 20.**
* Article XX sets out a two-tier test for determining whether a measure, otherwise inconsistent with GATT obligations, can be justified. **Thus, for a GATT-inconsistent measure to be justified under Article XX, it must meet:**
  + The requirements of one of the exceptions listed in paragraphs (a) to (j) of Article XX;
  + The requirements of the introductory clause commonly referred to as the ‘chapeau’, of Article XX.

**The Chapeau of Article XX:**

The requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or disguised restriction on international trade(restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX).

**The object and purpose of the Chapeau XX is -**

to avoid that provisionally justified measures are applied in such a way as would constitute a misuse or an abuse of the exceptions of Article XX.

**Requirement under Chapeau:**

* + - Either ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail;
    - or ‘a disguised restriction on international trade’.
* **XX (b) – measure necessary to human, animal or plant life or health:** a GATT-inconsistent measure is provisionally justified under Article XX (b) if:
  + The measure is designed to protect life or health of humans, animals or plants; and
  + The measure is necessary to fulfill that policy objective.

**A measure is necessary within the meaning of Article XX (b) only when exists no alternative measure that is GATT-consistent or less inconsistent, while providing an equivalent contribution to the achievement of the objective.**

* **XX (d) – measure necessary to secure compliance with …** Thus, for a GATT-inconsistent measure to be provisionally justified under Article XX (d):
  + - The measure must be designed to secure compliance with national law, such as customs law or intellectual property law, which, in itself, is not GATT-inconsistent; and
    - The measure must be necessary to ensure such compliance.

**According to the decision of the Appellate Body in Mexico – Taxes on Soft Drinks, ‘laws and regulations’ refer to domestic rules and not the obligations of another WTO Member under an international agreement.**

**In an evaluation of whether a measure is ‘necessary’, as required by the second element of the test under Article XX (d), involves, in every case, the weighing and balancing of factors such as:**

* + - The relative importance of the common interests or values protected (or intended to protect) by the law or regulation compliance with which is to be secured;
    - The extent to which the measure contributes to the securing of compliance with law or regulation at issue; and
    - The extent to which the compliance measure produces restrictive effects on international trade.
  + The burden of proof as to the available alternative is, at the first instance, the responsibility of complaining Member.
* XX (g) – measures relating to the conservation of exhaustible natural resources …this article sets out three-tier test requiring that a measure:
  + Relate to the conservation of *exhaustible natural resources*;
  + *Relate to* the conservation of exhaustible natural resources; and
  + Be made effective *in conjunction with* restrictions on domestic production or consumption.

**As an exhaustible natural resources might be considered a living and non-living, renewable and non-renewable resources.**

The measure has to be primarily aimed at the conservation of an exhaustible natural resource to be considered as **‘relating to’** conservation within the meaning of Article XX (g).

If no restrictions on domestic-produced like products are imposed at all and all limitations are placed upon imported alone, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure is the breach of ‘less favorable treatment’ Article III:4 of GATT 1994.

* **XX (a) -** necessary to protect public morals; **XX (e) -** relating to the products of prison labor (restriction on goods produced by prisoners); **XX (f) -** imposed for the protection of national treasures of artistic, historic or archaeological value; - **there is no cases up to date.**
* **General exceptions under the GATS are written in the Article XIV.** As with Article XX of the GATT, Article XIV of the GATS sets out a two-tier test for determining whether a measure, a measure, otherwise inconsistent with GATS obligations and commitments, can be justified.

**Thus, to determine whether a measure can be justified under Article XIV of the GATS, it must be examined:**

* + First, whether this measure can provisionally be justified under one of the specific exceptions under paragraphs (a) to (e) of Article XIV; and if so
  + Second, whether the application of this measure meets the requirements of the chapeau of Article XIV.
* **As a specific exceptions might be considered:**
  + The protection of public morals
  + The maintenance of public order
  + The protection of human, animal or plant life or health
  + The prevention of deceptive and fraudulent practices
  + The protection of privacy of individuals
  + The protection of safety and
  + The equitable or effective imposition or collection of direct taxes.
* **To date there is case law only on the exceptions under paragraphs (a) and (c) of Article XIV.**
* **Article XIV (a) – ‘measures necessary to protect public morals or to maintain public order’.**
* **The Member invoking Article XIV (a) must establish that:**
  + The policy objective pursued by the measure at issue is the protection of public morals or the maintenance of public order; and
  + The measure is necessary to fulfill that policy objective.
* **In the US – Gambling the Panel found that** 
  + **Public morals** – are standards of right and wrong conduct maintained by or on behalf of a community or nation;
  + **Public order** – the preservation of the fundamental interests of society, as reflected in public policy and law. These fundamental interests can relate, inter alia, to standards of law, security and morality.
* **In determining whether a measure is ‘necessary’ within the meaning of Article XIV (a) of the GATS it must assess the following factors**:
  + The importance of interests or values that the challenged measure is intended to protect;
  + The extent to which the challenged measure attributes to the realization of the end pursued by that measure;
  + The trade impact of the challenged measure.
* **The Appellate Body in the above mentioned case pointed two factors that relevant to determine the ‘necessity’ of a measure:**
  + The contribution of the measure to the realization of the ends pursued by it;
  + The restrictive impact of the measure on international commerce.

An alternative measure must be found not to be ‘reasonably available’, and must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.

* **Article XIV (c) – ‘measures necessary to secure compliance with…’**
* **The three-tier test is used to determine whether a measure is provisionally justified under Article (c):**
  + The measure at issue is designed to secure compliance with national laws or regulation;
  + Those national laws and regulations are not inconsistent with the WTO Agreement; and
  + The measure at issue is necessary to secure compliance with these national laws and regulations.
* **Article XIV (b) – ‘measures necessary to protect human, animal or plant life or health’.**
* **Two-tier test is:** 
  + The policy objective pursued by the measure must be the protection of life or health of humans, animals or plants; and
  + The measure must be necessary to fulfill that policy objective.

**To date, there is no case law.**

* **Paragraphs (d) and (e) do not impose necessity requirements.**

**14. Trade and the Environment**

* **The Committee on Trade and Environment was established on 31 January in 1995.**
* **Article XX (b)** concerns otherwise GATT-inconsistent measures allegedly adopted or maintained for the **protection of public health or the environment**.
  + The policy objective pursued by the measure must be the protection of the life or health of humans, animals or plants; and
  + The measure must be necessary (no alternative measure exists that would achieve the same end and is less restrictive to trade than the measure at issue) to fulfill that policy objective.
* In deciding whether the a measure is necessary, the following factors must be ‘weighed and balanced’:
  + *The importance* of the societal value pursued by the measure at issue,
  + *The impact* of the measure at issue on trade, and
  + *The extent* to which the measure at issue contributes to the protection or promotion of that value.
* As other exemptions, in this case the two-tier test works (the requirements of the section and chapeau).
* **Article XX (g)** concerns otherwise GATT-inconsistent measures allegedly adopted or maintained for the **conservation of exhaustible natural resources**.
  + The measure must relate to the *‘conservation of exhaustible natural resources’;*
  + The measure must ‘*relate to’* the conservation of exhaustible natural resources; and
  + The measure must be made effect *‘in conjunction with’* restrictions on domestic production or consumption.
* The concept of ‘exhaustible nature’ has been interpreted in a broad, evolutionary manner to include not only minerals and other non-living resources, but also living resources and, in particular, endangered species.
* The interpretation of the words ‘relate to’ is ‘primarily aimed to’.
* However, if no restrictions on domestically-produced like products are imposed at all and all limitations are placed upon imported products alone, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods. (third test ‘even-handedness’).
* **Cases:**
* ***US - Tuna-dolphin*** (complainant: Mexico)
  + The origin of what became known as the “tuna-dolphin” case was the United States’ Marine Mammal Protection Act (MMPA), which imposed a ban on imports of tuna from countries that did not have a conservation program designed to protect dolphins in the tuna-fishing process. Tuna, it turns out, are often found swimming in schools underneath dolphins. In order to catch the tuna, fishermen used to drag large nets through the water and then pull them up under the tuna. Dolphins swimming above the tuna would be caught at the same time and die in the nets along with the tuna. The MMPA therefore required American tuna fishermen to adjust their fishing practices to avoid such deaths and banned tuna from countries in which dolphin deaths from tuna fishing exceeded deaths from U.S. tuna fishing by more than 25 percent.
  + The Panel considered that the United States' measures, even if Article XX(b) were interpreted to permit extrajurisdictional protection of life and health, would not meet the requirement of necessity set out in that provision. The United States had not demonstrated to the Panel - as required of the party invoking an Article XX exception - that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas. Moreover, even assuming that an import prohibition were the only resort reasonably available to the United States, the particular measure chosen by the United States could in the Panel's view not be considered to benecessary within the meaning of Article XX(b).
  + And also was not justified under article XX(g).
* ***US – Tuna-dolphin II*** (EC and Netherlands)
  + The GATT Tuna-Dolphin II case was brought against the United States by the European Economic Community (EEC) and the Netherlands in June 1992, who claimed that the U.S. did not have the right to place embargoes on intermediary nations. The Marine Mammal Protection Act places countries involved in the importation of yellowfin tuna or yellowfin tuna products into the United States, into two separate categories: primary nations and intermediary nations. Primary nation: a nation that directly exports yellowfin tuna or yellowfin tuna products from its country, into the United States. Intermediary nation: a nation that exports yellowfin tuna or yellowfin tuna products to the United States, and that receives imports, in its country, of yellowfin tuna or yellowfin tuna products that are subject to the primary nation embargo outlined in Section 101(a)(2)(B) of the MMPA. For an intermediary nation, the MMPA requires its government to “…certify and provide reasonable proof to the Secretary of Commerce that it has not imported, within the previous six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States." If the intermediary nation cannot provide this proof, then its yellowfin tuna or yellowfin tuna products are banned from importation into the United States. The EEC and the Netherlands argued that this ban violated Articles XI, III, and XX of the GATT.
  + Article XX (g). After carefully examining the relationship between United States measures and its goal of dolphin conservation, the panel came to the conclusion that banning the tuna would not in itself conserve the dolphins; only policy changes would, which they felt was not within the original purpose of the GATT. The GATT was only supposed to deal with member states’ products, not their processes or policies.[6]
  + Article XX (b). To determine whether United States measures for dolphin protection were “necessary,” the panel first examined what the meaning of this word meant. The United States argued that necessary meant “needed,” whereas, the EEC and the Netherland felt it meant “indispensable” or “unavoidable.” To support their argument, they referred to a previously adopted panel report which interpreted “necessary” as meaning “no alternative measures” exist. The panel also agreed with this interpretation, and felt, once again, that banning yellowfin tuna and tuna products was not a measure that was necessary to protect dolphins; the only way to protect dolphins would be for intermediary nations to change their policies and practices, which was not within the original purpose of the GATT to regulate. Furthermore, the panel felt that banning tuna from primary and intermediary nations, regardless of whether their practices harmed or killed dolphins, but rather based on the fact of whether their practices were comparable to that of the United States, made it seem as if the United States was forcing primary and intermediary nations to adopt its fishing policies; this clearly was never the purpose of the GATT. For these reasons, the panel did not rule in favor of the United States.

**15. Exceptions to Basic WTO Principles III: Specific Exceptions**

* The Security Exceptions, stated in the Article XXI of the GATT 1994, which allow WTO Members, take measure, either unilaterally or multilaterally, against other Members as a means to achieve national or international security and peace.
* Article XXI(a) and (b) of the GATT 1994: **national security**
  + XXI (a) – allows Members to withhold information that it would normally be required to supply when it considers disclosure of that information contrary to its essential security interests.
  + XXI (b) – allows a Member to adopt or maintain certain measures which that Member considers necessary for the protection of its essential security interests.
    - Measures relating to fissionable materials –
    - Measures relating to trade in arms or in other materials, directly or indirectly, for military use; and
    - Measures taken in time of war or other emergency in international relations.
* Unlike Article XX of the GATT 1994, Article XXI does not have a chapeau to prevent misuse or abuse of the exceptions contained therein.
* In view of their wording, and in particular the use of the terms ‘action which it considers necessary’, the question arises whether the exceptions of Article XXI (b) are ‘justiciable’, i.e. application of these exceptions can usefully be reviewed by panels and the Appellate Body. It is imperative that certain degree of judicial review be maintained.
* Article XXI (c) of the GATT 1994: **international peace and security**
  + XXI (c) – allows WTO Members to take actions in pursuance of their obligations under the United Nations Charter for the maintenance of international peace and security. This means that Members may depart from their GATT obligations in order to implement economic sanctions imposed by the UN.

**GATS** Article XIV bis - *Security Exceptions*

* 1. Nothing in this Agreement shall be construed:

1. to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

- 2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

* Note that Article XIV *bis* of the GATS, unlike Article XXI of the GATT 1994, provides for a notification requirement.
* There are also **regional exceptions** set out in article XXIV of the GATT 1994 and Article V of the GATS.
* The key characteristics of regional trade agreements is that the parties to such agreements offer each other more favorable treatment in trade matters than they offer other trading partners. Such discriminatory treatment is inconsistent with the MFN treatment obligation.