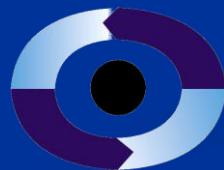


Study Tour for Kosovo Trade Officials to Geneva  
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# Introduction to the Legal Framework of Trade

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W T I  
a d v i s o r s

# What is the Legal Framework of Trade?

One Possible Answer:

*The legal framework for trade is a system of rules through which governments discipline their use of trade-distorting policy tools.*

# Overview

- The Legal Framework of Trade
  - The WTO Stated Objectives
  - The Law
    - WTO Agreements
    - Key Elements of WTO Law
    - Rule of Law
  - The WTO Agreements

So:

Why the whole thing?



# The WTO's Stated Goals

- Stated Objectives (Preamble of Marrakesh Agreement):
  - Increase standards of living
  - Ensure full employment (!)
  - Ensure growth of real income and effective demand
  - Expand production of goods & services
- “Allowing for”
  - Optimal use of the world's resources
  - Sustainable Development

# Simply put

## Recalling the Motto

*The legal framework of trade is a system of rules through which governments discipline their use of trade-distorting policy tools....*

*...in order to achieve the WTO stated goals. In other words: Trade policy making is disciplined because more and fairer trade helps achieving these goals – and not for its own sake.*

# Identifying the “Problem” – Some Random Examples

- Spanish exports of olives to China are taxed higher than olives from Jordan
- French lamb meat exports to the United States face expensive extra inspections because there have been cases of disease “in Europe” (the cases were in Romania)
- You want to advise clients in Cambodia on WTO law, but find out that you need to have a Cambodian law degree and an office in Cambodia to “practice law” there
- A patented Swiss AIDS drug is copied in Zimbabwe under the government’s “compulsory license”, with no royalties paid to the Swiss patent owner

# Thinking about **Trade Policy** – A Few Preliminary Considerations

The *WTO* is about Trade Policy...

...but what is Trade Policy about?

# *Trade Policy in Action— No Cuddling! (And No Kidding!)*

*Is this a toy? Or a decoration?*



# The Trade Policy Toolbox: The Top Five Classics

- Tariffs (and tariff rate quotas)
- Quotas (quantitative restrictions)
- Export subsidies
- Local content requirements
- Voluntary export restraints



# What other measures should we keep our eyes on?

- Other Non-Tariff Barriers
  - Sanitary and Phytosanitary Measures (SPS)
  - Technical Barriers to Trade (Technical Regulations, Standards) - TBT
  - Import procedures and requirements
  - Rules of Origin, Customs Valuation etc.
- Domestic subsidies

# And not to forget

- Regulation of **services**, e.g. telecoms, banking, lawyers, hotels, dentists, hairdressers – wherever foreigners are (could be) involved *as providers or clients*
- Protection (or not) of **intellectual property** for foreigners (patents, trademarks, copyrights etc.)

# How does the WTO System Discipline Trade(-Related) Policy Measures?

- In one word: Through the rule of law
  - The law itself, including in particular
    - Rules on the reduction/elimination of trade barriers (market access)
    - Non-discrimination rules
  - The “enforcement“ of that law
    - Transparency (also serves trade directly)
    - Dispute Settlement
- The goal: Reliability and predictability for Trade (because that helps delivering on the objectives)

# The Law

# The WTO Agreements

- Marrakesh Agreement (“WTO Agreement”)
- The three substantive pillars
  - Annex 1A (Goods – GATT)
    - ...and several other agreements → see next slides)
  - Annex 1B (Services – GATS)
  - Annex 1C (Intellectual Property – TRIPS)
- Other agreements
  - Annex 2 (Dispute Settlement – DSU)
  - Annex 3 (Trade Policy Review – TPRM)
  - Annex 4 (Plurilateral Agreements)

# WTO Agreements (cont'd):

## The Agreement on Goods in Annex 1 A

- General Agreement on Tariffs and Trade (GATT 1994)
- Sectoral Agreements
  - Agreement on Agriculture
  - [Agreement on Textiles and Clothing]
- Agreements Dealing With Technical Standards and Regulations
  - Agreement on Technical Barriers to Trade (TBT)
  - Agreement on Application of SPS Measures

# WTO Agreements (cont'd): The Agreement on Goods in Annex 1 A

- Agreements Affecting Importation Process
  - Agreement on Rules of Origin
  - Agreement on Customs Valuation
  - Agreement on Preshipment Inspection
  - Agreement on Import Licensing Procedures
- Agreements Dealing With Trade Remedies
  - Agreement on Anti-Dumping
  - Agreement on Subsidies and Countervailing Measures
  - Agreement on Safeguards



# WTO Agreements (cont'd): The Agreement on Goods in Annex 1 A

- Other agreements
  - Agreement on Trade-Related Investment Measures (TRIMs)
- (Not to forget, even if not in Annex 1A: Plurilateral Agreements
  - Agreement on Government Procurement
  - Agreement on Trade in Civil Aircraft
  - (*Information Technology Agreement*)
  - (*Sectoral Initiatives*)



# Key Elements of WTO Law

- Market Access
- Non-discrimination
- Transparency (in various shapes and functions)
- Exceptions

# Key Elements of WTO Law I

- Market Access (and Progressive Liberalisation)
  - Commitments (GATT: tariff bindings; GATS: specific commitments)
  - Elimination of quantitative restrictions (GATT)
  - Disciplines on market access-related regulation (import licensing, customs valuation, rules of origin, preshipment inspection, TRIMs)
  - Disciplines on trade remedies
  - (Disciplines on internal regulation (TBT, SPS))
  - (Disciplines on subsidies)

# Key Elements of WTO Law II: Non-Discrimination

# Non-Discrimination: Most Favoured Nation Obligation

## ■ GATT Article I

*“... any advantage, favour, privilege or immunity granted by any contracting party to any product originating 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”*

*GATT Art. I.1*

# Non-Discrimination: Most Favoured Nation Obligation

- Must not treat imported goods or services from one country more favourably than like imported goods or services from another country
- In other words, one should not discriminate based on the country of origin of a particular good or service

**→ *Simply put: Treat all foreigners equally!***

# Non-Discrimination: National Treatment Obligation

- Do not treat domestic goods or services more favourably than like imported goods or services
- In other words, one should not discriminate in favour of its domestic goods or (committed-scheduled) services

**→ *Simply put: Treat foreigners like your own people!***

# Non-Discrimination: National Treatment Obligation

## ■ *Example – Pass the Salt*

- Country X proposed law – no salt from mines
- Country X industry – all salt from the sea
- Neighbouring Country Y – all salt from mines
- Discrimination in treatment of domestic goods compared to “like” imports

# Cross-Check!

*What about treating foreign goods better  
than your own – Can you do that?*



# Non-Discrimination: When are goods like?

- 4 general criteria
  - the properties, nature and quality of products
  - the end-uses of the products
  - consumers' tastes and habits in respect of the products - i.e. consumers' perceptions and behaviour
  - the tariff classification
- But note: The list is not exhaustive!
  - e.g.: Health effect (*EC-Asbestos*)

# Non-Discrimination – Where does it appear in WTO Agreements?

- Almost everywhere, e.g.
  - Design and administration of **quotas** (GATT)
  - Application of **safeguards** (Safeguards Agreement)
  - Formulation and enforcement of **technical regulations** (TBT)
  - Application of **environmental measures** (GATT)
  - Application of **health measures** (SPS)
  - Grant of **patent protection** (TRIPS)
  - Registration of **doctors** (GATS)

# Non-Discrimination in the WTO – Not always unconditional!

	MFN	NT
GATT (Goods)	Unconditional	Unconditional (behind the border = after the tariffs!)
GATS (Services)	Unconditional (but one-time exceptions possible)	<i>Conditional</i> (only committed sectors and modes, subject to exceptions)
TRIPS (Intellectual Property)	Unconditional	Unconditional (some exceptions)

# Key Elements of WTO Law III: Transparency

- Transparency of the law itself
  - Conversion of non-tariff measures to tariffs (tariffication)
- Transparency mechanisms
  - Publication of the laws, regulations, and practices affecting trade in goods and services and investment
    - Enables WTO Members to assess compliance with WTO obligations
    - Enables the private sector to conduct business in a known and predictable environment
  - Notification
  - Designation of enquiry points
  - Trade policy review

# Key Elements of WTO Law IV: Exceptions

# 1. Economic (Or Intra-Systemic) Exceptions

- Trade Remedies
  - Safeguards (→ US Steel)
  - Anti-Dumping Measures (→ Vietnamese Catfish)
  - Countervailing Measures
- Balance of Payment

## 2. Policy (Or Extra-Systemic) Exceptions

- Exceptions from trade disciplines for legitimate non-trade reasons
  - General Policy Exceptions
  - Security Exceptions

# General Exceptions

May justify a Member's measure

- Necessary to protect public morals
- Necessary to protect human, animal or plant life or health
- Relating to the conservation of exhaustible natural resources
- Relating to products of prison labour
- Imposed for the protection of national treasures of artistic, historical or archaeological value
- Necessary to maintain public order
- Necessary to prevent deceptive and fraudulent practices



# Security Exceptions

May justify a Member's measure

- Which it considers necessary for the protection of its security interests
  - relating to fissionable materials or materials from which they are derived
  - relating to traffic in arms, ammunition and implements of war
  - taken in time of war or other emergency in international relations
- Taken in pursuance of its obligations under the UN Charter for the maintenance of international peace and security

# 3. Regional Trade Agreements

- The system recognises the desirability of forming close economic integration (CU, FTAs, EIAs)
- Opportunities for trade creation versus risks of trade diversion
- RTAs enjoy a conditional exception from the MFN obligation
  - GATT Article XXIV – goods trade
    - External trade requirement
      - Duties and other regulations of commerce *vis-à-vis* third parties not higher or more restrictive than before
    - Internal trade requirement
      - liberalization of “substantially all the trade”

# Regional Trade Agreements: Conditional Exception from MFN

- GATS Article V
  - Internal requirements: Substantial liberalization
    - Substantial sectoral coverage
    - Elimination of discrimination
    - Flexibility for developing countries (asymmetry)
  - External requirement— not to raise the overall level of barriers vis-à-vis third parties
- Enabling Clause, Section 2(c)
  - South-South agreements

# 4. Preferences, Waivers and SDT for Developing Countries and LDCs

- Preferences (MFN)
  - Unilateral non-reciprocal preferences for DCs and LDCs under Para 2(a) of the “Enabling Clause”: GSP, GSP +, EBA
- Waivers
- Special and Differential Treatment -SDT
  - Exemption from obligations, lower level of obligations, longer implementation periods, recognition of special needs, additional market access

# Rule of Law I: WTO Dispute Settlement

- Compulsory (in contrast to GATT)
- “Reverse consensus”
- Two instances (Panel, Appellate Body)
- Relatively fast
  - Panel: 6, max 9 months
  - Appellate Body: 60, max 90 days
- Implementation mechanisms

# Rule of Law II: Domestic Judicial and Administrative Protection

- Many WTO agreements contain clauses providing for domestic review procedures
  - judicial review
  - review by independent tribunals
  - administrative review procedures
- Violations can be brought to int'l level (WTO)

# The Agreements and What They are About – A Quick Look

- GATT
- TBT Agreement
- SPS Agreement
- Rules of Origin
- Customs Valuation
- TRIMS
- Anti-Dumping Agreement
- SCM Agreement
- Safeguards Agreement
- GATS
- TRIPS



# The GATT 1994 in a Nutshell

- General Agreement on Tariffs & Trade (GATT)
  - Provide NT & MFN
  - Eliminate quantitative restrictions generally
  - Reduce & bind tariffs at negotiated levels, tariffication
  - Freedom of transit
  - Fees and formalities
  - Customs valuation, rules of origin and more
  - Economic exceptions: anti-dumping, countervailing (subsidies), safeguards
  - Political exceptions: general and security



# *Example: Standardised Standards*

- Country Y has problem with plastic waste (plastic bags polluting ground water)
- Ministry prescribes minimum thickness of plastic sheets (domestic: 0.6 mm, foreign 0.8 mm)
  - What kind of measure is this?
  - Useful, necessary, legitimate in principle?

# TBT Agreement

- Technical Regulations (mandatory) v. Standards (voluntary)
- All products are covered except:
  - procedures of government procurement - GPA
  - sanitary and phytosanitary measures - SPS Agreement

# TBT Agreement (cont'd)

## ■ Disciplines

- Substantive standards:
  - take international rules where available
  - “...not more trade restrictive than necessary...”
- Transparency
  - Notification (rule: *ex ante*, exception: *ex post*)
  - Publication
  - Enquiry points
- “Code of Good Practice”
- Conformity Assessment Procedures
- Mutual Recognition

# *Example: No, Honey!*

- Trade in Goods – Agreement on Sanitary and Phytosanitary Measures (“SPS”)
  - EU protective measures banning imports of all products of animal origin intended for human consumption or animal feed (honey, shrimp and others)
  - Harmful residues presenting risk to human and animal health
  - SPS obligations
    - Risk assessment
    - Necessity

# SPS Agreement

- Measures to protect human/animal life or health (food, drink, feedstuff; pests, diseases, 'bad' organisms)
- Various forms (e.g. product criteria; production & processing methods; testing, inspection, certification & approval procedures; packaging and labeling requirements)
- Disciplines similar to TBT, but
  - Use international standards if possible, but higher level acceptable with scientific justification
  - Risk assessment (scientific basis or available information)

# Rules of Origin

- Agreement on Rules of Origin (rather basic)
  - Ensures that national RoO rules are
    - transparent
    - avoid restricting, distorting or disruptive effects
    - administered in a consistent, uniform, impartial and reasonable manner
    - based on a positive standard
  - Seeks global harmonisation of non-preferential RoO
- Note: RoO matter “big time” in preferential trade agreements (e.g., EU Association Agreements)

# Customs Valuation

- Customs Valuation Agreement (“Agreement on Implementation of Article VII of the GATT 1994”)
  - Establishes a system of valuation rules (*e.g.*, abolishes reference price schemes)
  - Intended to improve fairness, uniformity and neutrality
  - Subject to transition periods for developing countries (now generally expired or extended)



# Import Licensing

- Agreement on Import Licensing Procedures
  - Governs administrative procedures requiring submission of an application or other documentation (other than for customs purposes) as a prior condition for importation
  - General Requirements
    - Rules to be fair, equitable, neutral
    - Forms & procedures to be as simple as possible
    - Applications & licensed imports not to be refused for minor errors & variations



# TRIMs

- Agreement on Trade-Related Investment Measures (TRIMs)
  - Only applies to investment measures affecting trade in goods (TRIMs is not ‘about investment’! But GATS is!)
  - Prohibits measures that violate GATT Article III (national treatment) or Article XI (elimination of quantitative restrictions)
    - local content requirements
    - trade balancing requirements
    - foreign exchange restrictions
    - export limitations
  - But: LDCs largely exempted (Annex F of Hong Kong Declaration)

# Trade Remedies

*What was that again?*

# Trade Remedies

- Trade Remedies (economic exceptions)
  - Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping)
    - “Unfair” trade: Dumping (export price < normal value)
  - Agreement on Subsidies and Countervailing Measures
    - “Unfair” trade: Imported goods are subsidized → cheaper
  - Agreement on Safeguards
    - “Fair” trade but extreme and unexpected increase in imports

# Trade Remedies (cont'd)

- WTO Law on Trade Remedies
  - Ensures that Members conduct trade remedy investigations in accordance with appropriate procedures and substantive provisions
  - Applies to anti-dumping, anti-subsidy (countervailing duty), and safeguard measures
  - Intended to remedy injury to domestic industries caused by unfair trade or by increased imports that often result from liberalisation or market fluctuations

# Anti-Dumping

- Anti-Dumping Agreement
  - AD Investigation: Three-step approach
    - dumping
    - injury
    - causation
  - *de minimis* (dumping margin < 2%, Volume of dumped imports < 3% of imports of like products)
  - AD measures
    - Provisional duty
    - Price undertaking
    - Definitive duty
  - Judicial review

# Pause for Reflection: Subsidies and the WTO

- What is a subsidy?
- Are subsidies bad?
- Are subsidies prohibited?
- Do WTO disciplines on subsidies make sense?

# Subsidies and Countervailing Measures

- Subsidy = “unearned” benefit, *specific* to an enterprise, industry, group of enterprises or industries (domestic or export subsidies)
- “in law or in fact”
- Prohibited subsidies (exemptions for LDCs)
  - export subsidies
  - local content requirements
- Actionable subsidies (“adverse effects”)
- Two alleys for enforcement
  - Request removal
  - Take countervailing measures (rules similar to AD)

# Safeguards

- Agreement on Safeguards
  - Safeguards investigation (similar to AD & Countervailing)
    - increase in imports of a product
    - injury or threat of injury to domestic industry that produces like or directly competitive products
    - causation
  - General rule: no discrimination (but...)
  - Safeguard measures  $\leftrightarrow$  compensation



# GATS

What's special about services?

And what's special about  
*Trade in Services?*

# The GATS - Coverage

- **Mode 1:** Cross-border supply (e.g. faxed legal memo, software design via remote access/email)
- **Mode 2:** Consumption abroad (e.g. tourism, medical treatment, education abroad)
- **Mode 3:** Commercial presence (e.g. branch of foreign bank, subsidiary of telecoms provider)
- **Mode 4:** Movement of natural persons (e.g. visiting consultants, fashion models, engineers)

→ all “int’l” services covered

# Key GATS Obligations

- Market access (and progressive liberalisation) by sector, as negotiated
- Non-discrimination
  - “Most-Favoured Nation” Treatment (MFN): unconditional
  - “National Treatment”: only in committed sectors
- Transparency
- Rule of law (and reason): disciplines on domestic regulation

# GATS Structure

- General Rights and Obligations
  - MFN
  - Transparency
  - Exceptions
- Rights and Obligations Dependent on Specific Commitments (Individually Negotiated)
  - Market access commitments (scheduled sectors)
  - National Treatment
  - Disciplines on domestic regulation
  - Additional commitments (also “Reference Papers” on competition, e.g. in telecoms)

# TRIPS

# The TRIPS Agreement

- Recognizes seven categories of intellectual property rights:
  - Patents
  - Trademarks
  - Copyrights
  - Trade Secrets
  - Industrial Designs
  - Lay-out Designs/Integrated Circuits
  - Geographical Indications
- Defines minimum standards for these rights (including scope of the right, the term, how they can be exploited, exceptions)

# The TRIPS Agreement cont'd

- Applies principles of MFN and National Treatment and existing IP treaty rules
- Sets out (1) granting and (2) enforcement obligations of Member States
  - administrative offices
  - judicial procedures
  - border and internal measures to counter infringement, such as seizures, civil and criminal measures

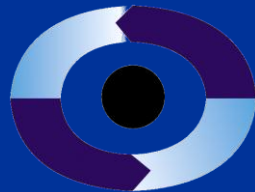


# TRIPS – Some Reflections

- Protecting Intellectual Property – Why? Why not?
- Is TRIPS good or bad for trade?

# Discussion

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