International trade law

Chapter one: Introduction

Basic concepts of Economics:

What is economics?

- the branch of knowledge concerned with the productio n, consumption, and transfer of wealth.
- It's the study of scarcity, the study of how people use r esources and respond to incentives, or the study of dec ision-making
- focuses on the behaviour and interactions of economic agents and how economies work.

I. Microeconomics analyzes basic elements in the econo my, including individual agents(households, firms, buy ers) and markets, their interactions, and the outcomes of interactions.

II. Macroeconomics analyzes the entire economy (meanin g aggregated production, consumption, savings, and in vestment) and issues affecting it, including unemploym ent of resources (labor, capital, and land), inflation, eco nomic growth, and the public policies that address thes e issues (monetary, fiscal, and other policies)

Cont’d

- There are **three economic questions** that e very economic system try to answer

1. *What to produce*?(type ,quality, time, quantit y)
2. *How to produce*?(by whom, what resource, te ch,)
3. *For whom to produce*?(to the rich or poor, dist ribution)

- All economics ask these three fundamental q uestions. But they don’t have similar answer f or these three problems are really about the li mitations and choices among an economy’s *i nputs(factors of productions; natural resource s ,labor and capital)* and *outputs*.

Cont'd

Alternative economic system

1. Custom- problem
2. Command- centrally planned eco
3. Market- invisible hands- interplay of price, demand an d supply
4. Hybrid- both private and gov't play vital role in the eco nomy

Basic terms of economics

I. **Law of scarcity** – resources are scarce

II. **Opportunity cost** - alternative given up when a deci sion is made. making a choice cost us the opportunity to do something else. That alternative forgone is calle d the *opportunity cost*.

- reinforces the point made by the no-free-lunch doctrin e . Even lunches that are given to you for free, is actua lly incurring you a cost – the cost of another opportunit y foregone – that is you could have spent that time doi ng something else or be somewhere else.

Cont’d

III. **The law of diminishing returns**

- concerns the relationship between inputs and outputs in the productive process.
- holds that we will get less and less extra output when we add successive doses of inputs while holding other inputs fixed.

IV. **Economies of scale**

- refer to reduced costs *per unit* that arise from increased *total* output of a product.
  Economies of scale give rise to lower per-unit costs for several reasons. First, specialization of labor and more integrated technology boost production volumes. Second, lower per-unit costs can come from bulk orders from suppliers, larger advertising buys or lower cost of capital. Third, spreading internal function costs across more units produced and sold helps to reduce costs. "Internal functions" include accounting, information technology, and marketing. The first two reasons are also considered operational efficiencies and synergies. The second two reasons are cited as benefits of mergers and acquisitions.

  - justify IT

- Can be internal or external. Internal if cost reduces due to expansion of the firm, external if cost reduces due to greater concentration of industry

Cont’d

V. marginal revenue (R') is the additional **revenue** that will be generated by increasing product sales by one unit. It can also be described as the unit **revenue** the last item sold has generated for the firm

Cont’d

V I. Economic Globalization(EG)

- Globalization is the closer integration of th e countries and peoples of the world

EG- is gradual integration of national econ omies into one borderless global economy.

EG encompasses both (free) international trade and (unrestricted) foreign direct inv estment.

EG-affects people everywhere and in many aspects of their daily lives.

It affects their jobs, their food, their health,

Cont’d

- EG- has been driven by two main forces

1.Technology, makes globalizations feasible

–reduces costs of transport, communication and computing

-natural barriers of time and space that separate national markets have been coming down.

2. **Liberalization of trade and foreign direct investment**

EG- seems irreversible

- It is very difficult for the protectionist to control the process
- liberal international trade policies now have a firm institutional basis in the multilateral trading system of the WTO
- High cost of withdrawal from the global economy

Cont’d

The Pro’s and con’s of Eco-Globalization

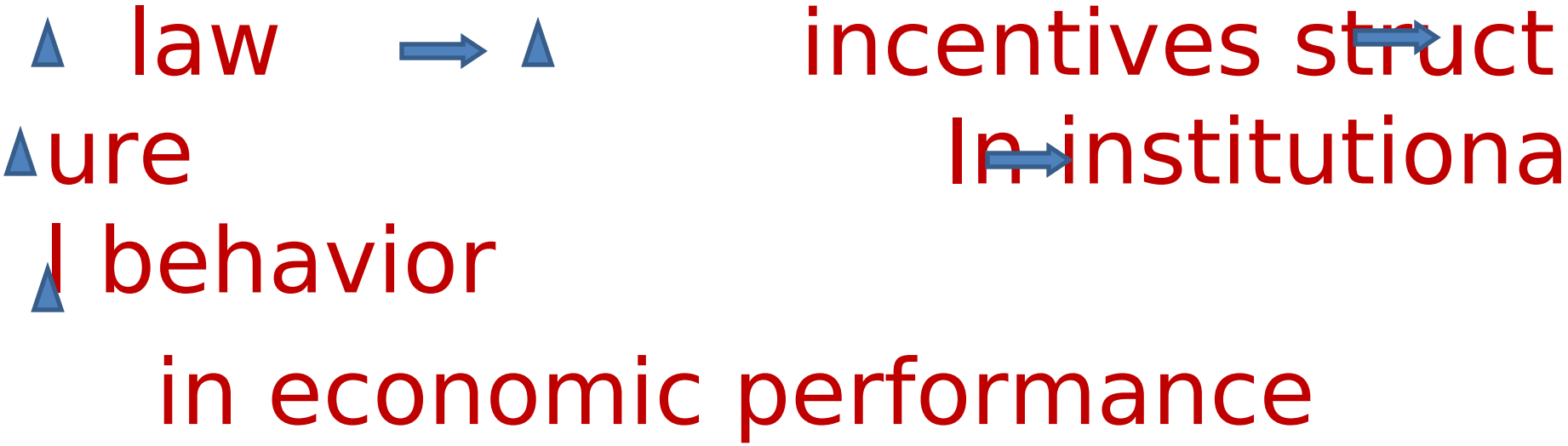
Pro’s

- the enormous reduction of costs of transportation and comm unication, and
- the breaking down of artificial barriers to the flow of goods, s ervices, capital, knowledge,
- And (to a lesser extent) people across borders.

Con’s

- Race to the bottom’ – everyone loses
- **Governments may not be able to implement policies t hat the electorate wants** -Transnational corporations are primarily the ones who benefit
- That 'developing countries are being forced to open their ma rkets too far to fast'
- Rich companies prevent competition with things they produ ce, e.g. agriculture, textiles
- Developing countries lack resources and info to negotiate eff ectively

Law and economics



Theories of International Trade

In. Trade is a deriving factor of eco glo. There is ,however, arguments as to whether IT is beneficial or not. Broadly, there are arguments in favor of trade liberalization and protectionism.

1. **Mercantilism**

- Favor protectionism -higher tariff on imported product and services and higher export subsidy
- Trade policy is good if it increases ***trade surplus which serves as*** state power than living standard (- opposite to economists) or surplus nation power to buy the real and financial assets of foreign countries(Neo mercantilists
- favor of export and discourage import
- tariffs and export subsidies could increase the government's stock of precious metals

problem

- Limit Items available in the local market
- Serve as source of conflict

2. Classical Theory

- In favor of free trade
- criticize mercantilist practices
- Though tariffs and export subsidies increase the government's stock of precious metals, they would also reduce the economy's consumption alternatives by comparison with a policy of free trade
- This may result , if IT focus only on export, a decrease in the real wealth of the nation

- Modified by Neo classical model assumptions-diminishing returns-economic of scale(constant returns)
- It also assume the labor force growth rate, the rate of savings out of national income, and the depreciation rate are "exogenous"

Cont’d

3. **Absolute advantage**

- A country should concentrate on the prod uction of goods up on which it enjoys abso lute advatage
- In favourof free IT- against qouta and tariff
- IT is a positive sum game- it benefits both parties

• It only assume trade b/n 2 states, two co mmodities, free trade, assume labor as th e only cost of production

Problem- what if a state has no absolute a dv?

Cont’d

4. Law of comparative Advantages- by Devid Ric ardo

- *An ability to produce particular with goods rel atively less opportunity cost*
- *favor free trade for it contributes for efficient al location of resources-*
- *A state should produce goods in which it has c. a and import goods in which it has no c.a.*

Problem

- it presupposes that states driven by the need t o maximize consumption and production, not b y other concerns.

-

Cont’d

5. New trade theory:- founded by the Swedish economists Eli Heckscher and (the 1997 Nobel Prize winner) Bertli Ohlin

- nations must specialize and trade both because their underlying differences and because increasing returns make specialization advantageous per se
- All traditional trade theories assume(which is *untrue assumption) constant returns, and perfect competition.*
- *This false assumption led them to a wrong conclusion,* comparative advantage is the essential factor for trade.

This theory, unlike previous theories, takes into account the changes in a country’s endowment of factors of production. It states that endowment of factors of production is the determining cause for trade between countries.

Cont’d

- ❖Generally, international trade is the result of two forces, namely,

- difference between countries; this gives ris e to comparative advantage, and

- economic scale; this provides an additional incentive for specialization.

- Traditional conceptions argue for Int-Trade- on the bases of static efficiency gains- one time gains-Modern conceptions lies on dyn amic efficiency test
- Eco- growth should be the test of liberalizat ion

Why In.trade?

- Positive for all trading partners
- If managed and regulated, international trade along w/ foreign direct investment could
- create income- by reallocation of resources-reduce poverty worldwide
- May reduce incentives for going to war
- Might promote democracy by expanding the middle class

Cont’d

- ***Potential Problems With Trading / W hy Adopt Trade Restrictions?***
- Big 4:

- Infant Industries
- National Security & (exporting bombs et c.)
- Security of domestic production (protectio nist ideas, and protecting essential indust ries like food)
- Protection of Culture

- ***Why do we need International Trade Law?***

1. 'countries must be restrained from adopting trade-restrictive measures
2. Traders and investors need 'a degree of security and predictability
3. 'national governments alone simply cannot cope with the challenges presented by economic globalization (*ensure than when countries do take protectionist measures, they do so for legitimate policy reasons)*
4. 'need to achieve a greater measure of equality in international economic relations

Breton Woods Agreement

- It is a result of WWI and WWII

- The war led to economic depression and new economic order.
- protectionist approach proved unworthy
- The consequences the war required the *allied powers* to promote international economic cooperation and integration. This was justified on

deterrence of another war and economic prosperity and equality

Con

The Bretton woods conference results to the creation of:

1. IMF- primarily intended to prevent countries from getting bankrupt- through providing loan as a last resort
2. World Bank(called IBRD)- rehabilitation and reconstruction of developing countries-Germany and Japan
3. GATT-1947-a result of negotiation to create ITO

GATT 1947

-provide basic rules of multilateral trading system until the creation of WTO

- GATT 1947, though not institutionalized, function effectively as an international organization mainly due to its provision of accession, consultations and complaints, joint action by contracting parties and its "*grand father clause*"

Cont'd

- *The so called GATT's grand father clause dictates that Non trade measures(Part II) apply to the extent that th ey were not inconsistent with legislation in effect when a country acceded to WTO*

❖ *GATT 1947 is main source of GATT 1994- Provisions dea ling MFN and trade and dev't are taken w/t change*

❖ *No longer in effect- as it superseded by GATT 1994-whi ch set out the main WTO rules in relation to trade in g oods- In fact some of its rule taken from GATT 1947 revi sed modified and excluded by WTO agreement- ex Prot ocol of Provisional application*

- Supplemented and modified by many legal instrument s adopted b/n 1948 and 1995- it took many rounds of n egotiation, protocols of accession and waivers and othe r decisions

Cont’d

Generally, GATT 1947

- ✓ multilateral trade agreement
- ✓ Has been developed by series of rounds of negotiations
- ✓ Never been institutionalized but served as a de facto institution
- ✓ Practiced due to principle of reciprocity and non discrimination
- ✓ Grandfather Clause plays vital role

Year	Round	Action	participants
1947	Geneva	45,000 reductions in bilateral tariffs covering 20% of world trade.	23
1949	Annency, France	5,000 reductions in bilateral tariffs.	13
1951	Torquay, England	8,700 reductions in bilateral tariffs covering a new range of goods.	38
1955-56	Geneva	Reductions in bilateral tariffs.	26
1960-62	Dillon Round	Reductions in bilateral tariffs. EEC talks begin.	26
1964-67	Kennedy Round	Reductions in bilateral tariffs. Negotiation rules established. -anti dumping	62
1973-79	Tokyo Round	Reductions in bilateral tariffs. Procedures on dispute resolution, dumping and licensing. non tariff measures such as subsidies and countervailing mea sures, technical barriers to trade, import licensing, customs v aluation, government procurement and trade in civil aircraft	102
1986-93	Uruguay Round	Additional tariff reductions. Stalemate for agricultural tariffs. first ‘comprehensive’ round of multilateral trade negotiations-cover TRIPS,GATS,TRIMS,GATT	123
1995	WTO established-Marrakesh agreement	WTO replaces the GATT.	124
2001-	Doha Round	Divergences between developing and developed countries. Issues over agricultural subsidies.	142-155

Introduction to WTO

WTO is a world trade organization.

- It consists of multilateral agreement.
- It was intended to be established in 1940s
- The origins of the WTO lie in the GATT 1947.
- It was not established as intended due to ideological, economical and political divergences

- WTO Laws is part of the body of public international law

- Grand father rule dictates that old rules continued to apply for pre existing situations and new rules apply to all future cases

Objective:

- the increase of standards of living;
- the attainment of full employment;
- the growth of real income and effective demand; and
- the expansion of production of, and trade in, goods and services.

Functions of WTO

- This section will examine the following fu nctions of the WTO:
- the implementation of the WTO agreeme nts;
- the negotiation of new agreements;
- the settlement of disputes;
- trade policies review;
- cooperation with other organisations; and
- technical assistance to developing countri es.

Who can be member of WTO?

1. States
2. Custom Union
3. Custom Territories

Institutional Structure of WTO

WTO Laws and National Law

- With regard to the place of national law in W TO law, Article XVI:4 of the WTO
- Agreement states:
- Each Member shall ensure the conformity of its laws, regulations and administrative
- procedures with its obligations as provided i n the annexed Agreements.
- It is a general rule of international law, reflec ted in Article 27 of the Vienna
- Convention, that:
- A party may not invoke the provisions of its i nternal law as justification for its failure
- to perform a treaty

Chapter 2

General Principle of GATT and WTO laws

PPLES OF GATT & WTO

- PPL of MFN Treatment-Art I

- Is a non discrimination policy(Art I&III and Art II of GATT &XVII of GATS)
- Corner stone of GATT 1947 as well as 1994

- MFN dictates that = 'any advantage , favor , immunity , privilege granted by a Member to any product from or for another country be granted ***to all like products*** from or for all other Members'-immediately and unconditionally
- Concerns ,advantages given to non-members too - 'any other country'
- MFN treatment is one of the key principles of Int'l Econ law, and an obligation that is contained in and is fundamental element of almost every FTA
- Connection with importation or exportation, international transfer of payments for imports or exports,method of levying such duties and charges, all rules and formalities in connection with importation and
- exportation
- Is negative integration rule as it does not tell what to do
- Prohibit discrimination based on nationality- country of origin/destination
- Includes both de facto and de jurue

Tests of MFN

1) Does the measure at issue confer a trade ‘advant age’ of the kind covered by ArticleI:1? (very broad)

2) Are the products concerned ‘like products’?

3) Is the advantage at issue granted ‘immediately a nd unconditionally’ to all like products concerned?

factors for determining if products are like:

A - Physical Characteristics of products

b-Their end-use

C- Tariff classification (largely uniform system)

D- (Now would also consider consumers’ tastes and habits because of EC -

Asbestos p 331)

- ***Why is discrimination bad?***

- Breeds resentment among countries poison international r/p economic and political confrontation and conflict

- Inefficient

- ***Why might it not be a good idea to strictly enforce MFN?***

- Might make it hard to discriminate w/ things you want, like labor standards

- Might be hard to make bilateral trade agreements

- Can’t use trade for diplomatic reasons

- Might want to give more favorable treatment to developing countries (GATT provides exception for this)

Eg-Spain did not impose customs duties on ‘Columbia mild’ and ‘other mild’, while it imposes a 7 per cent customs duty on the other three types of unroasted coffee: ‘unwashed Arabica, ‘Robusta’, ‘other’. Brazil exported mainly ‘unwashed Arabica’ and complained that this tariff regime was inconsistent w/ Article I:1.

- *Issue: Were the various types of unroasted coffee ‘like products’?*
- ***Held: Yes they were like products, breach of article I: 1.***

- - **Like -** Differences in geography, cultivation, processing and genetics were not sufficient to allow for different tariff treatment – even if taste and aroma differed because of these –
- **It was relevant that unroasted coffee is mainly sold in blends**-
- **End-use –** universally regarded as a ‘well-defined single product intended for drinking’ (panel)
- - **Tariff** – No other country had different tariff rates for these

B- Principle of National Treatments

- - *once the imported product is in the domestic market –* ***is about internal measures***
- **internal taxes** and other internal charges, and l**aws**, **regulations** and **requirements** affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and **internal quantitative regulations** requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

  1)Are there internal taxes or charges of any kind?
  2) Do we have like domestic products?
  3) Is the internal tax in excess? (anything s too much *Japan*

- Imported products should be treated (directly or indirectly) like domestic products- no less favorable than like products of national origin.- competitive conditions for imported products

  1.Do we have 'directly competitive or substitutable products?'

  2.Are there dissimilar internal taxes or charges of any kind?

  3. Is the dissimilar tax applied to protect domestic production**?**

- National treatment – have to treat other c ountries the same as your own country
- General application to trade in goods, not general application in services

Eg- Japan imposed higher internal taxes on vodka and whis ky than it did on shochu.

Souchu is like Vodka but not like whisky

- **But given physical characteristics, common end-u se, tariff classifications, nature of the compared products, competitive conditions In the relevant market- Whisky is also like Souchu**

EG-2 In *Mexico – Taxes on Soft Drinks*

C. Rules on market access for goods

- This is about what happens at the border
- Obstacles country can erect to prevent goods from entering market:

  A- Tariff

  B- Non-tariff(Quotas, technical barrier, custom formality, trade regulation)

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

❖ **WTO law contains four groups of rules regarding market access:**

- rules on customs duties (i.e. tariffs);
- rules on other duties and financial charges;
- rules on quantitative restrictions; and
- rules on other 'non-tariff barriers', such as rules on transparency of trade regulations; technical regulations; standards; sanitary and phytosanitary measures;customs formalities; and government procurement practices.

A-Tariff

- Is a customs duty, or tariff, is a financial charge, in the form o f a tax, imposed on products at the time of, and/or because o f, their importation. Usually, ‘tariff’ comprises list of product d escriptions and their corresponding customs duty
- Market access is conditional upon the payment of the custom s duty.

purposes of customs duties:

1) Revenue for government
2) Protect domestic industries
3) Promote a *rational allocation of scarce foreign exchange – encourage importation of* capital goods

- Customs duties are **specific, ad valorem or mixed**.
- A **specific customs duty** on a product is an amount based on the weight, volume or quantity of that product, for exampl e a duty of $10 per 100 litter of food oil
- **An ad valorem customs duty** on a good is an amount bas ed on the value of that good. It is a percentage of the value o f the imported product, for example a 15 per cent ad valorem duty on computers.
- **Mixed-** comprising of both ad valorem and specific

Cont'd

- Ad valorem duties is preferable

- duties are more transparent than specific duties. The protectionist impact and the negative effect on prices for consumers are easier to assess fora d valorem duties than for specific duties.
- Secondly, ad valorem customs duties are indexed. In times of inflation, the government's tariff reve nue will keep up with price increases and the lev el of protection will remain the same.

- GATT says if you want to erect barriers to market access, you have to do it in the form of taxes

To what amount?

It depends on the country origin-

- Developed-developing?
- Members of free trade union or not?
- Members of WTO or not

How can we identify country of origin a product?

- the principle of **value added**; or
- the principle of change in **tariff classification**.

❖ In the Uruguay round, Agreement on Rules of Origin adopted and this agreement makes a distinction between:

- non-preferential rules of origin; and
- preferential rules of origin.

2. Non Tariff Barrier

- **Includes quantitative restrictions,TBT,SPS,**

- A **quantitative restriction(** ‘QR’)-is a measure which limits the quantity of a product that may be imported o r exported.
- can be imposed through **prohibition, or ban** of a pro duct; a **quota, licensing** ,**mixing regulation**, **a mini mum price**, and **a voluntary export restraint**

Rules on QR

- GATT *Article XI* General Elimination of Quantitative Re strictions*

1. No prohibitions or restrictions other than tariff shall be i nstituted or maintained by any contracting party on the importation or on the expropriation
2. If QR imposed on the pretext of exceptions-it should be made in light of the principle of non-discrimination and rules on the distribution of trade

Which is preferable? Tariff or non tariff?

- Economic reason-economic impacts can easily be identified-

-Increase in price of goods due to barriers – imposed on the public in case of QR bu t on gov’t in case of tariff

- Administrative reason-corruptions(more i n quantitative)

- degree of restriction of market access- c ould be absolute in QR

- ***Non-Tariff Barriers to Trade in Goods***

- With quantitative restrictions
- It’s not clear how much they drive prices up
- Price increases from them benefit importers, not the gov’t
- More open to corruption because usually administered through import licensing systems
- Impose absolute limits on imports – customs duties do not

Exceptions to WTO Laws

1. General Exceptions

2-Security exception

3. Economic emergence

4. Regional integrations

5. Balance payment exception

6. Economic development

1. ***General exceptions(art-XX of GATT & XIV of GATS**)- Non e conomic objective- public health and environment- public moral s, life and ,health, gold and silver, measures necessary to secu re compliance with laws such as custom enforcement, monopoli es, patents, products of prison labor or adopt certain rules of i mporting state*

- *Only applied when a measure of a state is GATT inconsistence with other GATT provisions*
- *It is limited and **conditional exceptions-** an exhaustive list wh ich provides for justifications an otherwise illegal measures wh en conditions listed are fulfilled of GATT inconsistence measure*
- ***Plays a central role** in many GATT dispute*
- *There has to be a balance b/n **trade liberalization** and non e conomic objective*

Cont’d

- Thus, for a GATT-inconsistent measure to be justi fied under Article XX, it must meet:

1. Fulfill the requirements of one of the exception s listed in paragraphs (a) to (j) of Article XX; and

2. Satisfy the requirements of the chapeau of Arti cle XX.

- pple of good faith Reasonably applied-

- Should not be discriminatory and arbitrary

- *No explicit territorial limitation- thus state can pr otect their values outside their territory???*
- *Include measures requiring exporting countries t o comply with*

EX- Thailand- Cigarette importation ban

- Korea’s Beef regulation- issues of compliance

- **Security Exceptions**

Traditionally, in international relations, national security takes precedence over the benefits of trade.

This may be the case in three types of situation. First,

- States may consider it necessary to restrict trade in order **to protect strategic domestic production capabilities from import competition.**
- Secondly, States may wish to use trade sanctions, **as an instrument of foreign policy**
- Thirdly, States may **want to prohibit the export of arms or other products of military use** to countries with which they do not have friendly relations.

❖ Article XXI of the GATT 1994 is not concerned with all of these situations but

➢ allows a Member to adopt or maintain:

- measures relating to **fissionable materials**,-nuclear
- 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

➢ take measure against member states to maintain domestic and international peace

➢ Take measure in r/n to **info.** of national security

➢ members usually left to decide security issue by themselves

➢ Ex-USA-Embargo against Nicaragua-claiming dictatorial gov't is its security concern

-EEC, Canada and Australia embargo against Argentina

- ***Economic emergence exceptions*** *(discussed in detail in chapter 5)****XIX***
- In situations where a surge in imports causes, or threatens to cause, serious injury to the domestic industry
- Also called Safeguard measures- taken against competitive importation
- ❖ It reflects the political reality that trade liberalization may be difficult to sustain if and when it creates unexpected and severe economic hardship for certain sectors of a country's economy
- Does not depend on occurrence of unfair trade practices (unlike anti dumping and countervailing)
- Only taken in times of **extraordinary nature**
- **Ex- other WTO members were allowed import from China until Dec 2013- as part of Chain's accession protocol**

Does GATS allow safeguard measures ??

4-Regional integrations exceptions (Article XXIV of the GATT 1994 and Article V of the GATS) Ex- COMESA,NAFTA,EC,

- allow Members to adopt measures taken in the context of the pursui t of regional economic integration.
- parties to such agreements offer each other more favorable treatme nt in trade matters than they offer other trading partners.
- Recognized in both GATT 1994 and the GATS
- **RTI- Justified by economic and political rationale**

- RTI --- Economic growth --- generate more trade with the world
- RTI---economic integration---avoid war---- facilitate political union

- **Does RTI divert or create trade???**

- WTO rules should ensure that regional trade agreements create trade more than they divert it. It should be to facilitate trade not to raise b arriers

conditions:

-the measure is introduced upon the **formation of a customs union, a free trade area,** or an interim agreement, that meet all the requi rements set out in WTO law; and

- if the formation of the customs union or free trade area **would be pr evented, i.e. made impossible, if the introduction of the mea sure concerned were not allowed**. Ex- Turkey quantitative restric tions against India-rules of origin recommended

What is Cu?

Custom Union- substituting 2 or more CU b y a single CU

- members of a CU eliminate ‘duties and ot her restrictive regulations of commerce’ with respect to ‘substantially all the trad e’ between them.
- Econoimic test to test the extent of befor e and after CU

Ex- Turkey textile

5. Balance Of Payment Exceptions Articles XII and XVIII:B of the GATT 1994 and Article XII of the GATS.

- taken to safeguard their ***external financial position and to protect their balance of payments***.
- balance-of-payments problems may be resolved by other means than through trade restrictions.
- More important for developing country Members- In times of rapid economic development, countries often experience severe pressure on their monetary reserves.
- Can be effectively regulated by imposing trade restrictive measures on imports into the country.
- **Nature of BOP measures**

- Priced based measures**- such as surcharges, import deposit requirement, other equivalent trade measures-** *Understanding on BoP*
- quantitative restriction- GATT XII- **as a last resort**

- Pursuant to the *Understanding on BoP* Provisions, not more than one type of restrictive import measure, taken for balance-of-payments purposes, may be applied on the same product.
- A combination of price-based measures and quantitative restrictions on the same product is therefore prohibited.

Strict requirements

- **Firstly**, BoP measures may not exceed what is necessary to address the-Article XII:2 of the GATT

  - imminent threat (for developed)/a serious decline in its monetary reserves(developing countries), or

  - very low monetary reserves- to achieve a reasonable rate of increase in its reserves. Decided by IMF

- **Secondly** BoP measures must avoid unnecessary damage to the commercial and economic interests of other Members.

  - BoP measures may be discriminatory with respect to products, but not with respect to countries

- **Thirdly**, BoP measures are temporary measures.

EX –India- not allowed

6- **Economic Development Exceptions** S&D treatment

Almost all WTO agreements provide for special and differential treatment provisions for developing-country Members to facilitate their integration into the world trading system and to promote their economic development.

- ‘S&D treatment’ subdivided into six categories:

1- provisions aimed at **increasing the trade opportunities** of developing country Members;

2- provisions under which WTO Members should **safeguard** the interests of developing-country Members;

3-**flexibility** of commitments, of action, and **use of policy instruments;**

4-transitional **time** periods;

5-technical **assistance**;

6-**provisions relating to least-developed-country** Members.

Exceptions to promote the economic development of developing-country- Art XVIII

A. the infant-industry-protection exception under Article XVIII of the GATT 1994; a nd
B. the Generalized System of Preferences (GSP) exception (**the Enabling Claus e)**

infant-industry-protection

- - if a developing-country Member considers it desirable, in order to promote th e establishment of a particular industry, to modify or withdraw a tariff concessi on, it can do so.

Requirements

- **negotiations with the Members** primarily affected by the modification or wi thdrawal of the tariff concession in order to come to an agreement on compens atory adjustment.
- If no agreement is reached, it is for the **General Council to decide** whether t he compensatory adjustment offered is adequate
- If the compensation offered to be inadequate, but also that every reasonable e ffort was

  made to offer adequate compensation, the developing-country Member may proceed with the modification or withdrawal of the tariff concession.
- Any other Member affected by the modification or withdrawal is then free to m odify or withdraw substantially equivalent concessions with regard to the devel oping-country Member concerned.
- **Minimum protection compared to GATT47- which gave protection w/t compensation**

B. the Generalized System of Preferences (GSP) exc eption(the Enabling Clause)

- The 1979 GATT Decision(Tokyo) on Differential and Mor e Favourable Treatment, Reciprocity, and Fuller Particip ation of Developing Countries
- Notwithstanding MFN, Members may accord differential and more favorable treatment to developing countries
- Preferential tariff treatment for developing countries un der the Enabling Clause
- exempts Members from complying with the
- obligation contained in Article I
- authorizes developed-country Members to grant enhanc ed market
- access to products from developing countries
- **Principle of Relative Reciprocity applied** – developi ng-country Members are expected to 'reciprocate' only to the extent that is consistent with their development, financial and trade needs- motivate few Ding countr ies to engage in tariff negotiation-

- The Enabling Clause was adopted by the GATT CONTRACTING PARTIES in the context of the Tokyo Round of Multilateral Trade Negotiations.
- It replaced, and expanded, a 1971 Waiver Decision on the Generalised System of Preferences,
- The Enabling Clause thus plays a vital role in promoting trade as a means of stimulating economic growth and development.

Any differential and more favourable treatment provided under this clause:

a. *shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other [Members];*

b. *shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;*

c. *shall in the case of such treatment accorded by [developed-country Members] to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.*

- The regional trade agreements under the Enabling Clause include: (‘COMESA’);the Treaty Establishing the Common Market of the South (‘MERCOSUR’); and the Common Effective Preferential Tariffs Scheme for the ASEAN Free Trade Area (‘AFTA’).

Chapter 3-TBT & SPS

TBT & SPS

- Are the laws of WTO
- Are non tariff measures
- Are results of Uruguay round
- TBT- general category of technical barriers
- SPS- special category of technical barriers

- Includes technical requirements relating to their **characteristics** , the manner in which they are **produced** and procedures set up to verify whether a **product meets certain requirements**
- Note that not only action but also the absence of action, and in particular the failure to inform about the applicable trade laws, regulations, procedures and practices, timely and accurately, may constitute a formidable barrier to trade

purposes of TBT

- protection of life or health,
- protection of the environment,
- prevention of deceptive practices or to
- ensure the quality of products.

- The rules of the TBT Agreement apply to technical regulations, standards and conformity assessment procedures relating to: **products** (both industrial and agricultural); and related **processes** and **production methods** (PPMs).
- A measure is a ‘technical regulation’ within the meaning of the TBT Agreement if:

1. the measure applies to an identifiable product or group of products;
2. the measure lays down product characteristics(volume,packaging,); and
3. compliance with the product characteristics laid down in the measure is mandatory.

The TBT requirements /Obligations

1 .Members accord national treatment and MF N treatment to products imported from other Members.

2. TBT measures do not create unnecessary obs tacles to international trade.

3. Legitimate objectives- duty to show the possi bilities of risk arising from non fulfillment

- technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the **risks non-ful fillment would create….Necessity Test**
- In assessing such risks, Article 2.2 lists relevan t considerations, including available scientific and technical information, related processing t echnology and intended end uses of products.

4- Furthermore, the TBT Agreement requires WTO Members to consider accepting, as equivalent, the technical regulations of other Members if they are satisfied that the foreign technical regulations adequately fulfill the legitimate objectives pursued by their own technical regulations.

5- The TBT Agreement subjects Members to a number of detailed transparency and notification obligations.

SPS

- are measures aimed at the protection of human, animal or plant life or health from certain specified risks.

- merited special attention for two reasons; First, these measures are closely ***linked to agricultural trade***, a sector notoriously difficult to liberalis Secondly, these measures fall within a ***politically sensitive area*** of government policy, namely, the protection of health.
- A separate agreement, the SPS Agreement, was therefore considered necessary to balance the goal of trade liberalization with the right of governments to regulate for the protection of health in their territories.
- For a measure to be subject to the SPS Agreement, it must be:

- an SPS measure; and
- a measure that may affect international trade.

- Not all measures for the protection of health are ‘SPS – it depends on purpose and aim

Cont'd

- In broad terms, an 'SPS measure' is a measure that:
- aims at the protection of human or animal life or health from **fo od-borne** risks; or aims at the protection of human, animal or plant life or health risks from **pests or diseases.**
- 'within the territory of the Member', excluding measures aimed at extra-territorial health protection from the- scope of applicati on of the SPS Agreement.
- The adoption and implementation of SPS measures are someti mes in the hands of bodies other than central government, suc h as regulatory agencies, regional bodies and sub-federal gover nments.
- The SPS Agreement applies with the exclusion of TBT Primarly Intended to clarify Art XX(b)
- The SPS Agreement, in Article 2.1, explicitly acknowledges the sovereign right of WTO Members to take SPS measures.
- At the same time, however, the SPS Agreement subjects Memb ers to a number of disciplines regarding their SPS measures.
- Besides incorporating some familiar GATT rules relevant to hea lth measures, these disciplines introduce science as the touchst one against which SPS measures are judged.
- Members have duty to take SPS measures **based on** or **confor m to** or **better than** international standards

- Actual risk-not just a theoretical uncertainty

Requirements to take SPS measures

1. Necessity Test- Actual risk and Scientific justifications
2. Non discrimination

The two most important principles of the SPS agreement are:

1. The principle for non-discrimination(is put under article 2.3… and has the content of the GATT's MFN clause); an d
2. The Principle of Scientific justification(provided under arti cle 2.2 of the agreement; any SPS measure must be bac ked by scientific justification

- In order to achieve the aim of balancing legitimate polic y-interests and to fighting against protectionism, the SPS agreement suggests a number of instruments
- risk-assessment (5(1))-a very stringent process of risk as sessment is needed for a country to adopt SPS measure i n order to justify that the scientific justification for the le vel of protection the measure is aiming at-very difficult t o do it even for developed countries

- Rules on setting protection levels: article 5.4-5.6, 5.8 describe how the antidiscrimination level should be observed-measure must be the least trade restrictive among available alternativ es, and should not be more restrictive to trade than necessary to achieve the desired level of protection
- Exception in case of insufficient evidence: A single exception t o the definite scientific evidence requirement; a measure can temporarily be taken in exceptional cases based on available evidence and must be revised after a reasonable period
- Harmonization: article 3 demands that members' SPS rules sh ould confirm to international standards as a matter of principl e.
- If a member adopts international standards, it is presumed th at it is consistent with the SPS agreement and assumed to ha ve fulfilled risk assessment and non-discriminatory
- Equivalence:- recognition to other countries' standard as eq uivalent-Art 4
- Transparency: it takes time for a country to learn and adapt to the SPS measure of a foreign country; it's also costly. A member has to publicize through the WTO ch annel about a new SPS measure and any change to it

Possible Solutions

- technical assistance
- More time for implementation of new rules
- Participating in setting international standards

Chapter-4
Trade Remedies

- trade policy-makers often insist that international trade should at the same time be ‘fair
- ‘Unfair’ trade comes in many forms and guises includin g cartel agreements, price fixing, and the abuse of a d ominant position on the market.
- WTO law, at present, does not provide for rules on thes e and many other particular forms of unfair trade.
- WTO , however, is concerned over two specific practice s commonly considered to be unfair trade practices.

  1. Dumping and
  2. Subsidy

DUMPING

- There are no general rules against unfair trade, but are some s pecific rules for certain kinds of unfair trade – e.g. subsidies and dumping
- Rules on dumping articulated in art VI of GATT 1947- But it was proved inadequate
- Later it was revised in Kennedy , Tokyo and lastly in the Urugu ay round-reached at **ADA**
- Many anti dumping measures were taken against China,Korea,J epan

Dumping

- Dumping: selling in foreign markets at less than 'normal value'
- Dumping' is a situation of international price discrimination invo lving the price and cost of a product in the exporting country in relation to its price in the importing country.
- Creates problem for efficiency
- Dumping is not prohibited by the WTO, but it is condemned – *A rticle VI*

When dumping is prohibited?

The [Members] recognize that dumping ... is to be **condemned if it causes or threatens material injury** to an established ind ustry in the territory of a [Member] or **materially retards the establishment** of a domestic industry

Requirements to take Anti Dumping Measures

1-There must be dumping;

2- the domestic industry producing the like product in the importing country is sufferin g injury; and

3- there is a causal link between the dumping and the injury.

1-Determination of dumping:- involves

a. Likeness of the product-

b. Normal value

c. export price

d. Compare

A -LIKENESS

Agreement on dumping has special meaning for 'like products', w/ focus on they are substantially the same or have similar characteristics

B- 'normal value'

- the comparable price, **in the ordinary course of trade**, for the like product whe n destined for consumption in the exporting country.

-first, the sale must be 'in the ordinary course of trade';

-secondly, it must be of the 'like product';

-thirdly, the product must be 'destined for consumption in the exporting country'; and

-fourthly, the price must be 'comparable'.

- Look at prices good is being sold at in country of origin. If no identical product bein g sold in there, determine if there is a like product being sold there
- 'dumping' exists where the 'normal value' of the product exceeds the 'export price

- Sales not made in the ordinary course of trade ma y be disregarded in determining normal value for-
- Price in a domestic market could be distorted due to:

- sales to affiliated parties;
- aberrationally high priced sales, or abnormally low priced sales;or
- sales below cost.

- Price could be distorted due to Market monopoly (complete or substantial) or state price regulation

❖ Where the domestic price is not an 'appropriate' n ormal value***… the options are:****

- **using an appropriate third country price as t he normal value**; or
- **constructing the normal value.** the cost of pro duction in the country of origin plus a reasonable amount for administrative, selling and general cos ts and for profits.

C. Export Price

Could be determined by using:

a. ***Transaction value-****Price at which an exporter in the exporting co untry sells the product to an importer in the importing country or*

b. Price to an independent buyer or

c. Constructed price

❖ *Transaction price may not be appropriate to determine the export price for it could be distorted due to: Internal* ***transfer****,* ***barte****r,* ***co mpensatory arrangement***

D. Calculating the margin of dumping

- Compare the weighted average 'normal value' to the weighted ave rage of prices of all comparable export transactions
- A *transaction-to-transaction comparison of 'normal value' and exp ort* price
- May use a weighted average normal value against individual trans action export prices in certain circumstances

❖ Price adjustment is required to balance factors like **taxation, cur rency exchange, volume of trade, terms of trade,**etc

- Material injury, i.e. genuine injury to a domestic industry
- The threat of material injury to a domestic industry
- Material retardation of the establishment of a domestic industry

The proof of dumping perse is not adequate to take ADA. It should be supplemented by the **ff** two features

-1- Rather dumping must create material injury on the domestic industry or threat on the do mestic industry material retardation on the domestic industry

domestic industry in the context is producer as a whole of like product in the importing state. It does not however include those who have business affiliation with the exporter

Is injury??

-impact on market share, price, profit, sales, productivity

-Magnitude of margin of dumping

-actual or potential negative effects on cash flow; inventories; employment;

wages; growth; ability to raise capital; or investments.

Threat??

- Increasing rate of dumping
- Significant impact on it
- Significant price manipulation

- 2-There has to be a causal link between the dumping and the injury
- ‘non-attribution’ requirement. In short, in order to comply with the ‘non-attribution’ requir ement of Article
- an appropriate assessment of the injury caused to the domestic industry by the other kno wn factors, and they must separate and distinguish the injurious effects of the dumped i mports from the injurious effects of those other factors.
- Cumulative Analysis- incase dumped by 2 or more countries- if export more than deminis (2 or more% of export price)and import is not negligible(3 0r more %)

Response to injurious dumping

Permissible responses to dumping – the conjunction of *Article VI of GATT 94 and ADA*

- Provisional measures
- Price undertakings
- Definitive anti-dumping duties

Anti dumping Investigation

- Initiation- by domestic investigating authorities
- written application submitted ‘by or on behalf of ’ a domestic industry
- the application should consist of evidence of injury to the domestic industry and evidence of a causal li nk between the dumped imports and the injury to t he domestic industry
- the period of data collection for dumping investigati ons normally should not exceed twelve months and, in any case, be no less than six months, ending as close to the date of initiation as is practicable
- the period of data collection for injury investigation s normally should be at least three years, unless a party from whom data is being gathered has existe d for a shorter period, and should include the entire ty of the period of data collection for the dumping i nvestigation

Anti-dumping measures-three kinds: provisional measures; ff.

preliminary affirmative determination of dumping, injury and causation

1. Imposition of provisional anti-dumping measures

2. price undertakings; and

3. definitive anti-dumping duties; should be based on

- Lesser duty rule
- Non discriminatory
- May not exceed the dumping margin

❖ has no retrospective effect unless justified on the ground of

2. Subsidies

- a financial contribution by a government or public body, which confers a ben efit.
- Achievement of the Uruguay round
- Certain subsidies are prohibited, and certain other specific subsidies may be challenged when they cause adverse effects to the interests of other Member s

There is a division between **prohibited, actionable, and non-actionable sub sidies**

- **Prohibited**: Export subsidies, Import substitution subsidies
- **Actionable** -not prohibited but are ‘actionable’, i.e. they are subject to challe nge in the event that they cause adverse effects to the interests of another M ember. Where such subsidies do not cause adverse effects, or the adverse e ffects are removed, they cannot, or can no longer, be challenged. Article 5 of the SCM
- **Nonactionable subsidies**. referred to as ‘green light’ subsidies.
- those non-specific subsidies, to which the disciplines of the SCM Agreement d o not apply.
- Until 31 December 1999, this category of non-actionable subsidies also inclu ded certain types of specific subsidy, such as certain narrowly defined region al subsidies, environmental subsidies and research and development subsidi es.
- As from 1 January 2000, however, these subsidies, provided that they are sp ecific, have been actionable.
- under the agreement on subsidies there is no longer non-actionable subsidie s
- Moreover, subsidies on agricultural products are subject to certain rules set o ut in the Agreement on Agriculture.

- Members may respond to subsidized trade which causes injury to the domestic industry.
- Members may, in these situations, impose countervailing duties on the subsidized imports to offset, i.e. cancel out, the subsidization. However, like the anti-dumping measures discussed
- above, **countervailing duties may only be imposed** when it is properly established that there are

a- *subsidized imports,*

b- there is injury to a domestic and

c- there is a causal link between the subsidization and the injury.

- As with the conduct of anti-dumping investigations, the conduct of

countervailing investigations is also subject to relatively strict procedural requirements.

- Note that the substantive and procedural rules on the imposition and maintenance of countervailing measures are similar to (albeit somewhat less detailed than) the rules on anti-dumping measures.

a. subsidy shall be deemed to exist

1. financial contribution by gov't or any public body

- direct transfer of funds (e.g. grants, loans(more favorable than commercial loan), and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)
- government revenue that is otherwise due is forgone or not collected
- a government provides goods or services other than general infrastructure or purchases goods
- government makes payments to a funding mechanism, or entrusts or directs a private body to carry out the above activates

2. there is any form of income or price support
3. a benefit is there by conferred

- In brief, a 'benefit' arises if the recipient has received a 'financial contribution' on terms more favourable than those available to any recipient in the market.

How the benefit calculated? With in the discretion, provided that they comply with few guidelines, of members

- ❖ government provision of equity, capital governmental loans and the provision of goods or services or the purchase of goods by a government are not subsidy unless such things are inconsistence with the usual investment practice or practices of private sectors

4. Requirement of 'specificity' of the subsidy- subsidies do not apply to all 'financial contributions by the government that confer a benefit' -apply only to specific subsidies

- a subsidy is specific when it has been specifically provided to an enterprise, an industry or a group of enterprises or industries.
- A subsidy that is widely available within an economy is presumed not to distort the allocation of resources within that economy and, therefore, does not require or justify any action.
- The types of specificity are: **enterprise, industry, regional or prohibited specification**
- If the criteria and conditions governing eligibility for, and the amount of, a subsidy are objective, the subsidy is not specific, provided that eligibility is automatic and the criteria and conditions are strictly applied.
- The SCM Agreement applies to both de jure and de facto specific subsidies.

- **The subsidy has to be ‘specific:-** granted to enterprise or industry, or a group of enterprises or industries
- Export subsidies (contingent on export performance) and import substitution subsidies (contingent on the use of domestic over imported goods) are prohibited
- A subsidy that is widely available within an economy is presumed not to distort the allocation of resources within that economy and, therefore, does not require or justify any action

Why might subsidies be good?

- - Obvious way to protect domestic industries,
- - Infant industries
- - R & D

– ***What might Members do if subsidized trade is hur ting their domestic industry***

- Set out in Articles 10-23 of the *SCM Agreement*

- Can be challenged multilaterally – (go to the P anel, try to get the country to withdraw them) Or …

- May impose **countervailing duties** to offs et subsidization if it has been established that:

1. There are subsidized imports
2. There is injury to a domestic industry

❑ Material injury

- an actual and potential decline in the output, sale s, market share, profits, productivity, return on inv estments, or utilisation of capacity;
- factors affecting domestic prices; and
- actual and potential negative effects on cash flow, inventories, employment, wages, growth or the ab ility to raise capital or investments.

- Threat of material injury

- the nature of the subsidy and the trade effects likely to arise from it; a significant rate of increase of subsidised imports; a nd
- whether imports are entering at prices that will have a signifi cant depressing or suppressing effect on domestic prices.
- Or material retardation of the establishment of a domestic i ndustry the subsidy displaces or impedes imports of a like pr oduct of another
- Member into the market of the subsidising Member (Article 6. 3(a)); the subsidy displaces or impedes the export of a like pr oduct of another Member from a third country market (Article 6.3(b)); the subsidy results in a significant price undercutting by the subsidising product in comparison to the like product o f another Member in the same market, or significant price su ppression, price depression or lost sales in the same market

3. There is a causal link between the subsidized imports and the injury

- ***Remedies***

1- withdrawal- multilateral

2. Compensation-multilateral

3. Counter measures- unilateral

- A special duty levied for the purpose of offsetting.

Safeguard Measures(SM)

-are temporary measures designed to slow imports in order to enable a particular industry compete with foreign suppliers

- It is justified under art XIX(Emergence action against a particular product-also called **escape clause**), art XII(Restriction to safeguard the balance of payment),art XVIII(Gov't assistance to economic dev't)
- Unlike S and D, unfair competition is not an issue nor a ground to take SM

Until the Uruguay round, GATT contracting states usually applied the so called **Grey Area Measures-** voluntary export Restraints(VER) or Orderly marketing arrangement (OMA)-were not imposed in accordance of art XIX – problems of grey area measures necessitated agreement on SM

ASM- was the result of Uruguay round

- remove the so called grey area measures
- primarily intended to clarify and reinforce GATT, re-establish multilateral control over safeguards and encourage structural adjustment (affected by competition)

Basic Requirements to take safeguard measures are:

1- increased imports

2- serious Injury test- an actual or threat of injury on domestic product due to Competition from increased imports

- Likeness of the product

3-Link test- cause effect r/p b/n the injury and imports

of

Unlike SCM and ADM, the rules of ASM:

-broader defn of domestic industry

- use serious injury not material injury as a test

-unfair competition is not a concern

But both ASM,ADM, and ASCM raise few common questions

- Is z domestic industry injured
- What actions should be taken againist

SMs

a. import restrictions- should be for all MFN

- Could be quota or other quantitative restrictions

b. Adjustment of compensation through bilateral

Negotiation- reciprocity measure available as a retaliation(with a limitation for absolute increase of imports)

Provisional measures, in cases of delay

- SDT for developing states

-4 years max

-Reapplication is limited- should wait period of non application

No more than 2 SMs with in 5 years

Committee----council for goods---general council----ministerial conference

Chapter- 5 GATS

- The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services
- GATS is a new multilateral agreement
- GATS is a positive list, only applies to those services which are agreed on (GATT applies to everything)
- the economic rationale for liberalizing the trade in service s is identical to that for liberalizing the trade in goods
- Two of the more common arguments advanced against lib eralization of services are rooted in the essential nature of services, and the infant industry argument.
- First, it is often argued that, since services are essential t o the functioning of a country, they should be controlled b y domestic suppliers. However, as with goods, the need fo r regulation of services does not imply a need to keep the service sector domestic.
- Similarly infant industry protection can’t be an excuse – b/ c unless domestic service industries can accurately be ide ntified as ones that will compete in the long-run, short-ter m protection will result in foregone gains from liberalizatio n

- Unlike the case of trade in goods, multilateral disciplines on the trade in services have been slow to develop due to:
- Nature of barriers - domestic regulations, investment limitations, and immigration policies
- the need and desirability of liberalization have often been questioned. Many sectors, such as tourism, education and health have traditionally been considered purely domestic areas, with no real international element and others like transportation and telecommunications, have often been considered of such vital importance, that opening them to foreign meddling could prove disastrous.

- The need to liberalize the services trade grew, largel y as a result of the increasing prominence services h ave obtained in the international marketplace
- Since recently ,Services have become the most dyna mic segment of international trade
- This type of dynamic growth eventually led countries to consider a comprehensive services agreement dur ing the Uruguay Round negotiations of 1986-1994. T he result was the General Agreement on the Trade in Services, or GATS.
- GATS contains two types of obligations:

1. collection of *general* concepts, principles and rules t hat apply to *all* measures affecting trade in services; and (2) *specific* negotiated obligations that make up a collection of commitments that apply to service se ctors that are listed in a member country's 'schedule

Modalities of Trade in service:

1. from the territory of one Member into the territory of any other Member (cross-border supply);
2. In the territory of one Member to the service consumer of any other Member (consumption abroad);
3. By a service supplier of one Member, through a commercial presence in the territory of any other Member (supply through a commercial presence); and
4. By a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (supply through the presence of natural persons).

- 'Services' includes 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.
- It is clear from the third mode of supply, i.e. supply through a commercial presence, that the GATS **also covers measures relating to foreign investment by suppliers of services.**

Cont’d

- Scope of application limited only to service.
- Though an independent law, GATS may overlap with GATT on few matters. This is a case where measures that involve a service relating to a par ticular good or a service supplied in conjunction with a particular good
- Basic pples of GATS
- 1-Article II, on the MFN treatment obligation; pro hibit discrimination on the basis of ‘nationality’ or the ‘national origin or destination’ of a produc t, service or service supplier.
- - equality of opportunity
- -applies to both de facto and de jure discriminati on

2-Article XVII, on the national treatment obligation.

Con’d

Consistence Test of MFN

- the measure is a measure covered by the GATS;
- the services or service suppliers concerned are ‘like’ services or service suppliers; and

- Physical c/rs
- Consumer preference/habits
- Product classification by UN
- Engaging in similar services provision does not imply the likeness of the service supplier-it dep ends on size,technology,expertise

- less favorable treatment is accorded to the ser vices or service suppliers of a Member.

❖ Unlike under the GATT 1994, the GATS allows Members to schedule exemptions from the MFN treatment obligation in Article II:1. Article II:2 of the GATS

Cont'd

National Treatment

What is unique ?

- Has no general application- cs appl depends on the degree of schedule of commitment
- are often made subject to certain conditions, qualifi cations and limitations like:

- Three-tier test of consistency with Article XVII of

1-the measure at issue affects trade in services;

- first, whether there is 'trade in services' i
- secondly, whether the measure at issue 'affects' su ch trade in services

2- the foreign and domestic services or service suppli ers are 'like' services or

service suppliers; and

3- the foreign services or service suppliers are grante d treatment no less favorable.

progressive liberalization

- GATS -aspires to develop a system of international services trade “under conditions of transparency and progressive lib eralization and as a means of promoting the economic gro wth of all trading partners and the development of developi ng countries.” ‘
- Progressive liberalization is to be attained through successi ve multilateral negotiations.
- It does *not* entail a specific obligation to deregulate service s markets.
- GATS specifically recognize the rights of member states to regulate and to introduce new regulations to meet national policy objectives.
- process of liberalization shall take place with due respect fo r national policy objectives and the level of development of individual Members, both overall and in individual sectors.
- Thus, GATS is similar to the GATT in that it does not *require* liberalization, it only *promotes* liberalization through succes sive multilateral negotiations Indeed, GATS and the GATT a re based on many parallel concepts.

Differences between GATS and GATT

- Scope(good vs Service)
- REI- GATT requires elimination of restrictions on “substantially all trade GATS requires substantial sectoral coverage- requirement be less restrictive than its counterpart in the GATT
- public policies. GATS allows members(in relatively wider scope) to restrict trade in services in the event of serious balance-of-payments difficulties ,for health or other public policy concerns, or to pursue essential security interests.
- GATS’ national treatment obligation is much more limited than that found in the GATT- b/c most services cannot be restricted by border measures such as tariffs or quotas
- Progressive liberalization (wider in GATS)

Chapter 6-TRIPS

- The Agreement on Trade-Related Aspects of Intellectual Property Rights (the ‘TRIPS Agreement’) is not an agreement concerning trade or trade measures.
- However, the value of many goods and services, particularly those traded by developed countries, is largely determined by the idea, the design or the invention they incorporate.
- If that value is not protected by protecting the intellectual property rights in the idea, the design or the invention, trade in these products will not thrive.
- For that reason, developed-country members sought and obtained the inclusion in the WTO Agreement of an agreement specifying minimum standards of protection of intellectual property rights and requiring the effective enforcement of these rights.

The term "intellectual property" refers to all categories of
intellectual property

- Copyright and Related Rights
- Trademarks
- Geographical Indications
- Industrial Designs
- Patents
- Layout-Designs (Topographies) of Integrated Circuits
- Protection of Undisclosed Information
- Control of Anti-Competitive Practices in Contractual Licences

- Its objective is to :

- reduce distortions and impediments to international trade,
- promote effective and adequate protection of intellectual property rights, and
- to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade

TRIPS recognize the following

- the applicability of the basic principles of GATT 1994 and of relevant intern ational intellectual property agreements or conventions;

- Paris Convention(1-12.19)
- Berne conventions (1-21)
- Rome conventions

❖ These conventions have prevails over TRIPS of chapter 1-4(deals over subs tantive matters)

- *intellectual property rights are private rights;*
- *underlying public policy objectives of national systems for the protection of*
- intellectual property, including developmental and technological objectives;
- *the special needs of the least-developed country Members in respect of* ma ximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;
- *Emphasizing the importance of reducing tensions by reaching strengthened commitments to* resolve disputes on trade-related intellectual property issu es through multilateral procedures;
- *Desiring to establish a mutually supportive relationship between the WTO a nd the World*

Nature and Scope

- Members shall give effect to the provisions of this Agreement but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.
- Members are free to determine the appropriate method of implementing this Agreement
- In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided in the I conventions

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1. Copy Rights:

- Concerned with literary and artistic works
- It must be fixed and origional
- It primarily includes right to control copying and mor al rights
- THE OWNERSHIP OF COPYRIGHT IS ALIENABLE AND I T COULD BE TRANSFERRED TO ANOTHER OR LICENC E MAY BE GRANTED BY THE OWNER TO ANOTHER
- extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as s uch
- It includes literary works (books, magazines, poems et c); dramatic works (plays, shows etc); musical works (songs, musical pieces etc); artistic works (paintings, drawings, maps, architecture etc); sound recordings (cassettes, CDs); broadcasts (television programmes, radio shows etc.); typographical arrangement of publ ished editions (published works); and cinematograph films (movies, DVDs or music videos

2. Trade marks - any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark.

- Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks.

- Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use.
- Member may deny registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention

3. Geographical indications are

- indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin

4. Industrial design

- Members shall provide for the protection of independently created industrial designs that are new or original
- Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties
- The duration of protection available shall amount to at least 10 years.

5. patent rights:

- (a) where the subject matter of a patent is a product, to prevent third parties not having the owner’s consent fro m the acts of: making, using, offering for sale, selling, or importing for these purposes that product;
- (b) where the subject matter of a patent is a process, to prevent third parties not having the owner’s consent fro m the act of using the process, and from the acts of: usin g, offering for sale, selling, or importing for these purpos es at least the product obtained directly by that process.
- Patent owners shall also have the right to assign, or tran sfer by succession, the patent and to conclude licensing contracts.
- Members may exclude from patentability inventions, the prevention within their territory of the commercial exploi tation of which is necessary to protect *ordre public or mo rality, including to protect* human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely becaus e the exploitation is prohibited by their law

6. Lay out design

- importing, selling, or otherwise distributing f or commercial purposes a protected layout-d esign, an integrated circuit in which a protect ed layout-design is incorporated, or an articl e incorporating such an integrated circuit onl y in so far as it continues to contain an unlaw fully reproduced layout-design are prohibited
- layout-designs shall be protected for a term of no less than 10 years from the date of the first commercial exploitation wherever in the world it occurs

Contemporary Issues

Trade and Human Rights

-It has been the concerns of many that trade and human rights are incompatible- many feared that trade is an impediment of non-economic objectives

- Is **free trade** an end by itself or means to fulfill basic human rights such as the improvement of global standards of living, promotion of sustainable development, and preservation of the environment.
- Though basic pples are designed to avoid trade restrictions, various other agreement and exceptions such as XX,SPS,TBT,

- Yet each of these WTO Agreements has been roundly criticized for impeding the ability of Governments to meet human rights obligations to their citizens.

- Trade and Human Rights
- Trade and Investement

Dispute settlement in WTO/GATT

GATT dispute settlement

- originally disputes heard in the general council
- Under the old GATT, the panel could not authorize retaliation.
- It could only recommend that the Contracting Parties recommend to the violating party to withdraw the violative measure
- there had to be consensus for the formation of panels (including by country against whose practices the other party was complaining)
- panel reports had to be adopted by consensus (including the consensus of the party against whom the dispute was resolved).
- The failure of DSB reduce GATT credibility – requires a comprehensive rules and understanding- realized during years of WTO estblishment- finalized in the Uruguay round

The WTO Dispute Settlement Understanding (DSU)

- In WTO DSB is part of the General Council- it is an alter ego
- Convene once in a month
- decisions on the establishment of a panel or decisions on t he adoption of dispute
- settlement reports, by reverse consensus. Other decisions, such as the appointment of Members of the Appellate Body

- The DSU is the first fully integrated text of GATT dispute se ttlement procedures.
- For the first time, the text and these procedures constitute treaty obligations (as opposed to "interpretations" or "unde rstandings of practices"), and their use is mandatory
- The DSU states that dispute settlement is a central elemen t of the WTO/GATT system.
- The DSU sets forth a comprehensive statement of dispute s ettlement rules
- In the WTO, dispute settlement will be administered by a Di spute Settlement Body (DSB), which will effectively be the WTO General Council acting in a specialized role

- The WTO dispute settlement system has jurisdiction over any dispute between WTOMembers arising under the ‘covered agreements’.

Substantive rules

1- rules not to add or diminish members right

2- interpretations in accordance of customary international interpretation rules- authoritative interpretation lies on the GC and MC

3-positive interpretations- mutual consensus- withdrawal- retaliation

4-Interpretation in good faith should not be intended or considered as contentious acts

- The DSU will regulate dispute settlement under all covered Multilateral Trade Agreements, although under some agreements special rules and procedures will be applicable

stages in a WTO dispute settlement proceeding

1) The parties must attempt to resolve their differences through ***consultations***.

(2) If that fails, the parties may avail themselves of ***GATT's conciliation or mediation*** services.

(3) In the alternative, if consultation fails, a ***panel may be established*** to hear the dispute.

(4) The ***panel members are selected***.

(5) The panel's ***terms of reference*** are set (i.e., the decisions expected of the panel are specified).

Terms of reference (TORs)

- Whatever Panel decides and discusses mu st be circumscribed to the TOR
- If TOR is too narrow and certain provisions are not included, Panel may construe omiss ion as not having been raised. Thus, countri es will be *precluded* from raising the issue/ provision not invoked in the TOR
- Parties must agree to the TOR or the Direct or-General will determine TOR.

(6)The ***panel hears*** the disputing and other i nterested parties and ***issues its report***.

The panel's universe is not confined to what t he countries have presented to it. A panel c an base its decision on anything and everyt hing (e.g. expert review, group advice, etc.).

- Hearings and oral argument are conducted behind closed doors. After hearing and arguments, the panel will issue an interim panel report (confidential) after which there is an interim panel review. Then, the panel renders its decision.

(7) The report is considered for ***adoption by the DSB*** (i.e. the General Council) by a procedure that assumes adoption unless there is a consensus against adoption (reverse consensus).

(8) New under the DSU is the possibility of an ***appeal*** by any party to the dispute to the ***Appellate Body*** and the adoption of its report, again by reverse consensus.

- The Appellate Body may (i) modify, (ii) reverse, or (iii) affirm. However, there's no such thing as remanding.
- The Appellate Body is limited to issues of law and not of fact.

(9) Assuming that either the panel report or t he appellate report is adopted, the ***implem entation*** of its recommendations is monito red.

(10) If the recommendations are not impleme nted, the ***possibility of authorizing with drawal of concessions*** is considered.

- The DSU explicitly provides that withdrawal of a nonconforming measure is preferred to compensation or suspension of concessions.
- Art. 22.1. Compensation and suspensions of concessions are viewed as "temporary mea sures" to be used when a report is not impl emented in a reasonable time.

The Law of Article XXIII

- GATT Article XXIII is the basic dispute settlement provision of the WTO/GATT system.
- Article XXIII is expressly incorporated by the various WTO agreements as the standard for dispute settlement or a provision very similar to the wording of Article XXIII is contained in the agreement.

The Structure of Article XXIII

- In order to prevail under the terms of Article XXIII, a complainant must show that either

(i) *benefits* accruing to it under the General Agreement are being nullified or impaired;
or

(ii) the attainment of an *objective* of the General Agreement is being impeded.

- In addition, the complainant must show that such nullification or impairment (or impedance of objective) is a result of:

(a) *a breach of obligation* by the respondent contracting party;

(b) *the application of any measure* by the respondent contracting party, whether it conflicts with the General Agreement or not (i.e., there has been no breach but your rights have nevertheless been impaired or nullified, e.g., production subsidies are allowed, yet the rights of a party may be impaired b/c tariff concessions granted to it is not benefiting complainant as it did w/o the subsidy); or

(c) the existence of any other situation (this one has never been raised).

- The best strategy is to argue XXIII(a) and then XXIII(b) in the alternative.
- DSU (Annex II) has created a *higher threshold* for XXIII(b) non-violation (See Article 26 of DSU).
- It basically says that if country is bringing action under XXIII(b), country needs to have more detailed justification of action and there is less pressure on respondent to withdraw alleged impairing measures

Accession to WTO

- Currently there are 164 member states 27 observers
- Who can be a member of WTO? Any state or customs territory having full autonomy in the conduct of its trade policies may join (“accede t o”) the WTO
- Separate custom territories can also be member of Wto – ex Chinese Tapie, EU
- Classify members as developed, developing and least developed- In t his regard WTO takes UN classification
- Most non member states and organizations such as FAO,IMF and WB have observer status
- There are two ways of membership- **original membership** -allowed k-ing parties to join WTO by accepting terms of WTO and making conc essions and commitments-until1997 and through **accession-indefin atly**
- The extent of the market access commitments and concessions that a candidate for membership will be expected to make will depend to a l arge extent on its economic development.
- Accession to WTO consists of four major phases

1- Tell us about your self

2- workout with us individually- bilateral rather than multilateral treaties

3- drafting membership agreement

4-final decision

The candidate has to accept all WTO agreements and trade treaties- not up for negotiation

First phase: Tell us about your self

- to report on all aspects of its trade and economic policies that are relevant to the obligations under the WTO agreements, and
- to submit a memorandum on these policies to the WTO.
- Working party established- examine policies and laws

Second phase: Workout with us Individually

- parallel bilateral market access negotiations process can start.
- With main trading partner

Third phase – the 'let's draft membership terms' phase –

- the working party finalises the terms of accession which are set out in a report, a draft membership treaty ('protocol of accession') and lists ('schedules') of the market access commitments and concessions of the candidate for membership.
- This package is submitted to the Ministerial Conference or the GeneralCouncil.

fourth phase: the 'decision' phase –

- the Ministerial Conference or the General Council decides by consensus or, if consensus cannot be achieved, by a two-thirds majority of WTO Members on the application for membership.
- In case of a positive decision, the candidate for membership accedes to the WTO thirty days after it has deposited its instrument of ratification of the membership treaty (i.e. the protocol of accession).

It takes many years. The **delays** in completing accession negotiations is due to:

1- the result of **hard bargaining** on the part of WTO Members

2- **political facts**.

3- It is also a result of the **tardy/slow supply of information**

4- **policy adjustments** on the part of the candidate for membership-

- adapting to WTO rules usually requires significant changes in national legislation and practices.

- It can take years to draft, approve and apply new legislation required for accession to the WTO.

The Doha conference came up with a solution to un necessary delay of accession- helping Least-developed countries – for they lack the administrative capacity to conduct the complex negotiations and to develop and apply the necessary changes in national legislation and practices-

Obligations of membership

1- duty to comply with established rules and laws

2-non reservation

Exceptions-

Waiver clause-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 WTO Agreement,**‘exceptional circumstances**’ may justify such a waiver

- Decided by Ministerial Conference granting the waiver shall state the exceptional circumstances, the terms and conditions governing the application of the waiever
- Ex- EC wavier for African,caribian,pacific
- USA ,Canada,Japan,Aus,SA---MFN,QR waivier banning trading “blood diamond
- Waiver of essential medicines for HIV, malaria and other life threatening diseases,

Non application Clause :a member right to prevent WTO rules from applying to its trade relations with another Member.

- For political or other reasons (including economic reasons)
- Article XIII of the WTO

- However, the ‘non-application’ or ‘opt-out’ clause has to be invoked at the time that this Member, or the other, joins the WTO. It cannot be invoked at any later time.

The decision to opt out must be notified to the Ministerial Conference (or the General Council) before the latter decides on the accession.

- ex USA vs Communist state

- No state currently enjoy this clause

Withdrawal and Expulsion-Article XV of the WTO Agreement states:

1. Any Member may withdraw from this Agreement-shall take effect up on the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.
2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

- Any Member may, at any time, unilaterally withdraw from the WTO.
- To date, no Member has ever withdrawn from the WTO.
- The WTO Agreement does not provide for a general procedure for th e expulsion of a Member. There is no procedure to exclude States fro m the WTO that systematically breach their obligations under the WT O agreements.
- There are also no rules or procedures for the expulsion of Members t hat are guilty of gross violations of human rights or acts of aggressio n.
- The expulsion of a Member is, however, provided for as a possibility i n the specific case of the non acceptance of ammendements-Note, h owever, that the UN Security Council could impose trade sanctions or a trade embargo on such
- Members and that, pursuant to Article XXI of the GATT 1994 and Arti cle XIV bis of the GATS, other Members would be able to apply these sanctions or that embargo.

Security exceptions

- Symbolic accession was China
- Tariff reductions
- Special Safeguard measures- for future china’s export surge
- Defining the status of china- developed or developing? GATT based on slandered of living not export performance