**Preamble**

With my fascination of law and my interest in international relations I decided to write my Master thesis on International law. I asked Pétur Dam Leifsson to be my instructor for my thesis and together we concluded that the thesis would cover the main principles of the World Trade Organization and the main exceptions from the principles. The subject is extremely interesting as it covers how we can improve the world with international co-operation. International economic law has not been much of a subject to Icelandic scholars, especially in Icelandic, and that includes international trade law and WTO law. At the same time it is safe to state that the WTOs function has not been very noticeable here in Iceland. With the thesis I hope to shed some light on the interpretation of the main principles and their exceptions and how they have been applied in international relations between Members so that they who are interested in international trade law can improve their knowledge.

With that said I would like to thank my instructor, Pétur Dam Leifsson professor at Háskóli Íslands, for being my instructor and guide me through the writing of the thesis, and letting me know if something could be done better. I would also like to thank Sonja Ýr Þorbergsdóttir for reading my thesis in regard to grammar and form. And most of all I would like to thank my husband Ómar Brynjólfsson for the greatest support possible, not only through my Master thesis but through all law school. My two sons, Hilmir (2 years old) and Rúrik (6 months old) for being the best support net I could ever imagine.
SUMMARY OF TABLE CONTENTS

Preamble ........................................................................................................................................... 1

1 Introduction ..................................................................................................................................... 5

2 2 Main aspects of the World Trade Organization and the General Agreement on Tariffs and Trades .................................................................................................................... 7

2.1 International trade and World trade law ..................................................................................... 7
  2.1.1 Introduction ............................................................................................................................. 7
  2.1.2 The International economy ..................................................................................................... 8
  2.1.3 International trade .................................................................................................................. 9
  2.1.4 International trade law .......................................................................................................... 10

2.2 The General agreement on tariffs and trades ............................................................................ 11
  2.2.1 Origins of the General agreement on tariffs and trades, The GATT 1947 ............................. 11
  2.2.2 Overview of the General Agreements on Tariffs and Trades ............................................... 12
  2.2.3 The GATT system after the Uruguay Round ...................................................................... 14

2.3 The World Trade Organization .................................................................................................. 15
  2.3.1 Introduction to the World Trade Organization .................................................................. 15
  2.3.2 The Marrakesh Agreement establishing the World Trade Organization ......................... 16
  2.3.3 Structure of the World Trade Organization ..................................................................... 17

2.4 The settlement of disputes at the World Trade Organization .................................................. 19
  2.4.1 Introduction to the Dispute settlement system of the WTO .............................................. 19
  2.4.2 The Dispute Settlement Body ............................................................................................ 20
  2.4.3 Consultation ......................................................................................................................... 20
  2.4.4 Panels .................................................................................................................................. 22
  2.4.5 The Appellate Body ........................................................................................................... 23
  2.4.6 Multiple Complainants ....................................................................................................... 24

3 The general principles of international trade in the WTO ......................................................... 25

3.1 The problems to be dealt with .................................................................................................... 25

3.2 Rules on Tariffs and tariff negotiations at the WTO ................................................................. 26
  3.2.1 Tariffs and Tariff Binding ..................................................................................................... 26
  3.2.2 Tariff Negotiations ............................................................................................................. 27

3.3 Most-Favoured-Nation Treatment ........................................................................................... 29
  3.3.1 Most-Favoured-Nation Obligation ....................................................................................... 29
  3.3.2 De jure and de facto discrimination ....................................................................................... 38

3.4 The National Treatment principle .............................................................................................. 39
  3.4.1 The National Treatment principle in the GATT .................................................................. 39
  3.4.2 Object and purpose of the National Treatment principle ................................................... 41
3.4.3 Legal Framework...........................................................................43
3.4.4 GATT Article III – the National Treatment obligation ......................43
3.4.5 Article III:2: Internal Tax Measures..................................................46
3.4.6 Consistency test of GATT Article III:4: Regulatory Measures ..............52
3.5 Non-tariff barriers ..........................................................................57
  3.5.1 Article XI of the General Agreements on Tariffs and Trades ...............57
  3.5.2 Quantitative restrictions ................................................................59
  3.5.3 Other non-tariff barriers ...............................................................62
4 Exceptions from the main principles ......................................................63
  4.1 Introduction ....................................................................................63
  4.2 General Exceptions .............................................................63
    4.2.1 Introduction .........................................................................63
    4.2.2 Necessary .............................................................................64
    4.2.3 Chapeau ..............................................................................69
  4.3 Subsides and Countervailing Duties .................................................70
  4.4 Safeguard Measures ..................................................................72
  4.5 Regional Trade Exceptions ..............................................................73
    4.5.1 General on Regional Trade Agreements .....................................73
    4.5.2 EU and EEA as Regional Trade Agreements.................................75
  4.6 Special and Differential Treatment of Developing Countries ...............76
  4.7 Agreements ................................................................................82
      4.7.1 Dumping and anti-dumping ........................................77
      4.7.2 Agreement on Sanitary and Phytosanitary Measures ..................79
      4.7.3 Agreement on technical barriers to trade .................................80
      4.7.4 Agreement on Agriculture ..................................................82
5 Conclusions ....................................................................................85
BIBLIOGRAPHY ....................................................................................92
Table of cases ....................................................................................96
1 Introduction

The World Trade Organization (hereinafter WTO) provides an international and legal foundation for a multilateral trading system. Members of the WTO Agreement (hereinafter WTO Agreement) recognize that their relations in the field of trade and economic endeavour should be managed with a view to raise standards of living, ensure full employment and a large and steadily growing volume of real income and effective demand. This the WTO aims to accomplish by expanding the production of goods, trade in goods and services and by allowing for optimal use of the world’s resources in accordance with the main objective of the WTO to promote sustainable development. The Member states aim to achieve these goals by entering into equally binding and mutual advantageous arrangements that are to substantially reduce tariffs and other barriers to trade and eliminate discriminatory treatments in international commerce.

This thesis will provide an overview of the main principles of the WTO and the before mentioned objectives. The object and purpose of this thesis is to shed some light on the interpretation of the main principles provided in the WTO. These principles are very important in international relation between states and govern a very sensitive spectrum in economy of states. It is important for the principle to be clear, transparent and be consistent as to secure more liberal trade and furthermore world peace and economic stability by making the world one economic area, this also has the side effect of increasing peoples well-fare. To fully understand the principles they must be examined, therefore in this paper the main focus will be on the interpretation of the principles and how they have been applied in practice. Thus the WTO agreements will be examined as well as the interpretation of Appellate Body (and the panels). Hence, a brief introduction of the history, structure and function of the WTO will be examined in chapter 2. This provides a better understanding of the principles. Chapter 3 provides an overview of the practice and interpretation of the main principles. Tariffs are most common and obvious restriction on trade. Tariffs are also the only restriction that is not prohibited by the WTO, thus the „Tariff Only“ principle, and that will be the first principle that will be reviewed. The Most Favoured Nation treatment is the next principle that will be covered, as it has been known to be the cornerstone on which the WTO was build upon. The obligation provides import and export from Members the best available treatment offered to

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1 Agreement Establishing the WTO, p. iv
2 Preamble of the Marrakesh Agreement Establishing the World Trade Organization.
any other Member. National Treatment obligation provides that when product has reached into a foreign market, that the imported country shall not treat the imported product less than domestic ones. Hence, the National Treatment principle will be examined after the MFN principle. Other duties and charges on import or export are prohibited, however that is not without exceptions. Non-tariff barriers are under certain circumstances allowed and will be examined under the National Treatment principle in chapter 3. The main principles cannot be completely understood unless their exceptions are examined. But that will be the subject of chapter 4.
2 Main aspects of the World Trade Organization and the General Agreement on Tariffs and Trades

2.1 International trade and World trade law

2.1.1 Introduction

When looking into international trading, one cannot conclude that international trading is a modern thing only to make its way to the surface in past couple of hundred of years. It dates back as long as 60.000 years when the first humans migrated from Africa and has continued ever since. Today international trading is however conducted with greater ease than before. The effortless communication between people in different places around the world has had a major effect on international trading.4

International trade in today’s economy is extremely important which can clearly be seen by the vast growth in trade and income over time. Since the World War II (hereinafter WWII) the GDP5 of the WTO Members has increased dramatically and trade has increased even faster.6 As an example, the GDP in Europe and North America, has grown about 400 percent7 since 1970 and the trade flow has increased even more. Enabling factors to that effect have been the dramatic reduction in tariffs on trade and the decrease of cost of trading due to cheaper methods of transportation and communication. Furthermore, governmental policies and technology have played a major role in the increase of international trading.8

Economics has had a strong influence in shaping and evolving international trade law, as it is very involved with states economy.9 International trade law does not only have significant impact on economies of states but also on the welfare of people around the world.10 Economics is however not the only reason countries enter into economic co-operation. Quite often the reason is of political nature, for instance based on friendly relations, in order to reward other states for co-operation in other fields or it can be based on a long-term view of prevention of war between nations.11 When countries are economically connected there is a decreased risk of military conflict between them due to the common

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4 Arwel Davies, Bryan Mercurio and Simon Lester: World trade law, p. 4-5.
5 GDP stands for „Gross Domestic Product“ which is the total value of goods and service produced or provided in a country per year.
7 These numbers are from 2012.
9 Andreas F. Lowenfeld: International Economic Law, p. 3.
interest in the economic wellbeing of each other. With international trade this connection between countries becomes deeper and they become more dependent on each other. The likelihood of going to war with trading countries is far-fetched. This is one of the main reasons for the establishment of the World Trade Organization. Support grew around the World for economic co-operation to avoid another political and economical disaster as followed by the World War I (hereinafter WWI).

2.1.2 The International economy

Even though international trade is considered beneficial to all participants in the global trade network, the harsh truth is that there are always some domestic producers that lose in the competition with foreign goods. As an example it can be hard to compete with cheap labour in the developing countries. It is however fair to say that economists are unanimous in their view that benefits of international trading outweighs the shortfalls considerably. To understand the benefits of international trading, one must explore the fundamental theory which international trade is based on, namely the theory on competitive advantage. The theory has had a significant influence on the development of the WTO. The famous economist Adam Smith first set forth the foundation of the theory in his book „The Inquiry into the Nature and Causes of the Wealth of Nations” where he compared the home market to a household:

[...] It is the maxim of every prudent master of a family never to attempt to make at home what it will cost him more to make than to buy. The taylor does not attempt to make his own shoes, but buys them of the shoemaker. The shoemaker does not attempt to make his own clothes, but employs a taylor. The farmer attempts to make neither the one nor the other, but employs those different artificers. All of them find it for their interest to employ their whole industry in a way in which they have some advantage over their neighbours, and to purchase with a part of its produce, or what is the same thing, with the price of a part of it, whatever else they have occasion for.

What is prudence in the conduct of every private family can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry employed in a way in which we have some advantage. The general industry of the country, being always in proportion to the capital which employs it, will not thereby be diminished, no more than that of the above-mentioned artificers; but only left to find out the way in which it can be employed with the greatest advantage. It is certainly not

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employed to the greatest advantage when it is thus directed towards an object which it
can buy cheaper than it can make.\textsuperscript{14}

Later, economist David Ricardo took Adams Smith's theory even further, and by doing so he
finalized the theory on comparative advantage. In his book \textit{The principles of political
economy and taxation}, from 1817, he explains how even the poorest countries can benefit
from international trade. In short, the theory entails that when states open their borders to
trade, the availability for production possibilities increases and allows them to specialize in
the production of goods or services that they have competitive advantage in. The model only
takes into account two countries, A and B, that produce only two products, but both countries
have the ability to produce both products. Even though country B is less efficient in
production of both products, the theory states that both countries profit from specializing in
the least-costly product and export that product to maximize its economic welfare. The theory
has been the cornerstone for liberalizing trade and has withstood the test of time remarkably
well.\textsuperscript{15} It is still widely accepted even though comparative advantage is not completely
satisfying for the complex economy of today.\textsuperscript{16} Like Smith’s theory it is a simplification of
how the real market operates and since it was put forth it has been refined by economists of
the 20\textsuperscript{th} century, that have confirmed the basic conclusion of Ricardo.\textsuperscript{17}

2.1.3 \textit{International trade}

International trading affects people around the world and often in daily aspects that people
take for granted.\textsuperscript{18} For many years trade was in its essence exchange of products between
countries. It has however been noted by economists that the nature of trade has changed.
Globalized economy has had the effect that trade is now increasingly in tasks and added
value. Today are products often produced in more than one country and by more than one
producer.\textsuperscript{19} For an example an alarm clock can be designed in Europe, produced in Asia and
programmed in America. It is unlikely that many consumers give much thought to the origins
of their alarm clocks or that they are a subject of international trading or economic
globalization. Due to the growing importance of international trade the need for rules

\begin{footnotesize}
\begin{enumerate}
\item Andreas F. Lowenfeld: \textit{International economic law}, p. 3-4; (where he quotes Adam Smith: „An Inquiry into
the nature and causes of the wealth of nations” Book IV chapter. 2.11 and 2.12.)
\item Andreas F. Lowenfeld: \textit{International economic law}, p. 1-5; Peter Van Bossche: \textit{The law and policy of the
14-16.
\item Andreas F. Lowenfeld: \textit{International Economic law}, p. 7-8.
\item Jan Klabbers: \textit{An introduction to international law}, p. 1.
\item Peter Van de Bossche and Werner Zdouc: \textit{The Law and Policy of the World Trade Organization}, p. 12-13
\end{enumerate}
\end{footnotesize}
governing the spectrum has increased. International trade would not function as well as it does without international trade laws. The reason is fourfold. Most governments have a tendency to protect domestic productions that result in restrictions on imported goods from other countries. International trading between two parties becomes a lot easier with trust in the market and therefore it is important to establish security and predictability between investors and traders. International trade rules provide countries with the means to set national regulatory measures in order to protect primary social values that leads to a harmonization in international protectionism against societal values. And lastly to recognize the special need of developing countries, as without international rules many of them would not be able to integrate into the world's trade system and profit from international trade.  

**2.1.4 International trade law**

The international legal system is decentralized which entails that international law is never imposed on states. An international legislature does not exist. Furthermore the main subjects to international law are states that are equally sovereign. This field of law is essentially based on consensus among states and their consent to adopt obligations that could limit their behaviour. Most international laws are made by either state practice (customary international law) or through agreements that states enter into (treaties). Upon establishment of the rules, states cannot unilaterally change them.  

International law is a wide concept that covers all rules and regulations regarding international relations. International trade law, the focus of this thesis, is one aspect of international law as established in the case *US – Gasoline*. In short, the international trade law system is a part of international economic law, which is an aspect of international law. International economic law covers laws on international monetary systems, international investments and international trading. These laws are mostly governed by international organizations. The largest international organization in international economic relations that governs these aspects of international economic law are the International Monetary Fund (hereinafter IMF), the World Bank Group (WBG) and for mentioned WTO. International

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20 Peter Van Den Bossche: *The law and policy of the World trade organization*, p. 33.
21 Rebecca MM Wallace and Olga Martin-Ortega: *International law*, p. 4
22 Appellate Body Report, *US – Gasoline*, p. 17; Interpretation of the Article 3.2 DSU, that directs Appellate Body and Panels of the WTO to interpret WTO law in accordance with customary of public international law.
trade law governs rules on international trade and the WTO is the main international organization that governs rules on international trade law.\textsuperscript{23}

\section{2.2 The General agreement on tariffs and trades}

\subsection{2.2.1 Origins of the General agreement on tariffs and trades, The GATT 1947}

The outbreak of WWI interrupted economic prosperity worldwide and the recovery of international trading after the WWI was slow. Also, WWI had a long lasting effect as most countries still opposed against international trading after the war was over and tariffs remained even higher than before the war. Another hit on the world economy in 1929 also known as the Great depression was met by even greater protectionism among states.\textsuperscript{24} This lead to a further increasing need for a worldwide organization like the WTO.

A discussion began between UK and the US on the subject of free trade and the establishment of an organization which would administer rules that apply to all states. The object of the discussion was to encourage trade between national borders and limit government interference.\textsuperscript{25} The GATT was signed in 1947 as a result of negotiations, lead by the US between 23 states that originally had the main objective of establishing an international institution for the regulation of trade, the International Trade Organization (hereinafter ITO). The ITO was supposed to be the third branch of International economic triad with International Bank for Reconstruction and Development (World Bank) and the International Monetary Fund (hereinafter: IMF).\textsuperscript{26} Together they were supposed to promote economic development, the reconstruction of Europe after the WWII and the expansion of world trade. The IMF was to provide liquidity to countries that needed help to enable the ITO to reduce tariffs and other trade barriers to liberalize trade.\textsuperscript{27}

The GATT Agreement was intended to implement and protect the results of negotiations on tariff reduction that had been agreed on during ITO negotiations and the intention was that the GATT Agreement would be included in the ITO when it came to the existence. That however never happened. The ITO charter, known as the Havana Conference on Trade and Employment, was held and an agreement was made on international trade on 21\textsuperscript{st} of November in 1947. But the ITO never came into existence since the US Congress never

\textsuperscript{23} Pétur Dam Leifsson: „Fyrirkomulag um lausn deilumála á vettvangi alþjóðavísastofnunarinnar“, p. 297-298.
\textsuperscript{24} Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International trade law}, p. 86.
\textsuperscript{25} Andreas F. Lowenfeld: \textit{International economic law}, p. 24-25.
\textsuperscript{27} Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International trade law}, p. 87.
ratified the agreement. It was not officially rejected but mostly just faded away and never came into action. The GATT however was still in effect and remained a provisional agreement that did not need to be accepted by states parliaments, and endured until the WTO was formally established in 1995. Due to the fact that the main objective of the GATT was to protect commitments on reduction of tariffs it included most of the provisions related to trade of the Havana Conference. The original purpose was not however that it would have the function of an international organization. Some general governance provisions in the GATT enabled its contracting parties to make some sort of governance structure, which enabled its role that was thrust upon it as the only significant multilateral trade agreement.  

By entering into a negotiations promoting freer trade and reducing the restriction on trade the hope was that it would encourage better relations between countries and therefore lead to world peace. Another expectation was that the negotiations on international trade would lead to economic well-being. Both these objectives are to be found in the preamble of the GATT.

2.2.2 Overview of the General Agreements on Tariffs and Trades
The GATT was the principle agreement relating to international trading from its establishment and until the arrival of the WTO. Most spectrum of international trading was covered by the agreement and relevant side agreements. It prompted liberalization of trade through its sponsorship of eight negotiation rounds and provisions that provided a mechanism for dispute settlement between Members. The main objective of the agreement, to reduce tariff, was achieved remarkably well. The average tariff has gone from average of 40% to under 5%. One of the reasons for its success is that governmental approval of states was not required for GATT to come into force, hence making the agreement more effective in its main objective. This was achieved by not including a Final Act in the agreement as most law making international conferences do, however the Members signed a Protocol Provisional Application (hereinafter: PPA). By signing the PPA all Members became bound by the agreements, Part I (the basic provisions of the agreement) and III (procedural provisions), and to the fullest extent of Part II (substantive provisions on code of conduct) that was not

29 Andrew T. Guzman and Joost H.B. Pauwelyn: *International Trade Law*, p. 88; Preamble of the GATT Agreement.
inconsistent with existing legislation. By signing the PPA rather than a Final Act the
Members did not formally subject themselves under an international organization.31

As aforementioned the preamble of the GATT states that with the establishment of the
agreement its founders hope to ensure world peace and to sustain economic stability. To do so
the agreement aims to raise living standards, ensure full employment and expand
opportunities for exchange in goods. Also, reducing tariffs and other barriers that hinder the
flow of goods across borders and eliminate discriminatory treatment in international
commerce. But for the agreement to be effective it needs to apply equally to all its Members
and be obliged by them all. This is exactly why the principles of the agreement are of such
importance as they provide equality to all Members and encourage liberalization of free trade.
Five elements are crucial to achieve these goals: First, the MFN treatment that provides for
non-discrimination in trade between Members.32 An obligation that Members have to provide
imports from and export to any other Member state with the best available treatment that is
offered to other states.33 Secondly, increase in trade barriers imposed by Member
governments that hinder goods, in any form, is prohibited. All restrictions are to be held at
minimum and the only changes that are allowed are those who lead to reduction of
restrictions. Even though restrictions on goods are prohibited and should be kept to a
minimum, one type of restriction on goods is accepted. That leads to the third principle,
customs tariff or better known as the “Only Tariff Principle”.34 This principle provides that
Members are allowed to impose customs duties and other charges on imported goods that
amount to a tax on imports, that is collected by the importing Member, and paid by the
foreign exporter or the domestic importer. These tariffs are the most common and obvious
restriction on trade. The WTO actually prefers that Members impose customs upon imports to
any other restriction.35 Fourthly, is the National Treatment principle that states that countries
cannot discriminate between domestic and imported goods by imposing internal taxes,
charges or other regulations. This does not entail that states are banned all together of
imposing sale taxes and other taxes on imported goods but the effect and motive of imposed
tax cannot be discriminating. Together with the MFN treatment and the Only Tariff Principle
the National Treatment Principle establish the emphasis on tariffs as the only instrument
accepted as trade protection and the commitment to erase discrimination on goods based on

31 Andreas F. Lowenfeld: *International economic law*, p. 29-33.
32 ibid. 30-31.
34 Andreas F. Lowenfeld: *International economic law*, p. 31.
its origins.\textsuperscript{36} To maintain the efficiency of the agreement it is important that Members meet regularly to negotiate and look for ways to lower trade barriers even further. There is no question that the gathering of contracting Members of the agreement is one of the fundamental bases for international trade law.\textsuperscript{37}

It is believed that due to the fact that most negotiations where private between two countries but took place at the same time played a big role in GATTs success. All negotiations that took place had the same underlying understanding that is known today as the MFN principle. The negotiations were conducted in one document, rather than many agreements, that consisted of schedules on tariff negotiations and code of conduct to stand guard of the agreements. The result was that all participants were committed to a common behaviour with international trade in mind.\textsuperscript{38}

2.2.3 The GATT system after the Uruguay Round

The Final Act of the Uruguay Round negotiations was signed in Marrakesh, Morocco on April 15\textsuperscript{th} 1994, at a Ministerial Meeting.\textsuperscript{39} This is one of the most important negotiation rounds between the Members and its final results far exceeded the initial expectations. The round accomplished great transformation in international economic relations in general and liberalized trade.\textsuperscript{40} However, even though the victory was great the road was long and rocky as it took roughly seven years to complete the Uruguay Round. The reason for the length of the negotiations was due to differences between the US and the then European Community (now EU). On the bright side the disagreement between EU and US lead to more influence and participation of the developing countries in the negotiations, which proved that the GATT regime was a universal multilateral trading system.\textsuperscript{41}

The results of the Uruguay Round led to negotiations regarding agricultural and textiles areas where the GATT had been ineffective before. Furthermore, there was great developments, that lead to liberalization, in service and intellectual property rights. The Uruguay Round also made a great improvement on the rules of the pre-existing GATT from 1947 or other more recent rules.\textsuperscript{42} In a way the conclusion of the Uruguay Round negotiations and the agreement on establishment of the WTO constituted a new beginning in international trade law.\textsuperscript{43}

\textsuperscript{36} Andreas F. Lowenfeld: \textit{International economic law}, p. 32.
\textsuperscript{37} ibid, p. 29-33.
\textsuperscript{39} Andreas F. Lowenfeld: \textit{International economic law}, p. 73.
\textsuperscript{40} Sonia E. Rolland: \textit{Development at the World Trade Organization}, p. 61.
\textsuperscript{41} Gilbert R. Winham: „The Economic and Policy Context”, p. 18-21.
\textsuperscript{42} ibid, p. 18-21.
cooperation and international law on trade. With the Uruguay Round, principles of international economic activities that had been established fifty years before were finally formally agreed to.

The establishment of the WTO and the fact that it replaced the GATT as an international organization did not terminate the GATT. The GATT still exists under the WTO as the treaty covering trade in goods. But with the establishment of the new organization the GATT was updated, and a „new” GATT was taken into practice, GATT 1994 which is the only one that is a part of the WTO system. The main provisions of the GATT 1994 however entail an incorporation of the provisions of GATT 1947. In addition it also incorporated a number of decisions and protocols acted on behalf of its Members from the establishment of the GATT 1947 until 1994. It also further explains provisions that are provided in the GATT 1947, therefore the relevant rules provided in the GATT 1947 still apply with a supplemented understanding of the GATT 1994.

2.3 The World Trade Organization

2.3.1 Introduction to the World Trade Organization

WTO is an organization that deals with rules regarding international trade. One of its main objectives is to liberalize trade. WTO is a platform where governments can negotiate trade agreements, resolve disputes regarding trade and operates a system of trade rules. WTO’s core function is to be a place where Member governments come together to resolve any problems relating to trade by negotiating. The WTO and all its function is a result of negotiations. Most of its tasks is based on the Uruguay Round negotiations and earlier negotiations under the GATT. The negotiations between the Members provide legal ground-rules for international commerce. They are binding upon Member governments to keep their trade policies according to agreed limits. The main purpose of the organization is to help free trade flow as freely as possible, as long as there are no undesirable side effects. To achieve this Member governments have to remove obstacles against free trade as well as the organization strives to provide stability and certainty to companies and other governments, in the sense that there shall be no sudden changes of policies. Therefore the rules have to be transparent and predictable. Trade related disputes between Members are subject to a dispute

43 Andreas F. Lowenfeld: International economic law, p. 73.
44 ibid, p. 73-74.
settlement in the WTO. Trade relations often involve conflicting interests and agreements of the WTO are commonly a subject of interpretation. The most harmonious way to settle such disputes is through neutral procedures that are based on former agreed legal foundation.

2.3.2 The Marrakesh Agreement establishing the World Trade Organization

The legal text „Resulting from the Uruguay Round of Multilateral Trade Negotiations” are 60 agreements, annexes, decisions and understandings. The agreements are divided into six main parts, an umbrella agreement, (the Agreement Establishing the WTO), agreements for each of the three areas of trade that is covered by the WTO, besides agreements for dispute settlement and review of trade policies by the governments.46

WTO’s main source is the Marrakesh Agreement establishing the World Trade Organization (hereinafter WTO Agreement) which consists of sixteen articles and other agreements and understandings in the Annexes to the basic agreement.47 Its role is first and foremost structural as it establishes the WTO and determines its formal function. The substantive obligations provided by the WTO are found in the four Annexes to the WTO agreement.48 The first Annex holds most of the substantive WTO law and is divided into three parts: In Annex 1:A are 13 multilateral agreements on trade in goods,49 where the main agreement is the GATT. There is no doubt that the agreement is complex and it proved necessary to simplify the agreement by drafting up a new document that would reflect the basic rules as was agreed to in the Uruguay Round. A decision was made to incorporate the original GATT from 1947 into the new GATT 1994. This was done in order to prevent any debates on the provisions that could have led accidentally to a new agreement or any other unforeseen circumstances. Since this arrangement could be confusing the two GATTs were made legally distinct from each other in Article II:4. It was stated that the GATT 1947 was no longer in force, but incorporated into the GATT 1994. Should a conflict rise concerning a provision of a multilateral agreement and the GATT 1994 the provision from the GATT prevails. Annex 1:B contains the General Agreement on Trade in Service (hereinafter GATS) and Annex 1:C entails the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS). The second annex covers the Understanding on Rules and Procedures Governing the Settlement Dispute (hereinafter Dispute Settlement Understanding „DSU”) and the third annex covers the Trade Policy Review Mechanism (hereinafter TPRM)

46 ibid, p. 103.
47 Peter Van Den Bossche: The law and policy of the World trade organization, p. 35.
which contains procedural provisions. The first three are known as the multilateral trade agreements and are essential part of the agreement and have a binding effect on the Member States. The fourth annex, Plurilateral Trade Agreements, also contains substantive law but it does not create any obligation or rights on Members unless they have specially accepted them. In this thesis the focus is laid on Annex 1:A: Multilateral Agreement on Trade in Goods.  

Article III of the WTO Agreement stipulates on the function of the WTO. The provision provides that the WTO shall facilitate the implementation, administration and operation as well as further the objectives of the Agreements and the Plurilateral Trade Agreements. The WTO shall provide the forum for negotiations among its Members regarding their multilateral trade relations in matters provided in the Annexes of this Agreement. The WTO shall also administer the DSU as well as the Trade Policy Review Mechanism (hereinafter TPRM). And to achieve greater coherence in the global economic policymaking, the WTO shall cooperate with the IMF and the World Bank and its affiliated agencies.

2.3.3 Structure of the World Trade Organization

The WTO is different from other international organizations since the power is not delegated to a board of directors or a head of the organization. Decisions in the organizations are taken by Members governments and which are most in consensus. It can be a great difficulty to reach a mutual decision among 160 Members. However, the fact that the WTO is a driven, consensus-based organization makes the decisions reached more acceptable to its Members. Members themselves, as a result of negotiations, impose disciplining rules of the WTO on countries policies including the sanctions., Regardless of the difficulty of reaching consensus among the Members, some remarkable agreements have been made.

The Members decisions making is made through various councils and committees composed of representatives from all Members. The Ministerial Conference is the highest-ranking decision-making body of the WTO. It is composed of accredited representatives of all the Members that meet at least once every two years. When this is written, the Ministerial Conference has met nine times and the next scheduled meeting is to take place in

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50 ibid, p. 42-48.
51 Understanding the WTO, p. 101.
52 Andrew T. Guzman and Joost H.B. Pauwelyn: International Trade Law, p. 95.
53 Peter Van den Bossche and Werner Zdouc: The Law and Policies of the World Trade Organization, p. 120.
55 Article IV:1 of the WTO Agreement.
Nairobi in Kenya December 2015. The Ministerial Conference shall carry out the function of the WTO and take any necessary action to do so. It has the authority to take decisions on all matters related to any of the Multilateral Trade Agreements, if requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in relevant Multilateral Trade Agreements. Any decisions taken by the Ministerial Conference shall be taken according to Article IX being the decision-making provision of the WTO Agreement. Decision on launching a new round for negotiations and discussions are made by the Ministerial Conference.

General Council shall conduct the everyday function of the WTO in between the meetings of the Ministerial Conference. The General Council, the Dispute Settlement Body (hereinafter DSB) and the Trade Policy Review Body (hereinafter TPRB), that will be covered in the next chapter, are in fact all the same as stated in the WTO agreement. They are all the General Council, although subject to different terms and circumstances. Three councils report to the General Council, that each handles different areas of trade. These councils that operate under the guidance of the General Council are; the Council for Trade in Goods, the Council for Trade in Service and the Council for Trade-Related Aspects of Intellectual Property Rights. Each council shall oversee the function of their respective areas as their name indicates. Furthermore, each of the council have subsidiary bodies that deal with specific subjects that fall under their scope. The General Council shall as well carry out tasks that have been assigned to it by the Agreement, establish rules of procedures and approve rules of procedures for Committees. These committees report back to the General Council and are established by the Ministerial Conference. Their scope is narrower than the three councils. They are all represented by WTO Members and cover issues on trade and development, the environment, regional trading arrangements, and administrative issues.

Important decisions are rarely taken in formal meetings and least of all in the higher-level councils. Due to the aforementioned fact that the process of reaching a mutual agreement

58 Article IV:1 of the WTO Agreement.
61 Article IV:2 of the WTO Agreement.
63 ibid, p. 96.
64 Article IV:5 of the WTO Agreement.
65 *Understanding the WTO*, p. 102.
66 Article IV:2 of the WTO Agreement.
67 Andrew T. Guzman and Joost H.B. Pauwelyn: *International Trade Law*, p. 96; Article IV:7 of the WTO Agreement.
between the WTO Members, in some cases informal meetings take place between the Members where they have formed coalition on specific subjects. This leads to easier conclusion in some cases. ⁶⁸

### 2.4 The settlement of disputes at the World Trade Organization

#### 2.4.1 Introduction to the Dispute settlement system of the WTO

The successful aspect of the dispute settlement system of the WTO is how automatic and compulsory the system is. For treaties to be functional they need to be complied with, as there is one thing for states to agree to a treaty but another to enforce its compliance. Under international law, states can only be brought before an international court or tribunal upon its consent. In many cases, that means that a breach of a treaty cannot be challenged before a third-party adjunction or disputes resolved in a judicial matter unless both parties give their explicit consent. This does not apply in the WTO. If a Member has a complaint against another Member on matters that fall within the scope of the WTO Agreement it can invoke the dispute settlement system of the WTO, without an approval of the other. ⁶⁹ The dispute settlement system is essential to provide security and predictability to the multilateral trading system. ⁷⁰ WTO Members have frequently used the dispute settlement system and in a large majority the disputes have been resolved. ⁷¹

Effective dispute settlement system is crucial to WTOs operation. It would be quite pointless to negotiate for years on detailed rules if then the rules would be ignored. Hence, a necessity of a system that enforces the rules is of even more importance in regard of the size and number of membership countries to the WTO. ⁷² The dispute settlement system provided by the WTO is a central element to ensure security and predictability to the multilateral trading system. ⁷³

The dispute settlement system arose from Article XXII and XXIII in the GATT Agreement long before the WTO. The WTO dispute settlement system is based on these provisions as established in Article 3.1 of the WTO Agreement. At the beginning the complaints were maid by the Members in a form of request to resolve a dispute between them. In 1952 the Chairman of the Contracting Parties decided to establish a panel. These

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⁶⁸ *Understanding the WTO*, p. 104.
⁷⁰ Bugge Thorbjørn Daniel: „Dispute settlement”, p. 38.
⁷² ibid, p. 130.
⁷³ Article 3.2 of the DSU.
sessions were not of a judicial or arbitral nature. With time the nature of panels procedures became more formal but the panels decisions were not binding upon Members. This evolved dispute settlement system was considered excellent and at the establishment of the WTO the decision was made to build upon the system for a new improved dispute settlement system, DSU in Annex 2 under the WTO Agreement. The DSU does yet not apply to all covered agreements of the WTO, though most of them are. The agreements that are listed up in the Appendix 1 of the WTO Agreement are all subject to the DSU, they consist of all the Multilateral Trade Agreements, plus the plurilateral Agreement on Government Procurement. In Appendix 2 are special or additional provisions in number of the agreements that are identified in DSU and they apply to the extent that there is a difference between them and the DSU provisions. If a conflict comes up between agreements where one is subject to additional provisions and the other is not the chairman of the Dispute Settlement Body DSB has the authorization to resolve it if the parties cannot.

2.4.2 The Dispute Settlement Body

The DSB was established to administer the rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provision of the covered agreements. The DSB has the authority to establish panels, adopt panels and Appellate Body reports, maintain surveillance of Members implementation of rulings and recommendations and authorize suspension of concessions and other obligations under the WTO agreement. A decision made by the DSB must be taken in consensus on matters that is brought before it for consideration. This requirement for consensus can sometimes be reversed consensus requirement, as the DSB must take a decision unless there is a consensus not to take a decision.

2.4.3 Consultation

The first step in the WTO dispute settlement system is consultation. This provides the parties with the option to settle their disputes on a formal or informal basis. A Member can ask for a
consultation with another Member if the former Member believes that the other Member has violated a WTO Agreement or in other way nullified or impaired benefits accruing to it. When a Member believes that another Contracting Party is or has violated the WTO Agreement the Member must submit to a “request for a conclusion” and identify the alleged violation that has occurred. The goal of the consultation is to enable the parties to a dispute to understand the facts and legal claims of the case and to resolve the matter without any further proceedings. Consultations are highly recommended for Members to resolve their disputes, as the aim of the dispute settlement mechanism is to secure a positive solution. A solution that is mutually acceptable by both parties and consistent with the WTO Agreement is therefore highly preferred. If the parties fail to reach an agreement the complaining party may request for another way to resolve the problem.81 Rules and procedures of the consultation and negotiation stage are mapped out in Article 5 of the DSU.82 The procedures provided in Article 5 are however „purely to help Members resolve their differences and do not limit their treaty rights in any manner.”83

General practice for consultation, as provided in Article 4.3 of the DSU is if a Member requests for a consultation the other party, which the request is addressed to, replays within 10 days of it receipt.84 The manner of which the consultation is conducted is up to the Members themselves. The only obligation provided by the DSU is that they are entered into with good faith and are held within 30 days of a request. During the consultation, both parties are likely to try to learn more about the facts of the case and the legal arguments of the other party. The Members shall notify the DSB and relevant Councils and Committees if consultation leads to a conclusion.85 If consultation does not resolve the dispute within 60 days of the request for consultation the complaining Member can request the DSB to establish a panel to rule on the dispute. If the respondent has not respected the responding deadline to the request for consultation or both parties agree that the consultation has failed to resolve the dispute, a request for panel can be made earlier.86

81 Article 5.3 of the DSU
83 The WTO Director-General issuing this communication was Mr Mike Moore on 13th of July 2001; Interpretation and Application of Article 5, available at www.wto.org.
84 Article 4.3 of the DSU; Pétur Dam Leifsson: „Fyrirkomulag um lausn deilumála á vettvangi alþjóðavísskiptastofnunarinnar“, p. 305.
85 Article 4.4 of the DSU.
2.4.4 Panels

If in some way the parties could not reach a conclusion by consultation the case can be referred to the panels. According to the DSU the DSB must establish a panel no later than at the second meeting after the request has appeared on the agenda, unless there is consensus on the contrary. Therefore panels are often established 90 days after the initial request for consultation. Parties are however not required to request for the panel at a specific time in the case.\textsuperscript{87}

The panel consists of three individuals and is created \textit{ad hoc} for the particular purpose of each case. According to the DSU the panel should be composed of panellists that are government officials (current or former), former Secretariat officials and trade academics or lawyers. The individuals that sit on the panels are not representatives of their governments but sit in their individual capacity. Those who sit on the panels are often people that are familiar with trade issues through their work experience or knowledge. Though it is not formally required that the panellists shall hold a degree in law, a Panel without a lawyer is rare nowadays. The panellists are bound by the restriction that an individual cannot sit on panels in a case of his own country, and therefore Members that frequently use the system seldom have individuals on the panels. The WTO Secretariat suggests panellists for the panels. The DSU allows the parties to reject for „compelling reasons” the choice of panellists. In practice this happens more frequently than expected, as the Members have quite a wide range of objections to suggested panellists as their agreement for composed panellists is necessary, unless the Director-General of the WTO is requested to be appointed to the panel. That happens if parties to the dispute cannot agree on the panellists within 20 days and then either of them can then request the WTO Director-General to be appointed to the panel.\textsuperscript{88}

Panels are technically not courts, the panellists are not judges and they do not take formal binding decisions. If a party is found to be in a violation of the agreements the Panel recommends that the DSB requests the Member to behave according to obligations provided in the agreements. When the DSB has adopt the panels decision it becomes binding upon the Members.\textsuperscript{89} The Panel can also suggest implementation methods on rules to prevent future violations. The quasi-judicial system was designed to preserve Members control and prevent that a final decision-making would be handed over to a third party. But over time it has

\textsuperscript{87} Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International trade law}, p. 132; „Dispute settlement system training module“, www.wto.org.
\textsuperscript{89} Pétur Dam Leifsson: „Fyrirkomulag um lausn deilumála á vettvangi að fjöðvisskiptastofnunarinnar“, p. 309.
become clear that panels rulings have been treated more like decisions rather than recommendations. The final report referred the DSB, after it has been introduced to the parties, for a formal adoption. This does not apply if there is consensus for not adopting the report or the case has been appealed to the Appellate Body. This negative consensus rule is one of fundamental changes made from the dispute system in GATT 1947 where a positive consensus was needed from all participants to adopt a panel report. Now it is enough for only one party to effectively adopt the report and that includes the prevailing party in a case.

2.4.5 The Appellate Body

The possibility to appeal panel decisions is new in the WTO dispute settlement system. The Appellate Body was established by the DSB in February 1995. Unlike panels the Appellate Body is a permanent international tribunal and consists of seven individuals, the Appellate Body Members. DSB shall establish and appoint seven persons to serve at the Appellate Body. They are persons of recognized authority, have demonstrated expertise in law, international trading and the general knowledge that the agreements cover. Therefore, the Members should have the knowledge to resolve issues of law that are covered by panel reports and general legal interpretations that are developed by panels. The Members are chosen randomly for each case and hear an appeal in division, though the DSU rules provide them to exchange views with the other four. Each Member serves on the Appellate Body for a four years term, and can only be reappointed once. They serve in cases regardless of their origin or nationality. All employment inconsistent with their position as a Member of the Appellate Body is prohibited. If so the Member can face disqualification on the ground of Rules of conduct and it is up to the Appellate Body itself to determine whether a violation has occurred. After an appeal of a panel report the Appellate Body has 60, maximum 90, days to report their decision which is then adopted automatically by the DSB within 30 days if total consensus is not reached there to reject it.

The Appellate Body’s mainly hears appeals from panel cases. The Appellate Body’s authority to review cases is limited to issues of law and legal interpretation developed by the

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90 Valerie Hughes: „The institutional dimension“, p. 277-278.
93 Article 17.1 and 17.2 of the DSU.
96 Pétur Dam Leifsson: „Fyrirkomulag um lausn deilumála á vettvangi alfjöðaviðskiptastofnunarinnar“, p. 310; Article 17.1 of the DSU.
panel. According to the DSU the Appellate Body has the power to reverse, modify or affirm panel decisions but does not specify the power to return the case to panels for reconsideration. The Appellate has adopted the practice to remand back to panel under certain circumstances.\footnote{Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International Trade Law}, p. 135.}

When a decision has been adopted, the DSB ensures that its recommendations that are based on the adopted panel or Appellate Body’s report, is implemented by the offensive state, as it is up to the Members to adopt the implementation.\footnote{Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International Trade Law}, p. 136; Peter Van de Bossche and Werner Zdouc: \textit{The Law and Policy of the World Trade Organization}, p. 291.} Multilateral surveillance of the DSB of implementation of DSB rulings and recommendations is unique.\footnote{Reflections from the Chair of the Dispute Settlement Body Jonathan T. Fried Ambassador and Permanent Representative of Canada to the WTO found on, Jonathan T. Fried „2013 In WTO Dispute settlement“, www.wto.org.} Under the surveillance function the offending Member is required, within 30 days of its adoption of the applicable report, to state its intention on implementation methods. It is essential to implement the recommendations promptly or immediately to maintain the function of the WTO system.\footnote{Article 21.3 of the DSU.} If under certain circumstances however that is not possible, which is often the case, the Member concerned can be given a reasonable time period to conclude implementation.\footnote{Article 9.1 of the DSU.} If a Member fails to implement the recommendation within a reasonable timeframe the other party can request for compensation. If that is not available the Member can request the DSB to take retaliatory action (suspend concession) against the offending state. In cases where it is agreed that implementation has not taken place the rules on suspension of concession work without a problem. However if the parties disagree if the implementation has been sufficient the applicable rules are in fact not quite clear in the treaty.\footnote{Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International Trade Law}, p. 136-137; Peter Van de Bossche and Werner Zdouc: \textit{The Law and Policy of the World Trade Organization}, p. 291.}

### 2.4.6 Multiple Complainants

If a more than one Member refers a dispute to the panel regarding the same case a single panel can be established to examine these complaint.\footnote{Article 9.1 of the DSU.} Multiple participation in a case is recommendatory but not mandatory. As established in Article 9.1 that panels should when feasible, it should not be intended to limit the rights of WTO Members. This is further supported by the aim of the dispute settlement mechanism is to secure a positive solution to a
dispute.\footnote{Panel Report, \textit{India – Patents (EC)}, paras. 7.13-7.15; Article 9.1, 9.2 and 3.7 of the DSU.} Multiple participation to a case is limited to \textit{multiple complainants}. However in cases where Members could have interest to a dispute under a covered agreement should be taken into account. Hence, a Member that has substantial interest in a matter shall notify the DSB and have the opportunity to be heard by the panel and to write submissions to the panel. These submission shall be given to the parties to the case and be reflected in the case.\footnote{Article 10.1 and 10.2 of the DSU.}

3 The general principles of international trade in the WTO

3.1 The problems to be dealt with

The WTO system is built on the ideology of free trade. The underlying principle of the system is trade liberalization and that more trade is better than less. Most countries have recognized that their economic welfare is overall improved by trading. Benefices of free trade are the consumers of the domestic markets, since free trade provides for wider and better variety on goods.\footnote{Kent Jones: \textit{Who’s afraid of the WTO}, p. 35.} Even though most people agree that international trading is beneficial the tendency with states governments is to impose restrictions to protect domestic production. This is where the WTO Agreements comes in, as they provide legal ground rules for international commerce. In its essence they are contracts between governments promising to keep their trade policies within agreed limits to provide producers, exporters and importers to conduct their businesses.\footnote{Gabriel Moens and Peter Gillies: \textit{International trade and business}, p. 362.}

International trading can in some cases lead to a decrease in demand for domestically produced goods. For that reason many governments but into place strong and difficult obstacles that favour restrictions on trade. International trade agreements are on of the few tools that can prevent such trade restrictions. Trade restrictions tend to raise prices of imported goods and increase profits or wages in the domestic industry, which is competing against impaired imported goods market.\footnote{Understanding the WTO, p. 9.} Rules on market access are the foundation of WTO law, since there can be no international trade if domestic markets of other countries are not accessible. Therefore this access needs to be secure and predictable to ensure international trading and prevent that markets are impeded or restricted in any way.\footnote{Peter Van Den Bossche and Werner Zdouc: \textit{The law and policy of the World trade organization}, p. 418-419.}
Political relations can be harmed when a Member discriminates against other Members, that can cause mislead in the market in favour of higher cost products and/or of lower quality. The importance of eliminating discrimination has been underlined in the preamble of the WTO agreement. It states two main principles non-discrimination obligations, the MFN obligation and the National Treatment. The difference between the obligations is that the MFN prohibits countries to favour on Member over others while the National Treatment obligation prohibits countries to favour itself over other Members.  

3.2 Rules on Tariffs and tariff negotiations at the WTO

3.2.1 Tariffs and Tariff Binding
Rules on tariffs are one of oldest international trade rules. Tariffs are almost as old as trading. As soon as traders began to profit from trade, authorities stepped in to control trading with taxation. Since then customs duties have been the source of revenue for governments. That and protectionism for domestic production are the main reasons for states taxation. Barriers to international trading can be in various forms. Obstacles to trade have been categorised into two groups, tariff barriers and non-tariff barriers. Tariff barriers have mainly been custom duties or other duties or charges on import and exports. An exporter of good must buy his access to foreign markets by paying customs duties or tariffs in most countries. Other duties are „any fee or charge that is in connection with importation and that is not an ordinary customs duty, nor a tax or duty as listed under.” The terms have not been defined in the GATTs or any other WTO agreements. When referred to in the agreements the terms have been used as synonyms. But by referring to custom duty or tariff on imports the general definition is when government imposes customs duties or other charges on imported goods. They amount to a tax on import, which is paid by producers, importers or exporters of goods and collected by the importing countries. Tariffs are one of most common and obvious ways to restrict trade. Countries may also restrict import with non-tariff barriers such as import ban or quota, these measures are however in principle banned, but not without exceptions. This will be further addressed later in chapter 3,5.

110 Peter Van Den Bossche and Werner Zdouc: The law and policy of the World trade organization, p. 315-316.
114 Panel Report, Dominican Republic – Import and Sale of Cigarettes, para. 7.113
115 Peter Van Den Bossche and Werner Zdouc: The law and policy of the World trade organization, p. 420.
117 ibid, p. 182.
It is very important to keep in mind that the WTO does not ban Members to impose tariffs. But still it recognises them as an obstacle and in Article XXVIII of the GATT are members encouraged to negotiate a reduction on tariffs even further. The fact that the WTO aims to liberalize trade does not mean that the WTO wants to eradicate tariffs completely. Tariffs are in line with WTOs objectives since they are transparent and maintain a link between the domestic market and world price. The GATT tries to guide WTO Members that want to protect domestic production by imposing tariffs, to more transparent and economic friendly tariff measures. At the same time the GATT tries to reduce tariffs on country-by-country (e.g. tariffs in EU and US on fish can vary) and product-by-product (e.g. EU tariffs on fish and technology is not necessarily the same) bases. Most tariffs are \textit{ad valorem} duties, which means that tariffs are calculated in proportion to the estimated value of the product. They can also be measured as „specific duties” then they are not based on the value but on its weight, volume or quantity.

The two most important things for traders to have in mind when dealing with customs are the domestic or national tariff laws of the importing country and the states WTO schedule of tariff concession. The WTO schedules give the country in question multilaterally agreed tariff ceiling „bound tariff rate”. According to Article II of the GATT, Members are obligated to keep tariff rates under or at the level of which they are bound. The bonding rate for a country can be relied on by all the Members as a result of the MFN principle. In certain circumstances Members are able to raise tariffs above mentioned ceiling as provided in GATT Article II:2.

3.2.2 Tariff Negotiations

Tariffs reduction was GATTs main focus until the conclusion of the Tokyo Round in 1979 and the Uruguay Round in 1994, and then focus changed equally to non-trade barriers. Tariff negotiations were conducted on selective product-to-product basis between seller and buyer of each product, up until 1962, Dillon Round. Now a more general approach is used by impose linear reductions or complicated formulas.

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\begin{itemize}
  \item 118 ibid, p. 181.
  \item 119 Peter Van Den Bossche and Werner Zdouc: \textit{The law and policy of the World trade organization}, p. 474.
  \item 120 Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International Trade Law}, p. 182.
  \item 122 Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International Trade Law}, p. 185; Appellate Body Report \textit{India – Additional Import Duties} fn. 320.
  \item 123 Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International Trade Law}, p. 182.
\end{itemize}
MFN principle and the reciprocity and mutual advantage principle are the basic rules that govern tariffs negotiations. The MFN principle will be addressed in the next chapter. However the principle of reciprocity and mutual advantage require, in short, that when a Member enters into a negotiation with the request of to reduce tariffs the Member must be willing to reduce customs duties on a product in return. Negotiations were based on common language that describes goods. This common language is found in the Harmonized System (hereinafter HS). In the HS goods are listed and classified according to products or tariff lines, each of which has a number of digits. Few digits refer to broader product categories and more numbers describe more specific products. Even though not all Members have made the HS official all countries categories products accordingly, at least to a certain extent. In the case EC – Custom Classification the Appellate Body found that the HS was part of the „context“ of the WTO agreement and is therefor relevant in interpretation of the schedules of concession between Members according to GATT Article II. All negotiations that lead to tariff concession must be added to the GATT and become essential part from there on. Every Member has a Schedule of tariff concession that becomes a subordinate part of the Marrakesh Protocol to the GATT or to a Protocol of Accession. The meaning of tariff concession can change over time in accordance of implementation of HS. Interpretations on tariff concessions and tariff schedules are according to the 1969 Vienna Convention on the Law of Treaties (VCLT) that holds the rules of interpretation. A Member’s unilateral understanding or intention to a concession made in the WTO multilateral trade negotiations cannot prevail the common intention of all WTO Members.

In tariff negotiations there are two different ways to negotiate as stated in Article XXVIII of the GATT 1994. The negotiations can be on the ground of selective product-by-product basis and by the application of such multilateral procedures. During the first years of the GATT years Members opted to use the product-by-product method. The disadvantage with this method is that the negotiations only grasp one product at a time, and can therefore be very time consuming. Hence, product-by-product method is not the main negotiation technic used except in bilateral or plurilateral negotiations outside the Rounds. Multilateral negotiations are now the main negotiations technique and are based on a formula approach.

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128 Appellate Body Report EC – Chicken Cuts para. 305.
129 Peter Van Den Bossche and Werner Zdouc: The law and policy of the World trade organization, p. 431- 432.
3.3 Most-Favoured-Nation Treatment

3.3.1 Most-Favoured-Nation Obligation

One of the main attraction and discipline of the WTO Agreement is the MFN principle.\(^{130}\) The obligations of the principle provides that if one Member provides a special treatment to another Member that treatment has to apply to all other Members.\(^{131}\) The principle is set out in the very first Article of the GATT agreement.\(^{132}\) Article I states:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

The MFN principle is repeated, in one form or the other, throughout the GATT agreement and in the two other pillars of the WTO (GATS and TRIPS). Though the principle is a little different in each agreement the main aspects of the principle are the same. Together they apply to all fundamental trade areas that WTO covers. It is undisputed that the MFN principle is very important to the multilateral trading system. The obligation is one of the cornerstones of the GATT as well as one of the pillars that the WTO is based upon.\(^{133}\) The MFN principle was used as an encouragement for countries to enter into the agreement. The encouragement lies in the advantage given to another Member or an outsider to immediately and unconditionally apply to all WTO Members. The importance of the principle is not as much as is used to be, due to today's size of the WTO.\(^{134}\) The principle is unconditional and applies automatically to all advantages of any trade concession. This immediate application takes place without any compensation to the state that was granted the advantage.\(^{135}\) The concept the MFN principle is based on is not new. Professor Robert E. Hudec\(^{136}\) for an example points out that in medieval times the city of Mantua in Italy was given a promise from the Holy

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131 *Understanding the WTO*, p. 10.
132 The MFN is so important that it is the second Article in the GATS agreement and Article 4 in the TRIPS agreement.
136 Was a highly accomplished scholar and a professor at Yale, University of Minnesota and Tufts University.
Roman Emperor that they would receive the same privilege granted to other towns in trade. Another leading scholar, John H. Jackson\(^\text{137}\) notes in his book *The world trading system: law and policy and international economic relations* that the term MFN appeared as early as in the end of the 17\(^{th}\) century. This was however taken into new heights when the principle was stated in the GATT and accepted by so many countries. In the beginning the principle only applied to an exclusive club between „most favoured” trading partners. The origins of the name of the principle traces back to this. Today the name however is quite controversial since it suggests that a Member should get a special treatment when in reality the principle encourages equality and non-discrimination between Members. Today the principle applies to every Member of the WTO.\(^\text{138}\)

Unilateral tariff setting can lead to externalities, where countries behave in non-cooperative way and lead to a situation explained as prisoners dilemma. The Prisoner’s Dilemma is a paradox analysing decision making when two individuals act in their best interest but that course of action does not lead to the ideal results. The typical prisoner’s dilemma is set out that each party chooses to protect themselves at the cost of another’s. But with that course of action both find themselves in a worse situation than if they had co-operated with each other in the decision-making process. Trade agreements have the means to incorporate externality and escape from that kind of situations. Prohibiting Members of the agreement to offer outsiders better advantage than others conceived the MFN as a carrot for countries to join the GATT. Therefore all advantage to outsiders would immediately apply to GATT Members as well. Member States therefore knew that adherence to the agreement would grant them access to ever growing trade markets under the best terms available.\(^\text{139}\)

The MFN principle is set out in Article I:1 of the GATT. There are four questions to determine consistency of the obligation. These four questions ask if the measure at hand is covered by Article I:1, if the measures provide advantage to anyone, if the products are „like products” and lastly whether the advantage given grants immediate and unconditional advantage to all „like products”, regardless of their origin or destination.\(^\text{140}\) These consistency tests will be discussed in the next chapters. The examination of a violation of the principle

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\(^{137}\) John H. Jackson is a highly noted scholar in international and international trade law. He is a director at the Institute of International Economic Law, a professor at a Georgetown University and he is the editor-in-chief of the Journal of International Economic Law

\(^{138}\) *Understanding the WTO*, p. 10.


\(^{140}\) Peter van de Bossche and Werner Zdouc: *Law and policy of the World trade organization*, p. 320-321.
was laid out by the Panel in the case *Indonesia – Autos* which explains how examination of the measures shall be carried out. The Appellate Body, in *EC - Bananas III*, confirmed that to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all „like products” of all WTO Members.\(^{141}\) Following this analysis, the first examination shall be whether the tax and customs duty benefits are advantages of the types covered by Article I. Second, we shall decide whether the advantages are offered (i) to all like products and (ii) unconditionally.\(^{142}\) This examination has been known as the consistency test of the MFN principle.\(^{143}\)

### 3.3.1.1 Measures covered by GATT Article I:1

The object and purpose of the MFN principle provided in Article I „is to prohibit discrimination among like products originating in or destined for different countries”\(^{144}\) as stated by the Appellate Body in the *Canada – Autos* case. The principle applies to cases when „the failure to accord an „advantage” to like products of all other Members appear on the face of the measure, or can be demonstrated on the basis of the words of the measures. […]” Article I:1 does not cover only „in law”, or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also „in fact”, or *de facto*, discrimination[…]”.\(^{145}\) The MFN principle covers both internal and border measures, both recognised by the panels and Appellate Body.\(^{146}\) All rules and formalities that are in connection with importation or exportation fall under the scope of the principle. Article I requires that the broad interpretation of the phrase „rules and formalities in connection with importation” of the MFN treatment covers rules that are related to tariff quota allocations. Such rules are clearly applied in connection with importation of goods. They are indeed critical when it comes to determine imposed amount of duty. License procedures of import are rules and formalities that also fall under the scope of the principle.\(^{147}\) In the case *Colombia – Ports of Entry* parties agreed upon an advanced declaration requirement on textile, apparel and footwear imported from Panama where those measures constituted rules and formalities in connection with importation.\(^{148}\) A US legislative provision that restricted the use of funds was considered a rule in connection

\(^{142}\) Panel Report, *Indonesia — Autos*, para. 14
\(^{143}\) Peter van de Bossche and Werner Zdouc: *Law and policy of the World trade organization*, p. 321.
\(^{144}\) Appellate Body Report, *Canada — Autos*, para. 84
\(^{145}\) Appellate Body Report, *Canada — Autos*, para. 78.
\(^{146}\) Peter van de Bossche and Werner Zdouc: *Law and policy of the World trade organization*, p. 321.
\(^{147}\) Panel Report, *EC — Bananas III*, para. 7.107 and. 7.189.
\(^{148}\) Panel Report, *Colombia — Ports of Entry*, para. 7.342.
with importation within the meaning of Article I:1 of the GATT 1994. It furthermore stated that the wording „[…] in connection with importation” as used in the Article I:1, not only encompasses measures which directly relate to the process of importation but could also include […] other aspects of the importation of a product or have an impact on actual importation.149

Products that are imported from a territory of a Contracting Party shall not be directly or indirectly a subject of internal taxes or other internal charges of any kind. The MFN principle covers both internal and border measures, both recognised by the panels and Appellate Body.150 These matters that are referred to in paragraphs 2 and 4 of Article III fall within the scope of Article I:1 In the case EC – Trademarks and Geographical Indications (US) the Panel concluded that regulations that fell under as law or regulations in Article III:4 of GATT 1994 and therefore fell within the scope of Article I:1 as stated in the article.151

There has been some debate regarding safeguard measures, anti-dumping duties and countervailing duties. With the Agreement on safeguards it has been established that the MFN covers safeguard measures but on the other hand the agreement allows discrimination on safeguard measures, under certain conditions. The anti-dumping agreement provides that countervailing duties as well as anti-dumping measures fall under the scope of MFN obligation.152 Even though the scope of the MFN principle is wide the panel in the case EC – Commercial Vessels clearly stated that the range of the principle were not unlimited. In the case, Korea challenged Regulations of the EC that provided EC shipbuilders aid and support for shipbuilding contracts where Korean shipyards had offered lower price. The panel concluded that “[…] interpreting the ordinary meaning of the terms used in their context, the Panel considers that the phrase […] in Article I:1 […] cannot be interpreted without regard to limitations that may exist regarding the scope of the substantive obligations provided for in these paragraphs.”

3.3.1.2 Is „any advantage” given

The second consistency test of the MFN treatment obligation in Article I:1 is whether the matter at hand grants any advantages. The article refers to any given advantages to any like product from another country that has been provided by a Member State. Text of the article provides a broad definition by stating „any advantage, favour, privilege or immunity granted

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149 Panel Report, US — Poultry (China), para. 2.2–2.3.
151 Panel Report, EC — Trademarks and Geographical Indications (US), para. 7.713.
This broad interpretation has been the adjudicate bodies understanding of the WTO. In the case EC - Bananas III, the panels considered that the „advantages” given are those who create „more favourable import opportunities” or affect the commercial relationship between products of different origins, as provided by Article I:1. The Appellate Body’s decision was similar in the Canada – Autos case where Canada’s import duty exemptions accorded to motor vehicles originating in some certain countries and manufacturers were present, was inconsistent with Article I:1. The Appellate Body noted that „Article I:1 requires that „any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally of all other Members.” The Words of Article I:1 does not refer to some advantages granted „with respect to” the subjects the fall within the defined scope of the Article, but to „any advantage”.”

Advantages given can be in various forms of tariff quotas as stated in the case EC – Bananas III where requirements for tariff rate quota allocation to importers differed after the origin of the bananas. In the case

The Panel found that the procedural and administrative requirements of the activity function rules for importing third-country and non-traditional ACP bananas differ from, and go significantly beyond, those required from importing traditional ACP bananas. This is a factual finding. Also, a broad definition has been given to the term „advantage” in Article I:1 of the GATT 1994 by the panel in the United States – Non-Rubber Footwear. „It may well be that there are considerations of EC competition policy at the basis of the activity function rules. This, however, does not legitimize the activity function rules to the extent that these rules discriminate among like products originating from different Members. For these reasons, we agree with the Panel that the activity function rules are an „advantage” granted to bananas imported from traditional ACP States, and not to bananas imported from other Members, within the meaning of Article I:1. Therefore, we uphold the Panel’s finding that the activity function rules are inconsistent with Article I:1 of the GATT 1994.

Countries receiving more flexibility in import procedures are considered to fall under the scope of the MFN principle. In the Colombia – Ports of Entry the panel found that the imports declarations and legislations requirements were an advantage to special products from other WTO Members. The Panel found that „one advantage arises from the fact that importers of subject goods from territories other than Panama or the CFZ are granted flexibility to make customs duty and tax payments when they see fit. Additionally, an importer that has not filed

154 Panel Report, EC — Bananas III, para. 7.239.
155 Appellate Body Report, Canada — Autos, para. 79.
an advance import declaration would retain the option to inspect his goods on site upon arrival, verifying its dimension and weight, prior to submitting a declaration, thereby assuring himself of the accuracy of the declaration and avoiding fees required to file a legalization declaration.\textsuperscript{157} Access to certain certifications procedures were considered as any advantage that fell under the principle in the case \textit{US – Poultry (China)}. It was believed that successful completion of certain procedures to be the only way for importers to enter into the US market for poultry products. For importers not to be able to enter into such favourable market meant a real competitive disadvantage in the US market and affect the commercial relationship between two products regarding their origin. Therefore the ability to export poultry products to the US after the successful completion of the procedures is an advantage within the meaning of Article I:1 because it creates opportunities to market access and affects the commercial relationship between products of different origin.\textsuperscript{158}

3.3.1.3 \textit{Analysis of „Like products”}

For products to fall under Article I:1 they must be „like products. An extreme way to explain the term would be that for instance, a car and a fruit would be to unlike for comparison if one is believed to receive more advantage than the other. Products that are „like products” cannot be treated differently according to the principle. The MFN obligation therefore only applies when discrimination is against „like products”.\textsuperscript{159} Even though the concept appears more than once it is not defined in the agreement.\textsuperscript{160} However as stated in \textit{US – Poultry (China)} case is the concept regardless of the provision the concept must be analysed on a case-by-case basis.\textsuperscript{161}

To help interpretation of the concept three questions have been laid out to determine if products are „like products” or not. Firstly, which characteristics or qualities the products have in common that is important when assessing „likeness”? Secondly, to what degree or extent does this similarity has to be? Thirdly, from what aspects should the „likeness” be judged? It has generally been accepted that the concept can vary depending on the context. Therefore products that are a „like” in context to Article I of the GATT 1994 can also differ in

\textsuperscript{159} Peter van de Bossche and Werner Zdouc: \textit{Law and policy of the World trade organization}, p. 325-328.
meaning compared to other articles. As the Appellate Body stated in the case *Japan Alcoholic Beverages II*, „No one approach to exercising judgement will be appropriate for all cases. The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of the term „like”. The concept of „likeness” is a relative one that evokes the image of an accordion. The accordion of „likeness” stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term „like” is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.“

In the draft articles of the GATT there are some clues for the interpretation of „likeness” in Article I:1. In the London Conference meeting Mr Nathan, the French representative, wondered about the translation of the words „like” or „similar products” into French. The problem was regarding how narrow or wide these words were intended. The question raised was in the case of wheat, could all cereals be considered „like products” within the meaning of Article I:1. In response Mr Videia from US noted, „that only wheat from other countries, not other cereals, would be considered as such.” Accordingly, the wording the drafters intended were not to extend „like” products so broadly that it would include „competitive or substitutive” product concept. This understanding of the interpretation of the word „like” was followed in the *Australian Subsidy on Ammonium Sulphate* were the tribunal stated that „As regards the applicability of Article I to the Australian measure, the working party noted that the General Agreement made a distinction between „like products” and „directly competitive or substitutable products”. […] The most-favoured-nation treatment clause in the General Agreement is limited to „like products”.” This on the other hand does not guarantee inference since the conclusion made in „likeness” of product could be a reason of lack of adequate sensitivity to the distinction between identical or closely similar products and on the other hand products that do not have physical similarity but are still remotely similar.

In the Havana Conference the „likeness” concept popped up again regarding enquiry from Mr Zorlu, from Turkey. The Chairman used an example of two categories of automobiles. Whether automobiles that weight under and then again over 1.500 kilograms are

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165 Wong-Mog Choi: „Like products” in *international trade law*, p. 95.
167 Wong-Mog Choi: „Like products” in *international trade law*, p. 96.
considered like products. The conclusion was that these automobiles were not „like products” according to the article.\textsuperscript{168} It is safe to say that according to this mere competitive or substitutable relationship products do not fall under the likeness concept of the article. The scope of the obligation provided by the MFN is largely based on the interpretation of the concept „like products”. With that in mind it must be said that it has been generally accepted that a fine product distinction has been generally accepted to protect the competitive benefits occurring from reciprocal tariff bindings. The broad interpretation of the concept is not strong enough to include the concept of „direct competitive and substitutable”, since a product can have more than one function those concepts tend to reduce the permissible distinction between products. In its broadest interpretation the MFN obligation could come to include direct competitive or substitutable relationship between products. The abbreviation to determine the „likeness” concept in the article provides both predictable and enforceable standards for future tribunals. Regardless to when products are determined „directly competitive or substitutable”, „similar” or „identical relationship” it needs to be taken into account if the products can switch with less effort from one sector to another than other products.\textsuperscript{169}

As already noted the interpretation of the concept „like products” must be on a case-by-case basis.\textsuperscript{170} The Panel set out the main approach for determining „likeness” of products. „The traditional approach for determining „likeness” has, in the main, consisted of employing four general criteria: „(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers” tastes and habits — more comprehensively termed consumers” perceptions and behaviour — in respect of the products; and (iv) the tariff classification of the products.”\textsuperscript{171}

\textbf{3.3.1.4 Analysis of „Immediately and unconditionally”}

Whether the advantage that has been given is accorded „immediately and unconditionally” to all like products, when taking into account the origin of the product or its destination, is the fourth and final element for the test of consistency with the MFN principle. Article I:1 states that advantage that has been given by a WTO Member to import or export, has to be „immediately and unconditionally” to all other WTO Members. There has been a debate on what requirement to accord and advantage „immediately” to all like products. Immediately

\textsuperscript{168} E/CONF.2/C.3/SR.5 p. 4
\textsuperscript{169} Won-Mog Choi: „Like products” in international trade law, p. 97-104.
\textsuperscript{170} Appellate Body Report, EC – Asbestos, para. 102.
has been interpreted to be at once or instantly, when there is no delay on the advantage granted. In the case Indonesia – Autos exemption on import duties and sales taxes to automobiles under certain conditions were considered as „immediately and unconditionally” and inconsistent with Article I:1. These conditions that lead to much higher duties and sales taxes on certain Members than others. In the GATT/WTO Members right cannot depend upon any private contractual obligations in place. In the case Canada – Autos the panel ruled that conditions attached to an advantage of motor vehicles that were affiliated with a manufacture or importer in Canada were eligible to import motor vehicles duty exemption. This was considered a violation of Article I:1. As these measures depend on the conditions relating to the origin of goods. Panel has referenced to this conclusion since then. In conclusion the complainant must show that it has been unsuccessful to show any actual trade effects nor discriminatory intent of the measure at hand in claiming inconsistency with the MFN treatment obligation of Article I:1. In the case before the Appellate Body it stated that according to the panels conclusion about the practicality of Canada’s operation, that by custom duties imposed on or in connection with importation, was a violation of the obligation under Article I:1. The Appellate Body further noted that „The context of Article I:1 within the GATT 1994 supports this conclusion. Apart from Article I:1, several „MFN-type” clauses dealing with varied matters are contained in the GATT 1994. The very existence of these other clauses demonstrates the pervasive character of the MFN principle of non-discrimination.”

In the same case the Panel clarified the meaning of the term „unconditionally”. „In this respect, it appears to us that there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded „unconditionally” to the like product of all other Members. An advantage can be granted subject to conditions without necessarily implying that it is not accorded „unconditionally” to the like product of other Members. More specifically, the fact that conditions attached to such an advantage are not related to the imported product itself does not necessarily imply that such conditions are discriminatory with respect to the origin of imported products. We therefore do not believe that, as argued by Japan, the word

175 Appellate Body Report, Canada — Autos, para. 81.
176 Appellate Body Report, Canada — Autos, para. 82.
„unconditionally” in Article I:1 must be interpreted to mean that making an advantage conditional on criteria, not related to the imported product itself is per se inconsistent with Article I:1, irrespective of whether and how such criteria relate to the origin of the imported products.\textsuperscript{177}

3.3.2 \textit{De jure and de facto discrimination}

The importance of the MFN principle is not only to prevent different tariff setting on products from different Members but also to prohibit other kinds of discrimination. According to Article I:1 the MFN principle applies to all rules and formalities regarding import and export on products according to Article III:2 and III:4. The articles prohibit discrimination based on \textit{de jure} discrimination and \textit{de facto} discrimination. It can be very easy to establish if discrimination is based on origin of the product but harder if the origin is not used to determine the discrimination but if the products are alike, that is „like products”. The Appellate Body has stated that it is not possible to establish what „like products” are in different provisions in the GATT; the meaning can vary depending on what agreement is being interpreted. The likeness concept has not really been dealt with very often and therefore the concept not fully developed. Even though it has to be admitted that the term holds a characteristics, end use, classification and consumer preference that all are relevant factors in interpretation of the concept.\textsuperscript{178} The essence of change in interpretation of „like products“ likes from shifting the focus from end-use in general to end-uses in the given market. The Appellate Body confirmed this market-based rule in the case \textit{EC - Asbestos}. According to Appellate Body an examination of the market-base, as evidence based on consumers tastes and habits, is an „indispensable aspect“ of any determination that products are „like“.\textsuperscript{179}

In the case \textit{Canada – Autos}, a disagreement arose based on agreement between Canada and US known as „Auto Pact“. Upon this agreement Canada provided duty free access to imports of cars that fulfilled certain conditions regarding their historical presence and production in the Canadian domestic market and the value added to the Canadian economy. The duty reduction was not related to nationality of the manufacturer or origin of the cars. EU and Japan brought the case before the Appellate Body on behalf of its national producers that did not qualify for the duty exemption. Both argued that the limitation on eligibility on the duty exemption was inconsistent with GATT, Article I:1, because it entailed \textit{de facto}

\textsuperscript{178} Karsten Engsig Sørensen: „Trade in goods”, p. 161.
\textsuperscript{179} Won-Mog Choi: \textit{Like Products}, p. 27 and 156.
discrimination. In practice, this measure does not accord the same import duty exemptions immediately and unconditionally to like motor vehicles of all other Members, as required under Article I:1 of the GATT 1994. The advantage of import duty exemptions is accorded to like motor vehicles originating in certain countries without being accorded to all other Members. Accordingly, we find that this measure is not consistent with Canada’s obligation under Article I:1 of the GATT 1994.

De facto discrimination has been dealt with in older reports of the GATT panels. In one case, Belgium taxed products differently based on if the products came from countries were taxation was similar to the Belgium taxation. The issue was whether charges on foreign goods, purchased by public bodies of Belgium, where family allowances did not meet certain requirements. It was clear that discrimination was not based on origins of goods but still it discriminated between countries, and according to Article I:1 it was prohibited. The MFN principle has been very important to make sure that Members do not apply different tariffs on „like products” from different countries. When Member is granted an advantage to product, when they fulfil some kind of commitment or conditions that is unrelated to the character of the product, it gets more complicated to ensure if the MFN principle applies. The aforementioned Belgian Family Allowances report provides that WTO Members cannot provide advantage to „like” imported goods on the grounds of different policies of originating country.

3.4 The National Treatment principle

3.4.1 The National Treatment principle in the GATT

The reason for National Treatment principle is quite simple and clear: countries can give whatever with one hand to comply with other obligation such as MFN obligation but on the other hand impose strict behind-the-boarder or internal measures that target imports when

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181 Appellate Body Report, Canada – Autos, para 85.
182 Karsten Engsig Sørensen: „Trade in goods”, p. 161; Report adopted by the Contracting Parties, Belgian family allowances, para. 1.
184 Report Adopted by the Contracting Parties, Belgian Family Allowances, para. 3.
185 Karsten Engsig Sørensen: „Trade in goods”, p. 161-162.
they have cleared customs.\textsuperscript{187} The principle is laid out in Article III of the GATT agreement. Article III:2 addresses internal taxation and Article III:4 addresses internal regulations.

The National Treatment obligations were originally drafted during negotiations for the International Trade Organization Charter and tariff concessions on multilateral basis. The preparation for the rule covered four sessions of negotiations from October 1946 to March 1948. According to negotiation records that led to establishment of the rule the principle is quite complex. The National Treatment principle is a compromise between conflicts in the negotiations. Three conclusions can be drawn from the end results whether and where regulatory purpose should be considered. Firstly, the UK and the US believed that the provision was to tackle the \textit{de facto} discrimination that arose from origin-neutral measures. When dealing with that kind of discrimination there were specified legal requirements that needed to be met when examining regulatory purpose of the measures. There was only one Member, Belgium, that objected to the deletion of the first paragraph since it believed that its delegation would render the National Treatment rule less effective in regulating implicitly discrimination of non-fiscal measures than in fiscal measures. Secondly, there were almost no special discussions on protectionism of non-fiscal measures, and thirdly, despite the recognition of the potential interpretative problems associated with the terms „like products” and „competitive products” there were no efforts made to document further clarification or provide some clarity. According to this it must be seen that the interpretation of the concept „like products” was not intended in the beginning to take into account factors other than market-based ones.\textsuperscript{188}

It is clear that States weigh up the potential countervailing factors that were followed by the Uruguay Round. The development of strict rules regarding equality of market access for both domestic and import products have more effect after the establishment of a binding resolution process if those rules are breached, according to the National Treatment principle. Therefore, Members are very careful to avoid legislation that is in contrast with the National Treatment obligations. On the other hand they can conceal protectionism that is indented through measures that are „origin-neutral”, but in practice it does have disparate effects on foreign products or services, that could constitute \textit{de facto} discrimination.\textsuperscript{189}

\textsuperscript{187} ibid, p. 225.
\textsuperscript{188} Weihuan Zhou: „The role of the regulatory purpose under articles III:2 and 4 – Towards Consistency Between Negotiating History and WTO Jurisprudence”, p. 85-99.
\textsuperscript{189} Rajesh Pillai: „National Treatment and WTO Dispute Settlement” p. 321-322.
3.4.2 Object and purpose of the National Treatment principle

The National Treatment principle is one of fundamental principles in WTO law, along with the MFN principle. According to the principles Members are not allowed to discriminate against imported products. The most important provision that provides the National Treatment obligation is Article III. The purpose of the National Treatment obligation is to ensure equal competitively between imported and domestic products. The broad and fundamental purpose of Article III is to prevent protectionism in the application of internal tax and regulatory measures. The purpose is to ensure that internal measures are not applied to imported or domestic products to afford protection to domestic production. The principle therefore obliges Member States of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. The intention of the principle was clearly to treat imported products in the same way as like products once they had been cleared, through customs. Otherwise indirect protection would be allowed. This purpose of the National Treatment principle was explained in the Japan – Alcoholic Beverages II case by the Appellate Body and it has repeatedly cited to its finding since then. In the case Korea – Alcoholic Beverages, the Appellate Body further noted that „In view of the objectives of avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships, we decline to take a static view of the term „directly competitive or substitutable“.” It was also added in the case Canada – Periodicals where the Appellate Body added the following statement yet again: „The fundamental purpose of Article III of the GATT 1994 is to ensure equality of competitive conditions between imported and like domestic products.”

Since products that are imported are subject to tariffs but not domestic products, the aim with Article III has been to ensure equality when imported products have entered into the domestic market, through customs. Article I, II and XI cover other restrictions on import of products. When determining if an infringement has taken place the panels overview tariff classifications, nature of the product, intended use, commercial value and substitutability. The National Treatment obligation covers both trade in goods as well as in services. The key

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192 Appellate Body Report, Japan — Alcoholic Beverages II, p. 16.
193 Appellate Body Report, Korea — Alcoholic Beverages, para. 120.
194 Appellate Body Report, Canada — Periodicals, p. 18.
provision that covers National Treatment obligation for measures affecting trade in goods are Article III:2 and III:4 of the GATT. Discrimination against imported products is very common among countries it is their way to protect domestic products. Discrimination is not sensible according to international relations and does not make much sense from economic perspective either, and therefore WTO law aims to eliminate this kind of discrimination to enable and support international trade.\textsuperscript{196}

The fact that In the case \textit{Italian discrimination against imported agricultural machinery}\textsuperscript{197}. The panel examined UKs complaint regarding Italian law provision. The provision provided special credit facilities to some categories of farmers or farmer’s cooperatives for the purchase of agricultural machinery produced in Italy were an infringement with Article III of the GATT. The operation upon these laws impaired the benefits that UK was supposed to receive under the GATT. In the case the Panel considered whether the provisions of the Italian Law that granted special facility for purchase of domestic agricultural machinery were inconsistent with Article III of the GATT. Since the credit facilities represented discrimination since they were only reserved for purchasers of Italian agricultural machinery the Law were inconsistent with GATT Article III. It considered even further whether and to what extent the Italian provisions impaired the benefits accruing directly or indirectly to the Government of the UK under the GATT.

The Panel also noted that if the Italian contention were correct, and if the scope of Article III were limited in the way the Italian delegation suggested to a specific type of laws and regulations, the value of the bindings under Article II of the Agreement and of the general rules of non-discrimination as between imported and domestic products could be easily evaded.\textsuperscript{198}

The Panel recognized and the United Kingdom delegation agreed with this view that it was not the intention of the General Agreement to limit the right of a contracting party to adopt measures which appeared to it necessary to foster its economic development or to protect a domestic industry, provided that such measures were permitted by the terms of the General Agreement. The GATT offered a number of possibilities to achieve these purposes through tariff measures or otherwise. The Panel did not appreciate why the extension of the credit facilities in question to the purchasers of imported tractors as well as domestically produced tractors would detract from the attainment of the objectives of the Law, which aimed at stimulating the purchase of tractors mainly by small farmers and co-operatives in the interests of economic development. If, on the other hand, the objective of the Law, although not specifically stated in the text thereof, were to protect the Italian agricultural machinery industry, the Panel considered that such protection should be given in ways permissible under the General Agreement rather than by the

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\textsuperscript{196} Peter van de Bossche and Werner Zdouc: \textit{Law and policy of the World trade organization}, p. 349-350.  \\
\textsuperscript{197} Panel Report, \textit{Italian Discrimination Against Imported Agricultural Machinery}.  \\
\textsuperscript{198} Ibid, para 15
\end{flushright}
extension of credit exclusively for purchases of domestically produced agricultural machinery.\textsuperscript{199}

According to this case the panel definitely considered that the intention of the GATT were for Members to treat imported products like domestic products once they had entered the domestic market.\textsuperscript{200}

3.4.3 Legal Framework

National Treatment obligation appears more than once in WTO law. In GATT it is stated that imported products to a Member shall be treated no less favourable than „like” domestic products in respect of law, regulations and other requirements that could affect 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 either the imported or the domestic products to afford protection on domestic products. According to the provision the purpose to prevent protectionism in the on domestic taxes or internal measures is clear, and is a part of the primary goal to liberalize trade in goods across boarders. The National Treatment provision preserves the value of tariff concession negotiations between the Members to the GATT. But even when there is no concession the provision channels protectionism that is set by the imported country so it can easily be negotiated down. The obligation ensures that imported products are compatible to domestic ones without the intervention of the government.\textsuperscript{201} The draft of the GATT provides guidance to the purpose of the National Treatment when applied to trade in goods.

3.4.4 GATT Article III – the National Treatment obligation

Article III of the GATT states that „National Treatment on internal taxation and regulations” prohibits discrimination against imported goods. It prohibits Members from favouring domestic products over imported that have entered the domestic market. In the case Japan – Alcoholic Beverages II the Appellate Body stated in respect to the National Treatment obligation principle that the broad and fundamental purpose of Article III in the GATT is to avoid any protectionism in form of tax or regulation measures.\textsuperscript{202} In short the principle is supposed to protect imported products from internal measures that favoured domestic

\textsuperscript{199} ibid, para16
\textsuperscript{200} „GATT Analytical Index, Article III – National Treatment on internal taxation and regulation”, p. 125.
\textsuperscript{201} Jurgen Kurtz: „The use and abuse of WTO law in investor-state arbitration: competition and its discontents“, p. 752-755
\textsuperscript{202} Appellate Body Report, Japan – Alcoholic Beverages II, p. 16.
products over imported ones. In that regard the article obliges Members to provide equality of competitive measures for imported products in relation to domestic products. The Appellate Body stated again in the case *EC – Asbestos* that the purpose of the article was to prevent Members from applying internal taxes and regulations that would affect the competitive relationship between domestic and imported products. Article III requires equality in the competitive conditions between imported and domestic products but also protects the expectations of equal competitive relationships. Measures can be outside of the scope of Article III even though the effect of the measures on import can be so little or even non-existing. According to panels as well as scholars the main purpose of the Article III is to ensure that WTO Members do not undermine the their commitment to tariffs under Article II with internal measures. The Appellate Body went a little further in its ruling in *Japan – Alcoholic Beverages II* stating that Article III does not only cover products that are subject to tariffs under Article II. Article III is more of a general prohibition for Members to use internal measures that could affect products that Members have made tariff concessions or other measures that could affect products regarding to which Member have not done so.²⁰³

Article III only applies to internal measures but not to border measures. There are other provisions that cover border measures, for an example Article II and XI, but since there are different rules and provisions that cover measures depending on internal or borderers its important to distinct between when measures are internal and when they are border measures that is not always given.²⁰⁴ Measures applied to products at the time of importation are nevertheless internal measure within the meaning of Article III if they are also imposed on like domestic products. Therefore the fact that the measures are collected at the time and point of importation does not prevent them from qualifying as internal taxation.²⁰⁵ According to Article III if a product importation is prohibited at the boarders, for an example the requirement of regulations concerning public health or consumer safety is not reached, then the ban needs to be examined according to Article III. But it is still unclear whether Article XI could also apply.²⁰⁶ In the case *India – Autos* the panel noted recalled that the Panel Report on *Canada – FIRA* the GATT distinguishes between measures that affect importation of a

product or a imported product. If Article XI would also cover internal requirements then Article III would be unnecessary.\footnote{Panel Report, \textit{India – Autos}, para. 7.220; Panel Report, \textit{Canada – FIRA} para. 5.14,(fn. original).}

Article III applies to internal taxes and charges, to laws and regulations as well as other requirements that can affect the sale, offering sale, purchase, transportation distribution or use of products or a mix of taxes and trading rules. Article III has a very broad version of the National Treatment principle. Even though the article can apply to many different national regulations the panels have concluded in more than one case that the article only applies when regulations can affect products. Therefore regulations concerning process and production are allowed under it and are not a violation of the National Treatment principle according to the article. Article XI could however apply to restriction on the ground of process and production. There is uncertainty to what extent Article XI applies to Process and production methods (hereinafter PPM) as well as to what extent the PPMs fall under Article III. It is clear that prohibition to import products that have been processed in certain way can fall outside the scope of Article III, as was clearly stated in the Panel Report in the \textit{US - Tuna} case\footnote{Panel Report, \textit{US – Tuna}, para. 3.5.}, but does that mean that rules that favour products that are produced in certain way fall under Article III or not?\footnote{Karsten Engsig Sørensen: „Trade in goods”, p. 143-145.} In the case the Panel noted that Article III only covers measures that are applied to product as such. The measures in the case could not be considered as being applied to tuna products as such and would not regulate sale of tuna and could not affect tuna as a product. Provisions at hand did not constitute internal regulations covered by the \textit{Note Ad} Article III. The Panel further noted that though Article III did not apply that instead Article XI applied and was violated. This conclusion could therefore imply that rules that have an effect on the sale of tuna would fall under the scope of Article III, even if they were PPMs. And if that is so, then other rules that affect sales of products in the type of PPMs that is linked to taxation and minimum pricing systems would also fall within the scope of the article and could therefore be set aside if the rule were to discriminate products. The adopted report in \textit{US – Malt Beverages}\footnote{Panel Report, \textit{US – Malt Beverages}, para. 6.1.} also support this conclusion that not all PPMs rules fall outside the scope of Article III. According to this case PPM is only outside the scope of the article when ban on imports or a total ban is set on a product because of the production method used.\footnote{Karsten Engsig Sørensen: „Trade in goods”, p. 143-145.}

According to one of the primary rule of treaty interpretation set out in Article 31.1 of the VCLT a treaty should be interpreted in good faith with in mind that the ordinary meaning
should be given a meaning in line with the context of the treaty and in light of its object and purpose. If that fails, interpretation can be based on recourse to other materials, for an example preparatory work.  

3.4.5 Article III:2: Internal Tax Measures

The analysis of GATT Article III:2 involves two separate considerations of the first and second sentence of the article. The first sentence implies that imported products that are „like“ domestic product cannot be taxed in excess of taxed domestic products. But determining whether products are „like“ is not enough as a violation can still be found under the second sentence. Corresponding Ad Note, if „directly competitive or substitutable“ products are „not similarly taxed“. Second sentence of Article III:2 and the accompanying Ad Article have equivalent legal status, both of which are treaty language that was negotiated and agreed upon at the same time. The Ad Article clarifies the meaning of Article III:2 but does not modify or replace the language contained in the article. Therefore the Ad Article and Article III:2, second sentence need to be read together in order to achieve their proper meaning.  

In the case Japan – Alcohol the panel found that shouchu and vodka were „like products“ and that shouchu and other liquor (such as whisky, rum and gin) were „directly competitive and substitutable“.

Two non-discriminating obligations is to be found in Article III:2 relating to internal taxation on „like products“ and then another obligation found in the second sentence of the provision on internal taxation on „directly competitive or substitutable products“.

This provision will be discussed in this chapter but the provision will be split into 2 chapters and each sentence will be discussed separately.  

Article III:2 GATT 1994 states in the first sentence:

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

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212 Weihuan Zhou: „The role of the regulatory purpose under articles III:2 and 4 – towards consistency between negotiating history and WTO jurisprudence“.

213 Ad Notes to Articles are interpretations and explanations of articles, Appellate Body and panels have referred to Ad Notes in their interpretation in various cases. Appellate Body Report, US — Anti-Dumping and Countervailing Duties (China), para 569; Appellate Body Report, EC — Fasteners, fn 460 to para. 285.


215 Andrew T. Guzman and Joost H.B. Pauwelyn: International Trade Law, p. 348; Japan – Alcoholic II.


217 Weihuan Zhou: „The role of the regulatory purpose under articles III:2 and 4 – towards consistency between negotiating history and WTO jurisprudence.”
Three questions need to be answered to determine if a violation of Article III:2 has taken place or not. These questions were set out by the Appellate Body in two cases. First, was the case Canada – Periodicals, where the Appellate body cast two questions, i.e. if the imported and domestic products are like products, and secondly, whether the imported products have been taxed more than the domestic product. The Appellate Body then referred to another question in the case China – Auto Parts before answering the question laid down in the former case, determining whether the measures at hand were internal tax or charges of any kind according to Article III:2. The new question that was referred to as „threshold issue“.

This question includes the third important question that needs to be answered and that is whether the issue at hand is an internal tax or charges that have been applied to the imported product. The internal taxation cannot be applied in the form of protectionism for domestic products but in the case Japan – Alcoholic Beverages II the presence of protectionism does not need to be established separately from the defined requirements in Article III:2.²¹⁸

3.4.5.1 Consistency with GATT Article III:2, first sentence

By establishing if imported products are taxed in excess of domestic products then tax measures are inconsistent with Article III:2.²¹⁹ The concept „likeness“ implies that a comparison must be made between products under the National Treatment provision to determine whether imported products are treated differently or in a discriminatory manner against domestic products. The „likeness“ concept in the National Treatment principle is very vulnerable to domestic protection pressure. Therefore when analysing the „likeness“ concept one needs to be very careful of the possibility of an abuse since the inherent vulnerability comes directly from the interest upon domestic „like product“ producers in the importing state.²²⁰ The wording of the provision as to not apply measures to „afford protection“ must have some meaning. Protective application therefore needs to be established separately from the specific requirements that are included in the first sentence to shot that tax measures are inconsistent with the general principle set out in the first sentence. This however does not imply that the general principle does not cover the first sentence rather that the first sentence is an application of the general principle.²²¹

²¹⁸ Peter Van den Bossche and Werner Zdouc: The law and policy of the World trade organization, p. 355-357.
The first question is to find out if the measures at hand are internal taxation or other charges on products that have been applied directly or indirectly. The key is to find whether the tax or charges at hand are internal or not since the provision does not cover taxation or other charges like income taxes. In the case China – Auto parts the panel needed to examine whether the charges were indeed internal or not or custom duties. The panel concluded that all but one of the charges were internal and therefore fell under the scope of Article III:2. When determining when measures fall within the scope of the article the characteristic of the measures must be examined as well as the circumstances. The article refers to charges and taxes that have been applied directly and indirectly, and this should be understood as they have been applied in or on connection with the product. The issue concerning border tax adjustment must also be mentioned here in this context. Boarder tax adjustment are any fiscal measures that are put into an effect, that allows exported products to be relieved of some or all of the tax charged in the export country if similar products that have been sold to consumers on the home market and increases imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of the similar domestic products. Such fiscal measures fall within the scope of Article III:2

There is one issue that has been widely debated and that is when two products that are physically identical but have been produced in different way are „like products”. In the case US – Malt beverages the panel found that tax credit that only small breweries received was a breach of Article III:2. This panel can have been under the consumption that all imported beer come from larger breweries, and therefore imported beer could not benefit from this tax credit. This conclusion can lead to a problem, if the PPMs are considered to fall within the scope of Article III, then a distinction between products differently produced can lead to discrimination between „like“ products unless the production methods used result in physically different products. This could lead to environmental friendly produced product would not be distinguished from non-environmental friendly produced product, if that would lead to that non-environmental produced product would be treated worse than the other. When determining if products are „like” the consumer preferences and habits are taken into account, and it is clear that to some consumers it is important whether a product is environmental friendly or not. In this case the products could not be referred to as „like products” even though the physical appearances was the same. With this comes the risk that Members would use the PPMs to favour domestic products over imported ones and therefore there needs to be

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restrictions on when the PPMs can be used and when not as a justification for determining that products are not „like products”.223

The last element that needs to be examined to conclude the test of consistency with the National Treatment obligation of Article III:2, is whether the imported products are „taxed in excess of“ the domestic product. If so, then Members that impose such taxation are not complying with Article III. In the case Japan – Alcoholic Beverages II the Appellate Body established that even the smallest difference on excess of tax is too much. „The prohibition of the discriminatory taxes in Article III:2, first sentence, is not conditional on a „trade effects test“ nor is it qualified by a de minimis224 standard.“225 The panel later stated that Article III:2 needs the comparison of actual tax burdens but not only the nominal tax rates. In the case Argentina – Hides and Leather, according to the panel, the impact of Article III:2 concerns the economic impact that the tax has on the competitive opportunities of the imported product compared to the domestic like products, the emphasis there is not on the tax and charges as such or the policy purpose, but on the end results. With that in mind it is also prohibited to impose higher tax on imported products and then to balance it out to apply lower tax as was also established in this case.226

3.4.5.2 Consistency with the GATT Article III:2, second sentence

In the second sentence of Article III:2 of GATT it is stated that moreover, no contracting party shall impose internal taxation or other internal charges to imported products or domestic ones in that is contrary to the principle stated in paragraph one. There is also added in the Note Ad of Article III that second paragraph shall not be considered unless competition is involved between the products in question and a directly competitive or substitutable product that has not been similarly taxed.227

The concept of „competitive and substitutable products“ is broader than „like products“. As the concept „like products“ the concept „directly competitive or substitutable product“ has not been identified in the GATT 1994. In the case Canada – Periodical the Appellate Body ruled against Canada that argued that since the products in question were not perfectly substitutable the article did not apply. In the ruling the Appellate Body noted that according to

223 Karsten Engsig Sørensen: „Trade in goods”, p. 145-146.
224 The term „de minimis“ is the Latin phrase for „of minimum importance“, a legal terms doctrine where the court refuses to consider such minor matters.
first sentence of the article the was no breach since the products were not „like products“ but since examination according to the second sentence has a broader prohibition the ruling found that there was a breach according to Article III:2, second sentence. The concept refers to that the products do not need to be physically identical and the emphasis becomes on whether the products are competing in the markets or not. To determine whether internal taxation is inconsistent with Article III:2 there needs to be an analysis on whether the products are in fact „directly competitive or substitutable products“, and whether the products are „not similarly taxed“ and the dissimilar taxation is applied „so as to afford protection to domestic production“.²²⁸ Before these questions of test of consistency of internal taxation can be applied the question whether the measures at hand have an „internal tax or other internal charge“ according to Article III:2, second sentence must be answered. But like the first sentence, the second sentence of the article is also concerned with internal taxation and charges that have been applied directly or indirectly on products.²²⁹ How much broader the concept „directly competitive or substitutable products“ is than „like“ products are for any given case a matter for the panel to decide depending on the case before them.’²³⁰

On the other hand case law has provided quite clear interpretation on what the concept „substitutes“ in the domestic market of a particular Member is. Even though products do not need to be physically identical it is yet important to examine the physical characteristics of the product as well as the end-use and relevant competitive conditions on the market. It has been accepted by the Appellate Body that the relevance of the cross-elasticity of demand.²³¹ If there are some relations in higher or lower demand for a product because of a change in price of another one it is very likely that they are competing products. It is important to take concealed demands into account by not only examining existing competitive situations in the market. There can be other barriers that need to be examined or consumer preferences that could explain why there is no competitive connection between the two products and why that could change. With that in mind taking a look at another domestic market and the relations between the products there can a better idea of the relations between the products or to make an assessment whether the products could be a substitute for one another. To give a better overview, alcohol as an example, can be taken into the equation. It is clear that vodka and rum

²²⁸ Karsten Engsig Sørensen: „Trade in goods“, p. 150.
²³¹ A cross-elasticity measures proportionate change in a demand for one product in response to a change in the price of another. It is considered positive if the two products are mutual substitutes, and increase in a price of one leads to increase demand for the other.
are not the same, they are not „like products” but could they be „competitive or substitutable products”? In the cases Japan – Alcoholic Beverages II as well as in the case Korea – Alcoholic beverages the Appellate Body used the test above and came to the conclusion that alcoholic drinks, etc. shouchu, whisky, brandy, rum, gin and genever, are directly competing or substitutable products. The word „directly” indicates certain degree of proximity in the competitive relationship between the two products in question. In the case Korea – Alcoholic Beverages were they noted that imported and domestic products are „directly competitive or substitutable” when they are competing on the market. The Appellate Body went further by saying that the term „directly” suggests a certain „degree of proximity in the competitive relationship between the products“.

Therefore it is important to consider the extant demand as well as latent demand and therefore a potential competition as was the reasoning by the Appellate Body that agreed with the Panel in the case Japan – Alcoholic beverages II, and found that there is a need to look at the market place and beyond the product itself.

The second condition laid down in the beginning of this chapter was that the products were „not similarly taxed”. This hardly leads to a problem but still worth taking a look at. If the products in question are „directly competitive or substitutable” but are taxed similarly then there is no breach according to Article III:2, second sentence. While at the same time even the slightest difference between taxation in Article III:2, first sentence is a violation of the provision. The difference needs to be more than de minimis to be inconsistent with the second sentence. If products are not subject to the same tax difference the products are taxed on different tax burden. Differences like these can lead to a breach of Article III:2 as the Appellate Body has already pointed, see above, that the dissimilarities in taxation must be more than just de monism. There is no special test to determine whether products are not similarly taxed and therefore the examination is decided on case-by-case basis. In the case Canada – Periodicals the Appellate Body found out that the amount of tax difference was

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way above the *de minimis* threshold, when taken into account that the considered amount was enough to prevent the production and sale of spoil-run periodicals in Canada.\(^{234}\)

The last condition can be viewed as proof to make sure that the legislation is not protecting the domestic product on the cost of the imported one. But the Appellate Body has pointed out that this is not the case, as the intention as such needs not to be proven. Therefore it is necessary to examine whether the tax system provides any protection. To determine whether this protection is taking place the tax system as such needs to be examined, how it is applied as well as its structure. This will usually show whether there is any protectionism to be found or not. The most common form is when the imported product is to be found in a high-tax category while the domestic one is on a low-tax category\(^{235}\). The protectionism can also be found in the magnitude of the dissimilarity in the taxation itself.\(^{236}\)

It is not always clear whether a breach should be determined on the basis of the first or second sentence of Article III:2. That can be seen in the case *US – Malt Beverages*.\(^{237}\)

3.4.6 **Consistency test of GATT Article III:4: Regulatory Measures**

Article III:4 states that Members cannot afford imported products less favourable treatment than is afforded to domestic products.\(^{238}\) According to the article the elements are three, first the imported and domestic product must be „like products”, secondly the measures at hand must come from a regulation, law or other requirements that could affect the sale of the imported product in any way and the third is that the imported product must receive less favourable treatment than the domestic one.\(^{239}\) There is not only dealt with international taxation in National Treatment obligation, but also international regulations as stipulated on in Article III:4. The article reads:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal

\(^{234}\) Karsten Engsig Sørensen: „Trade in goods“, p. 150-151; Van den Bossche and Zdouc: *The law and policy of the World trade organization*, p.378-381.

\(^{235}\) High tax category refers to higher tax percentage, compared to low- tax category. Price of a good to consumers in Europe is calculated as base price plus tax. Thus when a good is in a high tax category the price of the good is higher than the price of a low tax category due to higher taxation.

\(^{236}\) ibid, p. 150-151.

\(^{237}\) ibid, p. 150-151.

\(^{238}\) This applies to all laws, regulations and other requirements that could affect internal sale, offering for sale, purchase, transportation, distribution or use.

\(^{239}\) Karsten Engsig Sørensen: „Trade in goods“, p. 152-153.
As in the other article a test of consistency needs to be performed before establishment of whether a breach of the Article has taken place or not. According to the ruling in Korea – Various Measures on Beef the Appellate Body stated that for a violation to be established of Article III:4, three elements need to be satisfied. First, the measures in question needs to be established through law, regulations or requirements that affect their international sale, offering for sale, purchase, transportation, distribution or use. The imported product needs to receive less favourable treatment than the domestic products. So in short the test of consistency applies that the measures at hand need to be because of law, regulations or requirements that the article covers, if imported and domestic products are „like products”, and thirdly whether the imported products receive less favourable treatment. Article III:4 does not specifically refer to Article III:1 like in the second sentence of Article III:2. This means that when examining a breach of Article III:4 a separate consideration of whether the rules apply protection for the domestic product or not is not required. Accordingly, unlike the other tests of consistency, Article III:4 only has three elements instead of four. In the next chapter/s the elements will be examined.240

3.4.6.1 Are measures „law, regulations or requirements” covered by Article III:4

The National Treatment obligation of Article III:4 applies to domestic regulations that affect sales and use of products, broadly speaking. In the case Italy – Agriculture Machinery the panels ruling referred to laws, regulations and requirements that affected internal sale, purchase and so on, with this selection of words the panel emphasised that the article should not only cover laws and regulations that have direct effect on the products but as well those who might modify the conditions of competition between the domestic and imported product on the domestic market. The Appellate Body in the case US – FSC later affirmed the interpretation of the panel that lead to a broad interpretation of the article. This broader interpretation also covers procedural laws, regulations and requirements when affecting internal sale. The article has even been interpreted broader than according to above, for an example the Appellate Body confirmed that the article was relevant to EU requirements in the case EC – Banana III were import license was considered a border measure and not international measure within the scope of the article. However the Appellate Body ruled that

the EC requirements went way beyond the mere import license needed to administrate the
tariff quota. The rules that affected the internal sale, offering for sale, purchase and so on
within the scope of the article. When Article III:4 is being examined in cases today it is
generally concerning relevant laws or regulations, measures that apply across the board. It
also covers other requirements but does apply in more isolated cases only. When requirements
are examined relating to the article the question if the meaning „requirement” must be
government-imposed or if it covers requirements made by private parties. According to the
panels ruling in the case Canada – Autos private requirements can under special
circumstances be a breach of the article. It can also fall outside the scope of the article as
stated in the case China – Audio-visual Products, where the complainant, US, had not been
able to demonstrate that regulations in China and rules established would prevent other
enterprises from applying for, and receiving, a licence to distribute imported films. Taxation
that is mostly covered by Article III:2 can also fall under the scope of Article III:4 as the
panel stated in the case China – Audio-visual products (2010) where the same legal provision
in China was determined to be a violation of both Article III:2 and Article III:4.241

3.4.6.2 Are imported and domestic products „like products”

The second element of the test inconstancy with the National Treatment obligation in Article
III:4 relates to whether imported product and the domestic ones are „like products”. But like
Article I:1 and III:2 the provision only applies to „like products”. When interpretation
whether products are „like” the purpose of Article III in whole must be kept in mind. The
article is supposed to ensure that internal measures do not apply protection on domestic
products at the cost of imported products. Therefore the article obliges WTO Members to
provide equal competitive conditions to products whether they are imported or domestic. The
anti-protectionism principle is therefore very important and must be kept in mind when
examining the scope and measures of Article III:4. It is clear that products must be in
competitive relations and the regulations or laws that apply must address these products.
Therefore the determination of „likeness” is fundamentally a determination of the nature and
the extent of competitive relationship between the products as the Appellate Body stated in
the case Philippines – Distilled Spirits. This evaluation is very hard and can differ from case-
to-case and from which products are concerned, as it is both a qualitative and quantitative
judgement. The interpretation of „likeness” of products can vary from which article is applied

and a distinction made between the fiscal measures that are covered by Article III:2 and regulatory measures in Article III:4. Both provisions can be used to achieve the end results, and therefore it must be some kind of harmony in the terms. If there is not harmonisation between interpretations of the terms a Member could use the other measures to achieve the same end result from which he had been prevented from using. This is against the foundation of the WTO agreement. All evidence must be examined when determining the „likeness” of products and whether they could be in a competitive relationship or not. This was well established in the case EC – Asbestos when the Appellate Body was very critical of the panels ruling in the case. The Appellate Body criticized the panel for not examining each of the four criteria’s that were set out in the Border tax adjustment (1970) that the Appellate Body further developed in its ruling of the case. The Appellate Body concluded that it was only by examination of the whole criteria’s and forming the whole picture that the panel could reach its conclusion. Therefore the Appellate Body ruling concluded asbestos and asbestos contained products and products that could be substitutive for asbestos were like products. To reach that conclusion the perception and behaviour of the consumer (criteria 3) had a significant role. The Appellate Body stated that these criteria’s are not treaty-mended nor a closed list that should be examined as each case is different were all aspects and criteria’s must be examined to reach a conclusion. Another thing that must be taken into an account is the „regulatory intent” or „aim-and-effect”. In the case US – Malt beverages the panel considered whether beer with high alcohol and low were „like products”. The conclusion in this case was that the two products were not „like” and consisted of the distinction made by the US to direct consumers to consume low alcohol drinks rather than high alcohol drinks. Therefore the purpose of the regulations was not to protect domestic production. This approach is though no longer accepted by the WTO panels and the Appellate Body. The intent on the aim of the regulatory distinction made was not given any consideration in the case US – Gasoline since the gasoline was chemically identical and had the same physical characteristics. This conclusion was repeated itself in the case Japan - Alcoholic beverages II. This also applies to the production of the product, but different production does not lead to the conclusion that the products can be determined not „like” only on that base as the panel concluded in the case US – Tuna (Mexico). Therefore, any processes and production methods that do not affect the characteristics or properties of the product are not relevant when it

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242 To determine whether products are like there must be employed four general criteria: a) properties, nature and quality of the products, b) the end-uses of the products, c) consumers’ taste and habits (the perception and behaviour of the consumer relating to the products) and d) the tariff classification of the products.
comes to determining whether products are „like“. The concept of „likeness“ has evolved since the US – Tuna (Mexico). The procession and product method can have an affect on the behaviour and procession of consumers and could therefore have an effect on the competitive relations of products. Even though the concept of „like products“ has been looked at as very controversial the step to determine whether products are like or not has often been skipped and panels based their assumption on that the two products in question are „like products“. This is more common in cases were disagreement of measures of two products on the basis of their origin rather than when measures are „origin neutral“.

3.4.6.3 Is imported product achieving „less favourable treatment“

The third and last test consistency of the National Treatment obligation in Article III:4 is the no less favourable treatment. Determining whether products are like or not does not conclude on whether Article III:4 applies or not, as was very well established in the case EC – Asbestos. The interpretation of a „treatment no less favourable“ yet came first in the case US – Section 337 Tariff Act where the panel interpreted the concept as „effective equality of opportunities“ an has been the example of which Appellate Body and panels have used until this day. The formal difference in treatment between imported and domestic products is not necessary for it to be a violation of the article. The focus on favoured treatment is on the conditions of competition between imported and domestic products and therefore different treatment does not always mean a breach of the article. This was concluded in the case Korea – Various measures on beef. When establishing whether a product receives less favourable treatment the treatment to the whole group of „like“ products needs to be examined. That does not mean that for the treatment less favourable to be active that every single imported product of the group needs to receive less favourable treatment than all domestic products, since the less favourable treatment could apply to some but not all the products.

Therefore the argument is that an overall equal treatment does allow discrimination against some „like“ products. This was established in the case US – Gasoline where the panel rejected the US argument that since the overall conclusion led to equality therefore there was no breach. Accordingly, by balancing the less favourable treatment to some imported products

244 Complaint made by the EU against provision, Section 337, that granted the US to investigate whether imported goods infringe US intellectual rights and could on that ground exclude them from entering the US. The GATT panel found in 1989, that the important aspects of the Section 337 violated the National Treatment obligation. Section 337 was then partially amended in 1994. EC considered that the procedures and remedies under Section 337 are still in a violation as they are substantially different from internal procedures regarding domestic goods and discriminating against European industries and goods.
with more favourable treatment to other imported products does not make the application of the less favourable treatment right. The panel also made it quite clear in the case Canada – Wheat Exports and Grain Imports that there was no de minimis impact that could prevent less favourable measures to be a violation of the article. The panel argued its decision by pointing out that in neither the text of Article III:4 nor GATT/WTO case law is there anything that indicates that de minimis exception to the „less favourable treatment” obligation should apply here.

It has also been noted that it is not a requirement for the examination of „treatment less favourable” to be based on actual effects, since it is enough that measures could have an potential effect. There are however requirements that the measures are more than likely to have an effect or be responsibly expected to have an effect on the competition of the products.\(^\text{245}\) It is clear that measures that impose additional administrative burden or hurdle on imported products that could lead to worse competition environment for the products could fall under the scope of „less favourable treatment” obligation. Additional requirements that can be implemented on imported products do not automatically lead to that products are being treated less favourably than others. There has as well been cases were measures that do not require certain legal treatment of imports while are still considered to be „less favourable treatment”. These measures can be to motivate or encourage the participants of the market to act in a certain way and therefore products are treated differently leading to a less favourable treatment. This was concluded in the case Mexico – Taxes on soft drinks\(^\text{246}\) were the measures did not legally impede producers from using non-cane sugar sweeteners but they modified the competition between cane sugar and non-cane sugar. For a „treatment less favourable” to apply there are no requirements that measures at hand have to be harmful.\(^\text{247}\)

3.5 Non-tariff barriers

3.5.1 Article XI of the General Agreements on Tariffs and Trades

The biggest challenge in drafting articles regarding Non-Tariff Barriers is that they can come in so many different forms. A importing country can harm the competitive position of imported goods that is only restricted to the imagination of policymakers.\(^\text{248}\) Article XI of the GATT bans Members to maintain any other restrictions on imports or exports than tariffs. The

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\(^\text{245}\) This has been established in the cases Appellate Body Report, Thailand – Cigarettes, para. 53.
\(^\text{246}\) Appellate Body Report, Mexico – Taxes on soft drinks, para. 8.44-8.45.
\(^\text{248}\) Andrew T. Guzman and Joost H.B. Pauwelyn: International trade law, p. 218.
provision is primary governing quotas in the GATT and is entitled „General elimination of quantitative restriction“. Even though the title of the article refers to quantitative restrictions it is clear that the provision goes further than that.\(^{249}\) It would be impossible to identify every little detail of every possible non-tariff measures. The GATT provision addresses this issue.\(^{250}\) The provision indicates that quantitative and other restrictions are prohibited in general.\(^{251}\) It lists out that restriction are prohibited in regard to „duties, taxes and other charges“ to allow for continued use of tariffs. The provision can be read as to catch all other measures that disadvantage import other than tariffs.\(^{252}\) In the provision some examples are taken of non-tariff barriers that could restrict importation of products. The provision holds two important aspects. First the provision covers all measures that prohibits or restricts importation of a product. The measures used do not really matter since the provision covers them all, quotas, import and export licences etc. but excludes duties, taxes or other like charges that are covered by Article II of the GATT. Secondly, the provision covers measures that restrict or prohibit import or export of a product, even though in practice it is much more common that the provision is examined when there is imposed a restriction or prohibition of an import of a product rather than export.\(^{253}\) At the same time when tariff barriers were systematically removed through tariff negotiations between the Members, the non-tariff barriers have become more important protection barriers on domestic production. The term „Non-tariff barriers” is not explained in the GATT or other WTO law, but even though the term has not been defined the concept must hold any measures provided by the government that act as a prohibition or restriction on trade, except ordinary tariffs that have been imposed on import or export.\(^{254}\)

It is clear that quota on import of products would affect the quantity of imports, as well as requirements for import license that can take a lot of time and effort to comprehend. It is also obvious that a ban on import product is also a restriction. It must be kept in mind that a ban on import and absolute ban, by prohibiting the sale of the product imported or domestic, is not the same. According to decisions made by the panels it is clear that the requirements imposed on imports can as well be a restriction. For an example if a product needs to receive a certain

minimum price to be allowed. These are only a few examples of what could be considered non-tariff barriers. It is important to keep in mind that this list is not at all comprehensive as other measures that create uncertainties and affect investment plans, restrict market access for imported products or lead to high cost that can affect the imports are as well restrictions on the importation according to the provision. Even non-binding measures could affect restriction on import. 255

3.5.2 Quantitative restrictions
Article XI is considered a very straightforward provision except from the complicated rule in Article XIII that ensures that certain quantitative restriction is non-discriminatory.256
This was one of the debate in the case Japan – Trade in Semi-conductors were Japan and the US were the biggest producers of semi-conductors, but there had been some difficulties for the US to enter the Japanese market but at the same time the US also complained that the Japanese used unfair trading practice to access the US market. When the US started dumping proceedings against Japan the two countries reached negotiation to avoid Japanese producers dumping prices in the US market. According to this agreement the Japanese government was supposed to surveillance price and cost of export of the semiconductor to the US and make sure that the Japanese producers would sell their product at a price above the company-specific fair value. If their price would be higher the Japanese government was supposed to take some appropriate actions against the company according to Japanese laws and regulations. In the case the question was whether this restriction on export was a violation of Article XI. Since the Japanese government had not issued any legally binding or mandatory measures, but simply directed the producers not to dump their prices in the US and make quarterly supply and demand forecast as well as describe the governments concerns to accommodate their production levels to these forecast, they argued that there was no restrictions. The panel noted that since a minimum price regime is applicable under Article XI then a maximum price regime would also fall under the article. The panel also noted that the article contrary to many others does not specifically refere to laws, regulations etc., but rather a broader term „measures“ . Therefore, it is clear that non-legally binding measures fall within the scope of Article XI if they in any way affect import or export of products. In the panels ruling the administrative structure had been considered to have an effect by imposing as much pressure on the producers of the semiconductor as possible to cease exporting of the

256 Arwel Davies, Bryan Mercurio and Simon Lester: World trade law, p.262.
products below special cost. The binding obligations were not legal but different in form rather than substance and therefore the panel reached the decision that the procedure of the Japanese government was a violation of the provision. Any restriction that private parties can impose on import according to laws or other regulations is also a violation of the provision. Measures that affect both imported and domestic products cannot be a violation of the provision, and would rather be examined under Article III:4. So the measures under article XI must be imposed either on imported or domestic product but not equally on both then being a matter for Article III and XX of GATT.257

For measures to be a violation of the provision in Article XI it is sufficient for it to have potential effect, and therefore there is no need to prove that the effect has occurred or exists. In most cases it is quite clear whether the measure has such an effect or not but in some cases Members have claimed that a de facto restriction of imports exists, that must be supported by facts that the import has actually been affected because of the measures. Not all measures that have more effect on sales of import than domestic products fall under the provision, the measures need to affect only the import in law or in fact.258

The main focus of Article XI is that it covers boarder measures while Article III covers internal measures. This limitation of the provision can offer Members a loophole to pass their internal law so as to prohibit sales of imports once they are imported, since if there is no „like product” or „directly competitive or substitutable” Article III would not cover it. According to panel ruling in the case Panel Report India – Autos the interpretation of the provision is broader and does not only cover measures that take place at the boarders but also measures that have effect on the import. Instead of focusing on the problem whether measures were imposed at the borders the panel considered whether they placed limitation on imports generally or not. The Appellate Body has not yet reviewed this interpretation and it is not necessary that their conclusion will be the same as the panels.259 Article XI only applies to import restrictions where Article III applies to internal trade rules, regulations and taxation. It is therefore most often very easy to establish when each provision applies to measures. But it can be a lot more complicated when measures apply to imported and domestic products through separated mechanisms. Import restrictions are not at all allowed while internal trade rules are allowed as long as they apply equally to imported and domestic products. But even though internal rules have an affect on imported products in favour of the domestic ones the

258 ibid: „Trade in goods”, p. 136.
259 Arwel Davies, Bryan Mercurio and Simon Lester: World trade law, p. 262-266.
measures that imply those rules do not fall under the scope of the provision. Instead they will fall under Article III:4. When examining if measures are restrictions or internal rules on trade two questions need to be kept in mind: First, is the question whether the measures at hand apply only to imported products or if they also apply to domestic products. The second one is whether the rules that apply to imported products do apply only to their importation. These questions will help to realise which provision measures fall under since Article XI covers measures that apply only to imported products, no matter how small the price regime is where as Article III:4 covers measures that apply both to imported and domestic products. The measures must apply to the importation though since special rules that apply to imported products fall under the scope of Article III as part of discrimination. Another test has been used by the panels to determine whether measures apply to Article XI or not, as in the US - Tuna cases the panels decision was based on the examination that Article III only applies when measures apply directly to the products as such and since it did not do so in the US - Tuna cases the measures were inconsistent to Article XI.260 This test indicates at the same time that the scope of Article III has been limited and that some non-discrimination measures fall under the article. According to this there are some internal rules that „affect the rules as such” that fall under the provision and that becomes the most important question. But according to other rulings of other panels it has become clear that these kind of measures fall under the scope of Article III but not XI. But it must be kept in mind that this conclusion would be been seen as controversial and unclear if the same conclusion would be reached today. In the case US – Shrimps the WTO ruling however noted that the panels interpretation of the chapeau in the US - Tuna case, was correct to identify the object and purpose to prevent abuse of Article XX.261 The restriction, on US import of shrimp and shrimp products from countries that did not use a certain net to catch shrimps, was considered to be a violation of Article XI, but since the US did not test the conclusion of the US - Tuna cases the panels ruling has not been confirmed. This leads to the conclusion that there are some rules that are prohibited by Article XI even though they are not discriminatory. The provision of Article XI of GATT only applies to measures that occur at the boarder since it only covers imports restrictions.262

262 Karsten Engsig Sørensen: „Trade in goods”, p. 136-139.
3.5.3 Other non-tariff barriers

In addition to tariff barriers and quantitative restrictions are „other non-tariff measures“. As the term indicates in this category falls all other measures, actions or omission, which restrict market access for goods.

Costumes formalities and procedures can constitute as administrative barriers to trade. Article VIII provides that Members recognize the need to minimize the incidence and complex formalities on import and export and to decrease and simplify of import and export document requirements. It requires Members to review the operation of their rule and regulations. Licensing agreements are one that can be justified restrictions on import. When a license is required of an importer the delays of license procedure can lead to more cost and serve as objective for protectionism. The License Agreement covers both automatic licenses and non-automatic licenses. Even though licenses can be justified for an example regarding alcohol and firearms in many countries the agreement prohibits Members to use license requirements as barriers to trade.

Article X of the GATT is also worth mentioning though it may not seem to entail such barriers. The article addresses publication and administration of trade regulations. The Article provides that „laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party“, should be officially published. „Article X:1 addresses the due process notion of notice by requiring publication that is prompt and that ensures those who need to be aware of certain laws, regulations, judicial decisions and administrative rulings of general application can become acquainted with them“. They shall be published „promptly“ and „in such manner to enable government and traders to become acquainted with them“. These laws, regulations etc. are not described any further in the article. All Members are required to „administer in a uniform, impartial and...
reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1” of Article I.\textsuperscript{271} It is necessary for foreign importers, to be able to compete in a foreign market, to know the rules on its importation of its product. Transparent rules on technical requirements play an important rule to ensure that state publicize and administer their legal rules fairly.\textsuperscript{272} Unfair and arbitrary application of rules and uncertainty and unpredictability can constitute significant trade barriers.\textsuperscript{273}

4 Exceptions from the main principles

4.1 Introduction

The main principles of the GATT agreement that has been examined are MFN, National Treatment, Tariff Bindings, Quantitative Quota and Other Non-Tariff Barriers. It is not enough to examine just the main principles of the agreement since all of the principles are subjected to certain exceptions. To understand the principles one needs to understand the exceptions as well. The origins of the exceptions as a part of the agreement differs, they can have been in the text of the GATT agreement, or developed over time and could have been the understanding from the establishment of the organization.\textsuperscript{274} Exceptions provide Members to act in ways that otherwise would be a violation of their WTO obligations. The focus of this chapter is the exceptions to aforementioned principles. The exceptions are divided into two groups, first exceptions that apply to economic situations and second, exceptions where certain restrictions are imposed for trade or deviations from the rules are permitted under non-economical grounds.\textsuperscript{275}

4.2 General Exceptions

4.2.1 Introduction

It is considered that government’s fundamental act is to promote and protect public health, consumer safety, employment, the environment, economic development and national security. These acts can be threatened with trade liberalization resulting with availability for cheaper and perhaps less quality products. In order to protect and to promote for mentioned societal

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\textsuperscript{271} Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International trade law}, p. 221; Article X:3 of the GATT Agreement.
\textsuperscript{272} Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International trade law}, p. 221.
\textsuperscript{274} Andreas F. Lowenfeld, \textit{International Economic law}, p. 331.
\textsuperscript{275} Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International trade law}, p. 331.
values and interests, governments tend to impose legislation or take other measures that can result in barriers to trade. Members of the WTO can therefore be under certain circumstances, politically and/or economically, compelled to impose restrictions that goes against their WTO obligations, as trade liberalization, market access and non-discrimination rules can be incompatible with these social values.  

Article XX provides for few exceptions to the main principles of the GATT Agreement in this regard. The article can be divided into two parts, the specific exceptions, provided in paragraph a) to j) and introductory paragraph (hereinafter chapeau). To qualify for an exception under the article both criteria’s, specific exceptions and the chapeau, must be fulfilled. To establish whether exception is justified under Article XX the Appellate Body has emphasized the need to follow sequence of steps. First it must examine whether measures falls under exceptions listed in the various sub-paragraphs of Article XX and secondly whether the measures satisfy requirements of the chapeau.

Exceptions in Article XX are limited and conditional from the substantive obligations that are provided in other provisions. Since in practice the article has been interpreted narrowly it is up to Members, seeking to justify its action, to bear the burden of proof. But as a caution to prevent abuse of these exceptions it was inserted in the preamble that „[…] in any case indirect protection is an undesirable and dangerous phenomenon […] it is recommended to insert a clause which prohibits expressly to direct such measures that they constitute an indirect protection or, in general, to use these measures to attain results“.  

4.2.2 Necessary  

Three of exceptions provided in Article XX are available to states if they are considered necessary to achieve specified objective. The Appellate Body has emphasized that the term „necessary“ is not limited to what is considered „indispensable“. Measures which are indispensable are of absolute necessity or inevitable to secure compliance fall without a doubt

280 Panel Report, USUS – Tuna, para. 5.22; Article XX of the GATT Agreement.  
281 Panel Report, Canada – Administration of the Foreign Investment Review Act, para. 5.20; Panel Repost, US – Tuna, para. 5.27; Panel Report, US – Tuna, para. 5.22; Article XX of the GATT Agreement.  
under Article XX, but other measures may fall within the purpose of the exceptions. To determine the meaning of necessary is dependant processing of weight and balance of factors relevant to each case.284

Specific exceptions under Art. XX

In Article XX specifies ground of justification for exceptions from the GATT in paragraph a-to j. These justifications are related to afore mentioned societal values.285 It must be taken into account, when determining the degree of necessity that various terms are used in these different categories in the article. Therefore the same requirement in respect to each and every one category cannot be the same.286

4.2.2.1 Public Morals

Until 2005 Article XX (a) remained latent and untested. Actually the only time that the provision was invoked was not under GATT related issues but cases relating to GATS.287 The Appellate Body and panels consider interpretation of the provision in GATS to have relevant effect on the interpretation of the GATT provision, given their similarity in the text and purpose.288 The Appellate Body in the case US – Gambling and Betting Service, reaffirmed this.

Article XIV of the GATS sets out the general exceptions from obligations under that Agreement in the same manners as does Article XX of the GATT 1994. Both of these provisions affirm the right of Members to pursue objectives identified in the paragraphs of these provisions even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective agreements, provided that all of the conditions set out therein are satisfied. Similar language is used in both provisions, notably the term “necessary” and the requirements set out in their respective chapeaux. Accordingly, like the Panel, we find previous decisions under Article XX of the GATT 1994 relevant for our analysis under Article XIV of the GATS.

According to this, it can be assumed that the meaning described to the term „public morals“ in the GATS Agreement is suppose to apply in the same manners in the GATT Agreement. In the case US – Gambling and Betting Service the term „public morals“ was

287 The GATS Agreement includes sets of exceptions in Article XIV that closely resemble the GATT Article XX. Although the difference is that GATT Article only refers to „public morals“ where the GATS Article referrers to „[...] protect public morals or to maintain public order“
interpreted as standards of right and wrong actions maintained by community or a nation.\textsuperscript{289}
For measures to be justifiable under the provision Members have been give up to some degree the right to determine themselves the concept of public morals. The measures however must be aimed to protect the interest of the people within the community or nation as a whole.\textsuperscript{290}
As has been established the interpretation of Article XX (a) is closely linked to the interpretation of the GATS, the interpretation given in the for mentioned case therefore must be applied to GATT Article XX(a).

\textbf{4.2.2.2 Protect Human, Animal or Plant Life or Health}

Article XX (b) sets out that measures to „protect human, animal or plant life or health“ are qualified exceptions to the GATT.\textsuperscript{291} To justify application of Article XX(b) three elements must be met. Firstly that the policy, of measures taken, in question fell within the range of policies designed to protect human, animal or plant life or health. Secondly the measures must be necessary to fulfill the policy objective and thirdly that the measures were applied in conformity with the requirements of introductory clause of Article XX.\textsuperscript{292} The terms „protect human, animal or plant life or health“ have been a subject to relatively few disputes on the interpretation of these terms.\textsuperscript{293} The interpretation of the term „necessity“ is however more complicated, as the examination above shows. The question on extrajurisdictional protection of life or health\textsuperscript{294} has been raised. In the case US - Tuna the question arose whether the US could ban import on tuna and tuna products based on tunas fishing methods used. In the first US - Tuna case the panels answer to the question was negative.\textsuperscript{295} The second US - Tuna case led to the same conclusion, that US ban on tuna and tuna products was not justified under Article XX. The conclusion on the question on extrajurisdictional protection on life and health was however based on a different view. The panel noted that the provision provides no limitation regarding location. The panel even further noted that other GATT articles regarding different treatment of different origins could in principle be taken with respect of location of

\textsuperscript{290} Andrew T. Guzman and Joost H.B. Pauwelyn: \textit{International trade law}, p. 374.
\textsuperscript{292} Appellate Body Report, US – Shrimps, para. 150.
\textsuperscript{294} Can Members protect or care about humans, animals or plan life or health outside its own territory.
things or actions taken outside Members territories. In this regard Members can under certain circumstances raise barriers to trade to protect health and life of others than those within their own territory.

4.2.2.3 Secure Compliance with Laws or Regulations

Article XX(d) concerns and provides exceptions for trade measures. The exception is divided into two parts. On the one hand measures in question must be designed to secure compliance with domestic laws or regulations that in itself is not GATT inconsistent and on the other hand they must be necessary to secure such compliance. Unlike Article XX(b) the Appellate Body and panels have interpret Article XX(d). To apply the exception the first thing is to identify and characterize the alleged GATT consistent regulation. Secondly, the practice in question must be identified to what is considered to be deceptive and what it aims to prevent. In regard to the term to „design and secure compliance“ the Appellate Body noted that measures must enforce compatible WTO laws or regulations. Rules that are simply to determine individual baseline were not considered as enough grounds in the case US – Gasoline. In more recent cases Mexico – Soft drinks the Appellate Body was called upon to clarify the meaning of the phrase „to secure compliance with laws or regulations“. First the Appellate Body made it clear that under the terms „laws and regulations“ only refer to domestic rules, and not other obligations of another WTO Member under an international agreement. In the case the Appellate body noted that measures can be considered to be designed „to secure compliance“ even if the measures cannot guarantee to achieve results with an absolute certainty nor does use of „coercion“ as a necessary part of a measure that is designed to secure compliance . According to the interpretation of the provision regarding „not inconsistent with the provisions of this Agreement“ the panel in the case Colombia – Ports of Entry did not consider, that for laws and regulations to be inconsistent according to

301 The fact that measures debated in the case were considered „designed to secure compliance“ did not change the general conclusion that Article XX(d) was not applicable in the case since international obligations of WTO Members do not fall under the scope of the provision as „laws or regulations“.
Article XX(d) that one inconsistent provision does not automatically mean that the other individual provisions are incompatible as well. According the laws in question, except those that have been determined inconsistent with WTO, are not themselves inconsistent with other provision of the GATT. Hence, the meaning of Article XX(d) „Secure compliance with laws or regulations which are not inconsistent” only refers to domestic laws and regulations and therefore any international obligations fall outside the scope of the article. Even though one provision is considered a violation does not deem all other provisions in particular laws or regulations.

4.2.2.4 Relating to the Conservation of Exhaustible Natural Resources

Exceptions regarding conservation on depleted natural resources is to be found in Article XX(g), which addresses exceptions on environmental protection grounds. The article has evoked vast controversy. The most famous case concerning the meaning of Article XX(g) is Shrimp – Turtle case where two issues were raised. Firstly what constituted an „exhaustible natural resource“. The Appellate Body adopted a broad „evolutionary“ interpretation of the term „exhaustible natural resources“ and did not consider „exhaustible“ and „renewable“ natural resources were mutually exclusive. Renewable resources can in some cases be capable of depletion. The Appellate Body further noted that the term must be interpreted in the light of contemporary concerns of the community of nations about protection and conservation of the environment. The conclusion of the Appellate Body therefore applies to both living and non-living resources. The second issue raised in the case was that the measures must be „relating to“ the conservation of exhaustible natural resources. The Appellate Body noted that Article XX(g) requires a close and real relationship between measures adopted and the policy objective. Therefore for measures to be „relating to“ the measure must be reasonable to achieve the end result. The term „relate to“ is defined as

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303 Panel Report, Colombia – Ports of Entry, para. 7.53. In the case were Columbia had adopted measures under which textiles and apparel could only be brought into the country at 11 of Colombia’s 26 ports of entry and furthermore that certain textile products originating in Panama and China could only enter the country through two of those ports. Panama complained that those measures were inconsistent with Article XI:1 of the GATT and Article I:1.
307 In the case several WTO Members challenged US ban on import of shrimps and shrimp products that were caught in a manner that endangered sae turtles.
having some connection with or being connected to. For it to be a „relation to“ there must be a close and genuine relationship of ends and means.\textsuperscript{311} According to this the meaning of Article XX(g) of „relating to exhaustible natural resources“ is not limited to non-living resources. Therefore living and non-living resources can fall under the scope of the article. The term is interpreted evolutionary and must be interpreted in the light of contemporary concerns of the community of nations regarding the protection of the environment. The requirements at hand must be have a close and genuine relation to the end mean dot the objective.

4.2.3 Chapeau

Particular exceptions have now been discussed. But for Article XX to apply measures need to fulfill two criteria. The second criterion is that application of measure must meet the requirements of the chapeau of the article. The legal requirements set out in the chapeau have been highly relevant in practice.\textsuperscript{312} The chapeau seeks to balance the right of a Member that invokes an exception under Article XX and the rights of other Members under the substantive provisions of the GATT. The object and purpose is generally to prevent abuse of the article, it has been stated by the Appellate Body that in fact the chapeau is an expression of the principle of good faith. The chapeau prohibits application of measures that would constitute „arbitrary or unjustifiable discrimination between countries where the same conditions prevail“ or „disguised restrictions on international trade“. The chapeau addresses the questions regarding manner in which the measures are applied but not specific contents as such.\textsuperscript{313}

For measures to be justifiable under Article XX the application of the measures cannot constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, as already stated. The Appellate Body found that the „discrimination“ noted in the chapeau was different in nature and quality from „discrimination“ addressed in other provisions of the GATT. The Appellate Body stated that the enterprise of the article would not be profitable if standard measures regarding „discrimination“ would apply. The Appellate Body does not prohibit discrimination \textit{per se},

\textsuperscript{312} Van den Bossche and Zdouc: \textit{The law and policy of the World trade organization}, p. 573.
but rather arbitrary and unjustifiable discrimination. The Appellate Body in the case US – Shrimp’s, further interpreted arbitrary discrimination. The conclusion of the term lead to the understanding that „arbitrary discrimination“ can be a result because of rigidity and inflexibility in officials’ decision-making as well as a lack of adequate process can also constitute a „arbitrary discrimination“. Unjustifiable discrimination was also adopted in the case US – Shrimp’s. According to the case the treatment provided to countries must be similar and measures must allow for differential treatment when countries are in a different situations. Access to the market of a country cannot be a subject to conditions regarding regulatory program by the exporting country that is essentially the same as that of an importing country. An obligation lies on Members to negotiate in good faith between all countries, these negotiations however do not have to lead to complete agreement.

Restriction that formally meets the requirement of Article XX will constitute as an abuse if such compliance is in fact only a disguise to conceal the aim of trade-restrictive objectives. The verb „to disguise“ indicates an intention, therefore the word must be interpreted as „alter to deceive“ „misrepresent“ or alike. To establish if that has been the case the protective application of measures in question can often be discerned from its design, architecture and revealing structure.  

4.3 Subsidies and Countervailing Duties

Rules on subsidy are set out in Article VI and XVI of the GATT, and also in the WTO Agreement on Subsidies and Countervailing Measures (hereinafter SCM). The definition of the term „subsidy“ is a financial contribution provided by the government or public entity within a territory of a Member. The concept captures situations were economic value is transferred by a government to the advantage of the recipient. It is clear in Article 1:1 that subsidy has two distinct elements, a financial contribution and granting benefits. Both of which must be present for measures to be considered subsidy. The term „financial contribution“ and the negotiation history between the Members indicate that not all government’s measures that confer benefits could be deemed to be subsidies. According to

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317 The Appellate Body in the case Appellate Body Report, Brazil – Aircraft, para 157 emphasized this, and was re-established by the Panel in the case Panel Report, US – Export Restraints, para. 8. 20.
paragraphs (i) and (ii) of Article 1.1.1(a)(1) a financial contribution can be through direct and indirect transfer of funds and other liabilities by a government, or the foregoing of government revenue that is otherwise due. In addition, contribution has financial value, according to paragraph (iii), made in kind through governments by providing goods or services, or through government purchases. Paragraph (iv) recognizes that all for mentioned paragraphs can circumvent public body acting on behalf of the government. In order to determine whether financial contribution has conferred „benefits“ it is necessary to determine the financial contribution places of the recipient in a more advantage position than otherwise on the marketplace. To determine whether revenue „otherwise due“ has been foregone a comparison between the revenue actually raised and the revenue that otherwise would have been raised. The basis of the comparison is the tax rules applied by the Member in question. In the case US – FSC, the Panel found that the term „otherwise due“ establishes a „but for“ test in terms of which the appropriate basis of comparison for determination whether a revenue are „otherwise due“ is „the situation that would prevail but for the measures in question“. The Appellate body is however reluctant to apply certain legal standards instead of the actual text of the treaty. The Appellate Body furthermore acknowledged that the application of the „but for“ test worked in the case US – FSC but stated that however that did not mean that the test could apply in other cases.

Even if both elements of Article 1:1 are fulfilled the subsidy is only concerned under the article when they are specific, but have in mind that prohibited subsidies are deemed specific. The specificity requirements are laid out in Article 2. The article provides an indication on whether the conduct or instrument of the granting authority is discriminated or not. The article sets out limitation on eligibility that favor certain enterprises and industries and described criteria or conditions that guard against selective eligibility. Prohibited subsidies, which are subject to both export and domestic import of goods are automatically considered specific. Furthermore, Article 3.1(a) of the SCM clearly states that subsidies are prohibited de jure and de facto. The effect of Article 2.3 is not restricted to prohibit subsidies; the subsidy that falls under the scope of the article is specific for the purpose of

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320 Panel Report, *Canada – Aircraft*, para. 9.112.
324 Article 2.1(c) of the SCM Agreement; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties*, para. 367.
both prohibited subsidies and actionable subsidies.\textsuperscript{326} Rather the measure is simply not prohibited explicitly under the Agreement.\textsuperscript{327} A non-prohibited subsidy can be problematic if is „actionable“. Actionable subsidies are mostly defined by the impact of other states while prohibited subsidies are measured by the conditions that are required to receive the subsidy.\textsuperscript{328}

Prohibited subsidies and actionable subsidies can be brought before the DSU or alternatively they can be met by countervailing measures. Three requirements must be met to impose countervailing measures. First, the investigation must be transparent, secondly, all parties must be able to defend themselves and thirdly, investigation authorities must explain the basis of their determinations.\textsuperscript{329}

4.4 Safeguard Measures

Safeguard measures are mapped out in Article XIX of the GATT Agreement and the Agreement on Safeguard. They are remedies that are imposed in form of a restriction on import in the absence of any allegations of any unfair practice in trade. Due to their nature, they are extraordinary remedies that should only be taken in emergency situations. If all conditions are met for imposing the measures, safeguard measure can be applied to „fair trade“ of other WTO Members and further prevent that those Members enjoy full benefit of trade concessions under the WTO Agreement. In this way safeguard measures differ from other measures that most are taken in response to unfair trade.\textsuperscript{330} For imposing safeguard measures two basic inquires have been conducted in interpreting the Agreement on Safeguards. First the right to apply the safeguards must be established. A Member must determine the unforeseen developments and effect of obligations incurred under the GATT, that the product must be imported in such increased quantity and conditions that it causes or threatens to cause serious injury to the domestic producers of production on like products. Secondly, if so, have the rights been practiced, through the application of the measures set out in the treaty? The safeguard measures are limited to the extent necessary to prevent or remedy serious injury and to facilitate adjustments.\textsuperscript{331} Investigation of for mentioned inquires must take place before the application of safeguard measures.\textsuperscript{332} The term „increased quantities“

\textsuperscript{326} „WTO analytical index, subsidies and countervailing measures“, www.wto.org; Panel Report, Korea – Commercial Vessel, para. 7.15.

\textsuperscript{327} SCM, fn. 5; Appellate Body Report, US – FCS, para. 93.

\textsuperscript{328} Andrew T. Guzman and Joost H.B. Pauwelyn: International trade law, p. 449.

\textsuperscript{329} Peter Van Den Bossche: The law and policy of the World trade organization, p. 814-815.


\textsuperscript{331} Article XIX:1(a); Appellate Body Report, US – Line Pipe, para. 84; Article 2 of the Agreement on safeguard.

\textsuperscript{332} Article 3.1 of the Agreement on Safeguard.
has been interpreted by the Panel to only apply to data on imported quantitates but not value or other increasing factors. The term „serious injury“ is defined in Article 4.1(a) of the Agreement on Safeguard as a significant overall impairment in the position of a domestic industry. This has been understood to be a very high standard of injury.

4.5 Regional Trade Exceptions

4.5.1 General on Regional Trade Agreements

Members of the WTO have by the establishment of Article XXIV:4 of the GATT agreement recognized the desirability to increase freedom of trade with development, through voluntary agreements, of a closer integration between countries economies of the countries parties to such an agreement. They also recognize that the purpose of a custom union or a free-trade area should be to make trade between countries easier for parties to such an agreement and not to raise barriers to the trade of other contracting parties with such arrangements or territory. Article XXIV of the GATT Agreement governs the spectrum relating to „custom unions“ and „Free Trade Areas“. In paragraph 8 both terms are defined. A „Custom Union“ is substitution of a single custom territory for two or more custom territories. Duties and other restrictive regulations of commerce shall be eliminated with respect to substantially all trade between the constituent territories of the union or at least with respect to substantially all trade in products originating in their territory. A „Free Trade Area“ is countries in which duties and other restrictive regulations of commerce are mostly eliminated on substantial all trade between countries involved in products originating in their territory.

The WTO Agreement permits Members to enter into a custom-union provided that firstly such arrangement has to cover all trade between or among the parties. This is to prevent any preferential or discriminatory deals like were seen in the inter-war era. Secondly, it is also a condition that the duties and other regulations of commerce imposed on third states shall not be higher than the average tariffs that were in place before the formation of the custom union or the free trade area. Thirdly, if the formation of custom unions leads to the unbinding of former bound duties, the parties are under an obligation to negotiate with former beneficiaries.

336 Article XXIV:8 of the GATT Agreement.
on balancing the prior concession. Fourthly, a certain time period must be established with a plan or schedule if the custom union is supposed to be phased in. It is clear that the founders of the Treaty of Rome, establishing the European Economic Community, now being the EU, which is customs union established in the time of the GATT, had Article XXIV of the GATT in mind, and in whole complied with requirements of the article.  

WTO Members are able to enter into so-called Reservation for Regional Trade Agreement (herein after: RTA), RTA are when WTO Members enter into a regional integration agreement were they grant parties more favourable trading conditions than other Members of the WTO. This exception is in itself a violation from the non-discrimination principle since it can hinder free development of trade in the WTO. According to the principle Members are not allowed to give Members more favourable treatment in trade than to other Members. This exception from the MFN has however been allowed since it contributes towards more liberalization in trade in the area that they cover. But for parties to receive such exemptions the RTA must provide parties with more liberalization in trade than the WTO rules provide. The RTA’s exceptions that are allowed according to Article XXIV are two, customs union or a free trade area. A custom union is according to Article XXIV:8(a) a substitution of a single custom territory for two or more custom territories, so that duties and other restricted regulations of commerce are completely removed regarding trade between the states, at least all products that originate from the parties. All the duties and other regulations must apply to all parties in the same way. A free trade area is according to Article XXIV:8(b) a group of two or more customs territories were duties and restrictive regulations of commerce are removed from products that originate in a Member state that is part of the agreement. 

Regional trade-agreements between Members of the WTO have become more or less universal; they hold economical significance and are no longer geographically regional. Trade between states on most favoured nation basis which the trading system of the world is based on has become the rarity rather than the norm. This has raised some difficult questions regarding political, economic and legal standing. Regional trade agreements provide its Member States to a broader and better-connected integration with political and economic

338 The requirements for establishing a custom union is in Article XXIV:5(a) The agreement cannot be higher or more restrictive than the WTO provides, duties and other regulations cannot be higher or more restricted than according to the WTO and thirdly the interim agreement has to include a plan and schedule for the formation of the custom union/free trade union within a reasonable time.
339 Birgitte Egelund Olsen, Michael Steinicke and Karsten Engsig Sorensen: „The WTO and the EU”, p. 82-83.
340 Lorand Bartels and Federico Ortino: *Regional Trade Agreements and the WTO legal system*, p. 3.

74
beneficial that before were not attained. Still, regional trade agreements can also be politically and economically risky and the increase of regional trade agreements has raised questions among scholars.341

Current difficulties concerning the WTO are the increase of bilateral and plurilateral trade agreements providing preferential treatment to individual trade partners. Often referred to as preferential, regional or free trade agreements as well as continued use of so-called „trade remedies“. States forming a custom union, like the EU, is inconsistent with the MFN principle.342 Such arrangements on the other hand maintain elimination to trade barriers and are therefore consistent with the main objectives of the WTO. A custom union or a free-trade area reduces the duties and other restrictive regulations between its parties, and the result is a prohibition of certain trade barriers that otherwise would be allowed under the WTO agreement. Few of the founding parties of the GATT had already formed a custom union, and the idea of „Greater Europe“ was already in discussion in the context of restriction of Europe. Article XXIV of GATT states that the Agreement does not prevent Members the formation of a customs union or a free-trade area or the adoption of an interim agreement to form a custom union subject to certain conditions.343

4.5.2 EU and EEA as Regional Trade Agreements

According to these restrictions above the EU fulfils the definition of being a custom union under Article XXIV:8(b). Former Members of the EEC had to change from different tariffs to one tariff with the establishment of the custom union, EU. Duties in custom unions are required by Article XXIV:5 of the GATT Agreement to not be higher or more restrict than before the establishment of the custom union. To achieve this in the EU the arithmetical average was calculated of the duties in the custom territories in the EEC at the time, Italy, Germany, France and the Benelux countries, that later reformed to a one custom territory. The EU has also been eliminating restrictive regulations on commerce. The aim of the EU has always been, and even from the establishment of the EEC, to ensure free movement of goods within the EU, with the Single European Act the objective became lot stronger and further along with one internal market by pushing down trade barriers with treaties and harmonization. Today, according to Article 207 TFEU, the EU is able to negotiate on behalf of its Member States with third parties, on matters that concern the common commercial

341 Lorand Bartels and Federico Ortino: Regional Trade Agreements and the WTO legal system, p. 3.
342 Tania Voon: „Eliminating trade remedies from the WTO: lessons from regional trade agreements“, p. 10.
policy. This is very important issue relating to the external powers of the union while according to Article 5 TFEU, the EU can only act on behalf of the states within the limits set out in the EU treaties. The definition of common commercial policy was not to be found anywhere even though Article 207.1 gives a pretty good example, but that was it. But this is not certain, TFEU have established different legal basis on which the EU can enter into international agreements on behalf of the Member States. The CJEU came to the same conclusion in the opinion no. 1/94. In the opinion the CJEU was asked if the EU had exclusive competence to negotiate and sign the WTO Agreement. The conclusion of the CJEU was that the EU had the exclusive competence with respect to the parts of international agreements, including trade in goods. The Article was made clearer with adoption of the Lisbon Treaty. 344

4.6 Special and Differential Treatment of Developing Countries

Developing countries are about two thirds of the 160 Members. Their role in the WTO is increasing more and more.345 The Marrakesh Agreement recognizes the special need for developing and especially the least developing countries to secure their economic development through secure share of international trade.346 The main principles that have been discussed in this paper are the most important tool that WTO has provided for the developing countries therefore all the principles and the exceptions apply to them as well. With these rules the encouragement to open their domestic market and their export markets, contributes better welfare than the special rules that will be laid out in this chapter. The specialized rules in the WTO are a rather modest edition of the general rules. The provisions that are especially set for the developing countries are referred to as „special and differential treatment“ provisions (hereinafter S&D).347

The S&D provisions are widely dispersed in the WTO Agreements and can be divided into six categories. Provisions that aim to increase trade opportunities through market access, requiring WTO Members to safeguard the interests of developing countries, allowing flexibility to developing countries in rules and disciplines governing trade measures, allowing longer translational periods to developing countries, to provide technical assistance and relating to the poorest of the poor – the least developed countries.348 Two examples of the

345 Understanding the WTO, p. 93.
348 ibid, p. 678.
S&D exceptions are Article XVIII and Article 15 and the GATT of the Anti-Dumping Agreements. Article XVIII where the GATT provides for S&D regarding the rules on quantitative restrictions. According to the article the developing countries can impose quantitative restrictions for the balance-of-payments under less restricted conditions than apply to other Members. Article 15 of the Anti-dumping Agreement recognizes that special regard must be given by the developed countries to the special circumstances in the developing countries in consideration the application of anti-dumping measures. Possibilities of constructive remedies shall be explored before imposing anti-dumping measures. The article does not imply any obligation on Members other than that they shall consider with an open mind what affect of anti-dumping measures on developing country would have.

The „Enabling Clause“ was adopted by the Members on November 28th 1979. The clause provides that Members may give differential and more favourable treatment to developing countries without according for the same treatment with other Members. Regional or global arrangements are entered into by less-developed countries for a mutual reduction or elimination of tariffs or non-tariff measures on products from one country to another. The clause allows preferential arrangements among developing countries that otherwise would be seen as contrary to the MFN treatment obligation of Article I of the GATT Agreement. The conditions laid out in Article XXIV of the GATT Agreement are less restrictive when it comes to developing countries. The article merely requires that differential and more favourable treatment provided shall be designed to facilitate and promote the trade of developing countries but that there shall be raised barriers or difficulties to other Members. Other substantive requirements are not set in the clause.

4.7 Dumping and anti-dumping

Dumping and anti-dumping measures are set out in the Anti-Dumping Agreement and Article VI of the GATT. Dumping is defined when a product of one country is introduced into the commerce of another country at a lesser than normal value of the products. A product is considered to enter into the commerce of an importing country at lesser value than

351 „Different and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries“. Andrew T. Guzman and Joost H.B. Pauwelyn: International trade law, p. 345.
353 The right title is: Agreement on Implementation of Article VI of the GATT 1994.
355 Article VI of the GATT Agreement.
normal if the price of the product is lesser than compatible price, in the ordinary course of trade, for like products that are destined for consumption in the exporting country. In an absent of such domestic pricing the calculation of the normal value shall be determined by comparing prices for like product for export to a third country or the according to the cost of production plus responsible addition for selling cost and profit. The determined difference between the prices, the difference between the export price and the normal value, is known as the dumping margin. Even though the calculations seem quite forward there has not been established one method in practice.

Article VI:1 of the GATT requires the existence or a threat of a material injury to an established industry or material retardation of the establishment of a domestic industry. Determination of an injury for the purpose of dumping shall be based on positive examination and involve an objective examination of the volume and effect of the dumped imports and the consequences of the import on domestic producers. Investigative authorities must take into an account whether there has been a significant undercutting, whether the effect of such imports to otherwise depress prices or prevents price increase and all factors stipulated on in Article 3.4 should be considered even though other criteria’s could apply since the list is unexhausted.

A contracting party may levy on any dumped product an anti-dumping duty to prevent or offset dumping. Anti-dumping is a „specific action against dumping“ and can only be taken when the constituent elements of dumping are present. Measures qualify as „specific measures“ when there is a link between the measures and the elements of dumping. The focus is on the degree of correlation between the scope of application of the measure and the element of dumping. Therefore the element of dumping must be present in the case for anti-dumping to be applicable. Determining whether dumping has taken place the „intent“ of the

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356 Article VI:1 para. (a) - (d) of the GATT Agreement.
359 „The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.“
360 Article VI:2 of the GATT Agreement.
parties is irrelevant.\textsuperscript{363} This applies also to determine whether actions taken against dumping and is of no relevance are „specific actions against dumping“.\textsuperscript{364} The verb may, in Article VI:2 of the GATT does not imply that Members can choose alternative to impose anti-dumping or other measures against dumping. The verb only implies that Members can choose to impose anti-dumping or not, as well as the choice to impose an anti-dumping duty that is equal to the dumping margin or lower duty.\textsuperscript{365}

4.8 

**Agreement on Sanitary and Phytosanitary Measures**

Article XX(b) of the GATT Agreement authorizes governments to take measures on trade to protect human, animal or plant life or health, given that they do not discriminate or use the measures to disguise protectionism. More basic and detailed rules on food safety and animal and plant health standard are set out in the Sanitary and Phytosanitary Measures Agreement (hereinafter SPS Agreement).\textsuperscript{366} The Agreement applies to all sanitary and phytosanitary measures that affect, directly or indirectly, international trade.\textsuperscript{367} Even though the restrictions imposed take often the form of technical barriers the Agreement on Technical Barriers to Trade (hereinafter TPT) does not apply to restrictions imposed on the ground of the SPS Agreement.\textsuperscript{368}

SPS Agreement applies two requirements in Article 1.1 that must be fulfilled. Measures in dispute have to be „sanitary or phytosanitary measures“ and the measures must „affect international trade directly or indirectly“.\textsuperscript{369} Sanitary or phytosanitary measures have been mapped out in Annex A.1 of the SPS Agreement. The list divides into two broad categories’. Firstly, measures that protect human, animal or plant life or health from pests or disease and secondly, measures to protect human, animal life or health from contaminated food, beverages or feedstuff.\textsuperscript{370} The determination of whether measures are attributable to SPS measures is up to the Members themselves.\textsuperscript{371} In the case *Japan – Agricultural Products II* the panel emphasized that neither the panel nor the expert advising of the panel are capable to

\begin{itemize}
\item \textsuperscript{364} Appellate Body Report, *US – 1916 Act*, para. 122.
\item \textsuperscript{366} *Understanding the WTO*, p. 30.
\item \textsuperscript{367} Article 1.1 of the SPS Agreement.
\item \textsuperscript{368} Article 1.4 of the SPS Agreement; Peter Van den Bossche and Werner Zdouc: *The law and policy of the World Trade Organization*, p. 894.
\item \textsuperscript{369} Article 1.1 of the SPS Agreement; Panel Report, *EC – Hormones*, para. 8.39 and 8.26.
\item \textsuperscript{370} Andrew T. Guzman and Joost H.B. Pauwelyn: *International trade law*, p. 533; Annex A.1 of the SPS Agreement.
\item \textsuperscript{371} Article 5 of the SPS Agreement.
\end{itemize}
conduct their own risk assessment. Member countries are thereby encouraged to use international standards, guidelines or recommendations when applicable. They shall ensure that the assessment is based on appropriate circumstances to the risk of human, animal or plant life or health. Risk assessment, techniques development by relevant international organization shall be taken into account. In cases where there is scientific justification for the application of the measures, appropriate assessment, as long as they are consistent and not arbitrary, and precautionary principles can lead to higher standard than normal. If measures are considered applicable they should not exceed necessary required.

Since there are no specific standards and different methods of inspecting products apply there is a risk of confusion among parties if they fulfill the requirements. If however an exporting country can demonstrate that measures applied to exporting products are the same as the imported products of the importing country it is expected to accept such import. The transparency obligation in Article 7 of the SPS Agreement is also important. According to the article Members are required to notify other Members of any changes in their sanitary or phytosanitary and shall provide information on the measures adopted as provided in Annex 5 of the Agreement, where Members are among other things required to publish promptly adopted measures.

4.9 Agreement on technical barriers to trade

In the chapter on sanitary and phytosanitary measures, it was pointed out that SPS measures can take the form of technical barriers even though they are not categorized as such. Both however go beyond the limit of general rules on non-tariff barriers. The SPS and TBT Agreements also promote regulatory harmonization as they encourage Members to harmonize their national SPS and TBT measures around international standard set by a relevant international standard setting body.

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373 Article 5.1 of the SPS Agreement.
374 Understanding the WTO, p. 30.
375 Understanding the WTO, p. 30.
376 Understanding the WTO, p. 30.
377 Article 7 of the GATT Agreement; Annex 5.1 of the SPS Agreement.
Technical barriers become more important as tariff and quantitative restriction decrease. Technical barriers are different from country to country and can therefore become a restriction on trade, as producers face different standards. Technical barriers impose requirements that can be necessary to protect human health and safety, improve national security, environmental protection and security for consumers etc. Definition of the terms in Annex 1 apply for the purpose of TBT Agreement. Therefore the definition of terms varies from Annex 1 and ISO/IEC Guide 2:1991. This is the case even though the chapeau provides that definitions in the Annex shall have the same meaning as provided in the Guide, this interpretation is based on the word „however“ in regard of that the chapeau states: „For the purpose of this Agreement, however, the following definitions shall apply:“ According to the Annex there are technical regulations documents that lay down characteristics of a product or their related processes and production methods, including the applicable administrative provisions, with which compliance is not mandatory. Applicable standards are when approved documents, by the recognized body, provide for common and repeated use rules, guidelines or characteristics for products or related processes and productions methods, where compliance is not mandatory. For this purpose of the Agreement the standards have been interpreted voluntary and technical regulations as mandatory documents. The standards is that they are not based on consensus among Members.

In addition to understanding the definition of a technical regulation it is also important to understand the application of the key substantive regulations. Members shall ensure that products imported from other Members receive no less favourable treatment than like products from other Members and domestic ones, in respect of technical barriers. Technical barriers are therefore subjects to MFN and National Treatment Obligations. The panel noted in EC – Trademarks and Geographical Indications (Australia) that it would be unnecessary to consider a potential difference in the interpretation of Article 2.1 of the TBT Agreement and the National Treatment principle in Article III:4 of the GATT Agreement, regarding the term

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381 Understanding the WTO, p. 31; Andrew T. Guzman and Joost H.B. Pauwelyn: International trade law, p. 565.
382 General Terms and Their Definition Concerning Standardization and Related Activities.
383 Chapeau of Annex 1 of the TBT Agreement.
384 Emphasized added by the author.
385 Annex 1(a) of the TBT Agreement. „It can also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production methods.“ second sentence of the Annex.
386 Annex 1.2 of the TBT Agreement; Appellate Body Report, EC – Sardines, para 224 and 225.
387 Andrew T. Guzman and Joost H.B. Pauwelyn: International trade law, p. 566.
„less favourable“. However the likeness of products when dealing with technical barriers, that have legitimate public health objective, should not be approached with a competition perspective. Therefore a distinction from Article III:4 in regard of interpretations of the „like products“ has to be made when it comes to technical barriers on „legitimate objectives“. But even though the term „like products“ needs to be approach in a more narrow or broader way, depending on the situations, it is a closely mirrored from Article III:4 and could therefore seek guidance from the interpretation of that provision.

It is up to the Members themselves to decide which policy objectives they wish to pursue and at what level. But at the same time Article 2.2 and the preamble of the TBT Agreement provides some limits to their decision. Members cannot create obstacles that are more trade-restricted than necessary to fulfill a legitimate objective nor impose arbitrary or unjustifiable discrimination or disguised restriction on international trade. If relevant international standards exist Members shall use them as a basis for their technical regulations except in cases where such international standards are ineffective or inappropriate to fulfill the legitimate objectives.

4.10 Agreement on Agriculture

Many countries have imposed restrictions on agricultural products, especially in the developed countries. The GATT 1947 contained provisions regarding agriculture but it had some loopholes. As an example, countries could impose non-tariff measures like import quotas and subsidize. Agricultural trade became very twisted, especially with the use of export subsidies that normally was not subjected to industrial products. The Agreement on Agriculture was established at the Uruguay Round to attain order, fair competition and a less distorted sector. Therefore, new rules were set in the agreement that applied to market access, domestic support and export subsidies.

The market access of agricultural products changed a lot, from a myriad of non-tariff measures that hindered flow of agricultural products to a „tariff only“ protection plus reduction commitments. In order to obtain this objective, Members agreed to reduce the tariffs on agricultural products over a six-year period. The current practice is that Article 4.2
of the Agreement on Agriculture bans Members to impose non-tariff measures on agricultural products such as quantitative restrictions, variable import and levies etc. Furthermore, all other similar border measures are prohibited other than „normal customs duties“ except exceptions laid out in Article 5 (Safeguard measures) and Annex 5(Special treatment)\(^{394}\) of the Agreement.\(^{395}\) Article 4.2 does not prevent the use of non-tariff import restrictions that are consistent with the provision on general of the GATT or other WTO Agreements. According to Article 5 Members can take special emergency actions and safeguard measures on products that non-tariff restrictions have been converted to tariffs in special circumstances. The agreement specifies when and how these safeguard measures must apply.\(^{396}\)

Late in the Uruguay Round a decision was made to address subsides in the domestic market, as many Member countries where domestic payments made to farmers to support agriculture. Domestic price support were not banned but made subject to reduction commitments. The Agricultural Agreement distinguishes between governmental support program that stimulates production and those who have a damaging effect. Direct effect measures have to be limited, where as measures with minimal impact can be used freely and payments to farmers where they are required to drew back on the production. The reduction on domestic support or subsidize productions was decided for an example since support encourage over-production that leads to less imports or leads to export subsidies and to low world price, dumping on the world market.\(^{397}\)

Reaching a consensus among the Members regarding subsidies on agriculture took several attempts. The Agreement on Agriculture addressed the problem directly and did not prohibit the subsidies but required Members to set export subsidies on agriculture in a binding schedule. The agreement requires nonetheless WTO Members to cut the amount of money on export subsidies and export quantity to prevent dumping, over a six year period. The ban on export subsidies leads to a higher price of agricultural products from the developing countries that satisfy the purpose and object of the WTO. But some of the poorest countries depend on cheap supplies of food resulting from subsidized export from the major industrial nations. So

\(^{394}\) Under Annex 5 of the Agreement on Agriculture were four countries were subject „special treatment“ and therefore aloud to impose non-tariff border measures on certain products, but just during the period of reduction. This exception no longer applies.


\(^{396}\) Understanding the WTO, p. 27-28; Andreas F. Lowenfeld: International economic law, p. 100-101.

\(^{397}\) Understanding the WTO, p. 28-29; Andreas F. Lowenfeld: International economic law, p. 101-102.
even though they are receiving the benefit of higher income on agriculture it is not enough and therefore it has been set out a special ministerial decision for agricultural development.\textsuperscript{398}
5 Conclusions

Liberalizing trade among countries constitutes to a steady world economy and an increases in people’s welfare. International trading and economic globalization has led to better quality, more variety and lower prices on products, for even the least developed countries, international trading has then increased economic development and prosperity in all parts of the world both in developed and developing countries. But trade liberalization in international trade is not without its short falls and often result in a lesser demand for domestic production, governments tend to answer this by impose trade barriers. Trade barriers then result in higher price on products, both imported and domestic production. This is why an international organization is so important as Members have agreed to lower their tariffs and open their domestic market to trade. WTO is the main international organization that deals with rules on international trade. The WTO and its structure and function are all based on negotiation between Members of the WTO. This makes the WTO different from other international organizations since there is no delegated power. The WTO is built on the ideology of free trade, as the ultimate objectives of the WTO is to increase standard of living, attain full employment, increase real income and effective demand, expand production and trade in products, goods and service by reducing tariffs and other barriers to trade. The main principles of the WTO encourage lower tariffs to provide equality and no discrimination between Members.

Tariffs are the most common and obvious trade restrictions and in fact the only restrictions that WTO does not prohibit. Tariffs or customs duties are financial charges or tax imposed on importation of goods. It is very common for exporters to pay a fee to get their product into a foreign market. One of the main focuses of the WTO Members was to reduce tariffs at the establishment of the GATT Agreement to reach their objective which was to liberalize trade. From the establishment of the agreement there has been a remarkable success in reduction on tariffs. To ensure that Members do not raise their tariff barriers they have accepted tariff bindings or limits on many categories. The MFN obligation is reciprocal due to the MFN principles, all Members of the WTO are subjected to Members tariff schedule. Each Members schedule includes a list of what and how much tariff a Member can impose on import, the Member cannot impose other duties or charges on or relating to imports. Ad
valorem is the most common way to impose tariffs. The customs that are due in each country are laid out in the national customs tariff that most often reflect the HS system.\textsuperscript{399}

The MFN principle prohibits discrimination between import and export products based on their origin. An examination or a consistency test has been laid out to determine whether measures are a violation of the principle as established in the case Indonesia – Autos.\textsuperscript{400} The consistency test consists of four questions. Whether the measures at hand are covered by Article I:1, this condition has been interpreted broadly by the panel as to cover all rules and formalities, both internal and border measures imposed on imports and exports that leads to a discrimination on products. The article however is not without its limit as established in the case EC – Commercial Vessels.\textsuperscript{401} If they grant an advantage, this has also been interpreted in a very broad manner, as the Appellate Body stated in the case Canada – Autos that the principle refers to any advantage given but not some and therefore advantage given must be interpreted as circumstance where one party is given more favourable opportunities, without regardless of the form provided as established in the cases EC – Bananas III, Colombia – Ports of Entry\textsuperscript{403} and US – Poultry (China). The interpretation of how like products are has however been stricter than the other two conditions. To determine whether two products are a like, three questions have been laid out. The intention of the drafters of the article is however clear, it was not to extend the concept so broadly that it would include competitive or substitutive products. But as established in numerous cases the concept must be considered on case-by-case basis. Relevant factors in the interpretation are characteristic, end use, and classification of the product and consumer preference. If the advantage given is accorded immediately and unconditionally the last factor of the consistency test is fulfilled.

Immediately has been interpreted as at once or instantly and conditionally does not necessarily mean that conditions on a products that they are discriminatory it is however if the conditions are an advantage on criteria that is not related to the imported product itself. As established by the panel the principle applies both to de jure and de facto discrimination.

The National Treatment principle prohibits countries to discriminate against other countries. Article III holds the main provision of the principle. The object and purpose of the principle is to prevent protectionism by applying internal tax and regulatory measures. Like the MFN principle a consistency test has been established for the National Treatment

\textsuperscript{399} Chapter 3.2.2.  
\textsuperscript{400} Chapter 3.3.1.  
\textsuperscript{401} Chapter 3.3.1.1.  
\textsuperscript{402} Chapter 3.3.1.2.  
\textsuperscript{403} Chapter 3.3.1.2.
principle like the MFN principle. The consistency test is based on two sentences in Article III:2. The first sentence requires examination of whether measures in question are internal tax or internal charges on products, if imported and domestic products are like products and if the products are taxed in excess of the domestic product. According to practice the interpretation of the sentence implies that any internal tax or charges, directly or indirectly, or other fiscal measures such as border measures fall within the article. Likeness of a product is determined like the likeness concept in Article I:1 with a comparison of the products. When examining whether the imported products are taxed in access of the domestic product the discrimination is not conditional to having any effect nor is it qualified for a de minimis standard. Hence, any tax that is imposed in excess of on imported like product is a subject to the article and is in a violation of the principle.

Second sentence of Article III:2 applies to internal tax and internal charges like the first sentence, and is applied in the same way. The second sentence is only applicable in cases where products are in competition with each other. Since the second sentence only provides that the products are competitive or substitutable. Even though the products do not have to be physically identical the examination of the test on characteristic, end use and relevant competitive conditions on the market still needs to be performed because of the relevance of cross-elasticity of demand. The word directly in the sentence provides certain closeness in the competitive relationship between the products. This understanding is in line with panels and Appellate Body’s interpretation of the sentence. To determine whether products are substitutable an examination goes beyond the product itself and to the market.

The national treatment obligation of Article III of the GATT concerns not only internal taxation but also regulations, as provided in Article III:4. The broad definition of the term lead to the interpretation that laws and regulations and in certain circumstances other measures that have direct effect but also those who could modify the conditions of competition of the imported and domestic product in the market. The determination on the likeness of the product is very difficult and has varied between cases and is considered to be on a case-to-case basis. The Appellate Body further noted in the case EC - Asbestos that determination of whether products are like can only be determined with examination of the whole criteria and form the whole picture. The establishment of if product receives less favored treatment than another the whole group must be examined. That however does not imply that every single imported product needs to receive lesser treatment as established in

404 See Canada – Autio and China – Audio-visual Product cases in chapter 3.4.6.1.
the case US – Gasoline, it was further concluded in the case Canada – Wheat Exports and Grain Imports that the article is not subject to de minimis to prevent a violation to fall under the article.

Quantitative restrictions and other measures than tariffs constitute as non-tariff measures. The provision, Article XI can be read as to catch all measures that are not tariffs that impose requirements on import and could constitute restrictions. One of the main non-tariff barriers is the quantitative restriction. Quantitative restrictions are quantity limit of a product on import or exported product. The article has been interpreted broadly as to catch measures not only provided by laws or regulations but also non-legally binding measures could fall under the scope of the article. The main focus of the article is that it covers boarder measures and also measures that effect import as established in the case India – Autos.\footnote{Chapter 3.5.2.}

The broad interpretations of the principles are according to their main objective and that of the WTO. That is to say to prevent discrimination between Members. If the principles would be interpret narrowly then Members could discriminate on „legal grounds“ as the ways to discriminate is only limited to the mind of the imposing body. Accordingly the broad interpretation of the principles provide that most all cases that lead to discrimination fall under the scope of the provisions.

Exceptions to the principles can be just as important as the main principles of the agreement. They encourage Members to act under certain circumstances in a way that otherwise would be a violation of the WTO Agreements. The object and purpose of the WTO is not to promote free trade with undesirable side effects. The general exceptions provided in Article XX of the GATT Agreement are based on the societal values\footnote{Listed up in chapter 4.2.1.}. These exceptions are limited and conditional from the substantive obligations that are provided in the other articles. In practice the principle has been interpreted narrowly to prevent abuse of these exceptions. The exceptions are limited to necessity but the necessity does not have to be absolute. The determination of necessity however can vary depending on the weight and balance of factors in each case. The exceptions of Article XX specify a ground for justification for exceptions from the GATT in paragraphs a) to j) and are related to the society values. Paragraph a) provides for exception on the ground of public morals or standards of right and wrong actions maintained by community or nation. In paragraph b) of the article are measures to protect human, animal or plant life or health that must be examined on a case-by-case basis in a three
tried criteria, the question regarding if extrajurisdictional protection applies has been uncertain, however the newest case provides that a Member could impose the exceptions to protect life or health regardless of the location. In paragraph d) of the article is the exception on securing compliance with laws and regulations, accordingly the exception only applies in cases regarding domestic rules. For the exception to apply the measures taken to secure compliance do not have to absolutely guarantee results and even though one provision is inconsistent the error does not automatically apply to other provisions. The exceptions in paragraph g) has been interpreted broadly as to not only natural resources but also non-living resources. In access to this the legal requirements of the chapeau must be fulfilled and applied in good faith and imposed restrictions that entail unfair and arbitrary discrimination are prohibited.

Other exception from the main principles are rules on countervailing duties on subsidy, where direct or indirect financial support that grants benefits in favour of certain enterprises or entities. There Members can respond to imposed subsidies that are in a violation of the agreement, not all subsidies are a violation of the agreement for an example subsidies imposed in agriculture according to the Agreement on Agriculture can be legitimate subsidies. Safeguard measures can be take to prevent or remedy serious injury and to facilitate adjustments that were unforeseen. Increased quantity of import and the injury have been interpreted very high. Regional trade agreement are in its essence a violation of the MFN principle, however they are inline with the object and purpose of the WTO to reduce tariff and liberalize trade and are therefore acceptable as long as they do not restrict trade against other Members of the WTO that are not in the custom or tariff union. Developing countries require and retrieve special and favourable treatment under the WTO, they are not under the principle of reciprocity, anti-dumping measures should be specially considered against developing countries and the enabling clause provides for less restrict provision for developing countries to enter into regional or global arrangements.

Few agreements have been made between the parties in regard to exceptions in addition to those applied in the GATT Agreement. Agreement on Anti-dumping measures can be taken as specific measures when there is a certain link between the measures and the dumping, required that threat of material injury of a domestic industry is present. Anti-dumping measures are optional bot the imposing of the measures and measures taken as long as they are not higher than the dumping margin. Agreement on Sanitary and Phytosanitary measures,
those measures are up to the Members themselves to determine the risk and what measures should be taken and should not exceed necessary required.
## List of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AMS</td>
<td>Aggregate Measurement of Support (in Agreement on Agriculture)</td>
</tr>
<tr>
<td>BISD</td>
<td>Basic Instruments and Selected Documents (Published by GATT)</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>CAP</td>
<td>Common Agricultural Policy</td>
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<tr>
<td>CIF</td>
<td>Cost, Insurance and Freight</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>DSB</td>
<td>Dispute Settlement Body</td>
</tr>
<tr>
<td>DSU</td>
<td>Understanding on Rules and Procedures Governing the Settlement of Disputes</td>
</tr>
<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade from 1994</td>
</tr>
<tr>
<td>GATT 1947</td>
<td>General Agreement on Tariffs and Trade from 1947</td>
</tr>
<tr>
<td>MFN</td>
<td>Most-favoured-nation</td>
</tr>
<tr>
<td>ITO</td>
<td>International Trade Organization</td>
</tr>
<tr>
<td>IBRS</td>
<td>International Business Reply Service</td>
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<tr>
<td>IMF</td>
<td>International Monetary Found</td>
</tr>
<tr>
<td>PPMs</td>
<td>Process and production methods</td>
</tr>
<tr>
<td>S&amp;DT</td>
<td>Special and Differential Treatment</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Function of the European Union</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on the European Union</td>
</tr>
<tr>
<td>TPRB</td>
<td>Trade Policy Review Body</td>
</tr>
<tr>
<td>World Bank</td>
<td>International Bank for Restriction and Development</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
<tr>
<td>WTO Agreement</td>
<td>Agreement Establishing the World Trade Organization</td>
</tr>
</tbody>
</table>
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Agreement on Sanitary and Phytosanitary Measures

Agreement on Subsidies and Countervailing Measures

Agreement on Safeguards

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General Agreement on Tariffs and Trades (1994)


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## Table of cases

Table of WTO Cases:

<table>
<thead>
<tr>
<th><strong>Short Title</strong></th>
<th><strong>Full Case Title and Citation</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td>Case Description</td>
</tr>
<tr>
<td>------------------</td>
<td>----------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
**EC — Bananas III**, para. 7.239.

**EC – Commercial Vessels**

**EC – Sardines**

**EC – Tariff Preference**

**EC — Trademarks and Geographical Indications**

**Guatemala – Cement I**

**India – Autos**

**Japan – Alcoholic Beverages II**

**Mexico – Taxes on Soft Drinks**

**Philippines – Distilled Spirits**

**US – FSC**

**US – 1916 Act**
US – Certain EC Products


Panel Report, United States – Import Measures on Certain Products from the European Communities, modified by Appellate Body Report, WT/DS165/AB/R.

US – Clove Cigarettes


US – Cotton Yarn


US – Gasoline


US – Malt Beverages


US – Poultry (China)


US – Shrimp


US – Shrimp II

**US – Shrimp**  

**US – Tuna II (Mexico)**  

**US/Canada – Continued Suspension**  

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<table>
<thead>
<tr>
<th>Short Title</th>
<th>Full Case Title and Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Italy – Agriculture</strong></td>
<td>GATT Panel Report, <em>Italian discrimination against imported agriculture machinery</em>, L/833, adopted 23 October 1958</td>
</tr>
</tbody>
</table>