
Learning Objectives

This chapter is to help students understand:

1. Legal distinctions between GATT 1994 and GATT 1947;
2. Legal status of GATT 1994 in WTO Agreements;
3. Legal instruments incorporated into the WTO Agreement;
4. Main features of GATT 1994;
5. Authority to adopt interpretation of the WTO Agreement;
6. Structure of GATT 1994;

2.1 Introduction

2.1.1 Background

The original General Agreement on Tariffs and Trade,¹ now referred to as GATT 1947, provided the basic rules of the multilateral trading system from 1948 until the World Trade Organization entered into force in 1995. These rules, which dealt only with trade in goods, were supplemented and modified by many further legal instruments adopted over the 47 years between 1948 and 1995, as a result of multilateral negotiations, protocols of accession, waivers and other decisions. Provisions of GATT 1947 dealing with such matters as accession, joint action by the Contracting Parties (the signatories of the agreement) and consultations and complaints allowed GATT to function effectively as an international organization.

¹General Agreement on Tariffs and Trade. Oct. 30, 1947. 61 Stat. A-11, U.N.T.S. 55: 194. (GATT).

A further important feature of GATT 1947, however, was its “grandfather clause”, included in the Protocol of Provisional Application.² This provided that the rules in Part II of GATT 1947, which essentially dealt with non-tariff trade measures, need be applied only to the extent that they were not inconsistent with legislation in effect when a country acceded to GATT. GATT 1947 is no longer in force having been superseded by GATT 1994.³

GATT 1994, which sets out the main WTO rules that bear specifically on trade in goods, is legally distinct from GATT 1947. Many of its key elements, including post-1948 legal instruments, have been carried over without change from GATT 1947. Examples are the most-favored-nation rule⁴ and the provisions on trade and development.⁵ Other Articles carried over into GATT 1994 have effectively been modified, sometimes substantially, by individual agreements negotiated in the Uruguay Round. Some Articles are no longer valid, having been replaced by provisions of the WTO Agreement. The Protocol of Provisional Application is specifically excluded from GATT 1994.⁶ GATT 1994 is defined by a short Uruguay Round agreement entitled “General Agreement on Tariffs and Trade 1994”. This does not provide a new physical text for GATT 1994, but indicates the relationship between it and GATT 1947.⁷

2.1.2 Status of GATT 1994

The Marrakesh Agreement Establishing the World Trade Organization states that the General Agreement on Tariffs and Trade 1994 (GATT 1994) is an instrument legally distinct from the General Agreement on Tariffs and Trade dated October 30, 1947, annexed to the Final Act of the United Nations Conference on Trade and Employment (Havana Conference), and referred to as GATT 1947.⁸

GATT 1994, as set out in Annex 1A to the WTO Agreement, consists of: (a) the provisions of GATT 1947; (b) the provisions of legal instruments which entered into force under GATT 1947 before the date of entry into force of the WTO Agreement; (c) the Understandings on the interpretation of a number of GATT Articles, adopted at the end of the Uruguay Round; and (d) the Marrakesh Protocol to GATT 1994. The provisions of GATT 1947 incorporated into GATT 1994 include the rectifications, amendments or modifications introduced through the

² Protocol of Provisional Application of the General Agreement on Tariffs and Trade. Oct. 30, 1947. Stat. pts. 61: 5–6. TIAS N. 1700, UNTS 55: 308.

³ Jackson et al. (2008, pp. 214–224).

⁴ GATT, *supra* note 1. Art. 1.

⁵ GATT, *supra* note 1. Art. 4.

⁶ Matsushita et al. (2006, p. 9).

⁷ August et al. (2009, p. 347).

⁸ *Id.*, at 336–337.

terms of pre-Uruguay Round legal instruments – i.e., instruments which entered into force before the date of entry into force of the WTO Agreement.⁹

The legal instruments incorporated into GATT 1994 include: (i) protocols and certifications relating to tariff concessions; (ii) protocols of accession; (iii) waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement; and (iv) other decisions of the contracting parties (CONTRACTING PARTIES)¹⁰ to GATT 1947. These instruments maintain their prior status under GATT 1994. In respect of the protocols of accession, GATT 1994 excludes the provisions concerning provisional application and withdrawal of provisional application and providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol. The Uruguay Round Understandings incorporated into GATT 1994 include those on: (i) interpretation of Article II:1(b); (ii) interpretation of Article XVII; (iii) balance-of-payments provisions; (iv) interpretation of Article XXIV; (v) waivers of obligations; and (vi) interpretation of Article XXVIII.¹¹

The Marrakesh Protocol to GATT 1994 is the legal instrument that incorporates the schedules of concessions and commitments on goods negotiated under the Uruguay Round into GATT 1994, and establishes their authenticity and the modalities for their implementation.¹²

2.1.3 Main Features

The scope and coverage of the provisions of GATT 1994 have been fully clarified, and have been given a firm legal basis by incorporation into a full-fledged international treaty, accepted by governments and ratified by national parliaments. Whereas GATT 1947 was based on an interim instrument under provisional application, GATT 1994 is one of the Multilateral Agreements attached to the WTO Agreement.¹³

⁹ *Id.*, at 338.

¹⁰ Contracting parties are “those governments which [apply] the provisions of (the GATT) under Article 26, or pursuant to the (PPA).” GATT art. 32(1), *cited by* Reitz (1996, p. 556, fn. 4); Article 25 uses “CONTRACTING PARTIES,” in all capital letters, to mean “the contracting parties distinction and will utilize all capital letters to indicate those instances where the contracting parties act jointly”. In the GATT 1994 agreement, the 12 European Community (“EC”) nations are listed individually and as a collective. Most contracting parties are nations, but the GATT system is open to entities not recognized by the international community as sovereign nations. A “government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement may accede to (the GATT system).” For example, Hong Kong and Macau are listed as contracting parties. *See* GATT, *supra* note 1, Art. 33, *cited by id.*

¹¹ Agreement Establishing the WTO, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1125, art.2.4 & Annex 1A (1994) (WTO Agreement); *See* Matsushita et al. (2006, pp. 5–9).

¹² Jackson et al. (2008, *supra* note 3, at 216).

¹³ *Id.*, at 224.

Regarding the interpretation of the WTO Agreement, in accordance with Article IX of the WTO Agreement, the authority to adopt interpretations of that Agreement and the Multilateral Trade Agreements rests exclusively on the Ministerial Conference and the General Council. However, before the entry into force of the WTO Agreement, a number of understandings on the interpretation of GATT provisions were negotiated under the Uruguay Round. These understandings are an integral part of GATT 1994. Any further interpretations will be subject to the provisions of Article IX of the WTO Agreement.¹⁴

Regarding the schedules on trade in goods, for every Member of the WTO there is a Schedule of Concessions on Goods which forms an integral part of GATT 1994. Each schedule incorporates all the concessions made by the Member concerned in the Uruguay Round or in earlier negotiations. Under Article II of GATT 1994 Members are obliged to accord to the trade of other Members treatment “no less favorable than that provided for in the appropriate part of the appropriate schedule”. Modalities for the modification or withdrawal of a concession (or “binding”) inscribed in a schedule are described in Article XXVIII of GATT 1994.¹⁵

In the event of a conflict between a provision of that agreement and a provision of any of the multilateral trade agreements (of which GATT 1994 is one), the provision of the WTO Agreement shall prevail to the extent of the conflict.¹⁶ A general interpretative note to Annex 1A to the WTO Agreement, which includes all the multilateral agreements related to trade in goods, provides that, in the event of conflict between a provision of GATT 1994 and a provision of another agreement in Annex 1A, the provision of the other agreement shall prevail to the extent of the conflict.¹⁷

2.1.4 Structure

GATT 1994 is constituted with Parts I, II, III and IV.¹⁸

¹⁴ WTO Agreement, *supra* note 11. Art. 9.

¹⁵ GATT, *supra* note 1. Art. 2.

¹⁶ WTO Agreement, *supra* note 11. Art. 16.3.

¹⁷ WTO Agreement Annex 1A (In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the “WTO Agreement”), the provision of the other agreement shall prevail to the extent of the conflict.).

¹⁸ Jackson et al. (2008, *supra* note 3, at 216).

Part I of GATT 1994 is made up of Articles I and II. Article I, the Most Favored Nation Clause,¹⁹ sets forth the concept of non-discrimination. Article II states the obligations applicable to the schedules of concessions of each WTO Member.²⁰

Part II covers Articles III through XXIII of the General Agreement. Article III deals with the concept of National Treatment.²¹ Articles IV to XIX cover a wide variety of subjects which can all broadly be regarded as non-tariff measures. Provisions in this group cover unfair trade practices such as dumping and export subsidies, quantitative restrictions, restrictions for balance-of-payments reasons (and related cooperation with the International Monetary Fund), state-trading enterprises, government assistance to economic development, and emergency safeguard measures, as well as a number of technical issues related to the application of border measures (screen quotas for cinema films, freedom of transit, customs valuation, fees and formalities, marks of origin and transparency of trade regulations).

General and national security exceptions are provided for in Articles XX and XXI, respectively. Provisions on consultations and dispute settlement in Articles XXII and XXIII are elaborated in the WTO dispute settlement rules.²²

Part III comprises Articles XXIV through XXXV. Article XXIV deals with customs unions and free trade areas, as well as with territorial application, frontier traffic, and the responsibilities of Members for actions by their regional and local governments.²³ Articles XXVIII and XXVIII cover the negotiation and

¹⁹ GATT, *supra* note 1. Art. 1.1 (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, favor, 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.); Qureshi (1996).

²⁰ GATT, *supra* note 1. Art. 2.1(a) (Each contracting party shall accord to the commerce of the other contracting parties treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.).

²¹ GATT, *supra* note 1. Art. 3.1 (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.).

²² GATT, *supra* note 1. Arts. 4–23.

²³ GATT, *supra* note 1. Art. 24.1 (The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; provided that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.).

renegotiation of tariffs. Article XXIX spells out the relationship between GATT 1994 and the Havana Charter, and Article XXXIV makes the annexes an integral part of GATT 1994. Other articles dealing with joint action, entry into force, accession, amendments, withdrawal, non-application, etc., are no longer valid as they have been overridden by corresponding provisions in the WTO Agreement.²⁴

Three articles were added to the General Agreement in 1965 in the form of Part IV, Trade and Development, providing special rules and benefits for developing countries. Article XXXVI stipulates specifics about contributions to the advancement of developing countries. Article XXXVII (Commitments) outlines measures that developed country Members might, on a best endeavor basis, undertake in the trade area to promote development. Article XXXVIII (Joint action) provides for joint collaboration of the Members to further the objectives set out in Article XXXVI.

2.2 GATT 1994: Part I

2.2.1 The Most-Favored Nation Clause

The Most-Favored Nation (MFN) clause embodied in Article I²⁵ was the cornerstone of the GATT 1947 system, and is equally the cornerstone of the new WTO multilateral trading system. The commitment that “. . . any advantage, favor, privilege or immunity granted by any contracting party [now Member] 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 [Members]” is the starting-point of the WTO system of rights and obligations. It is fundamental to all the multilateral trade agreements annexed to the WTO Agreements.²⁶

²⁴ GATT, *supra* note 1. Arts. 24–35.

²⁵ GATT, *supra* note 1. Art. 1.1 (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, favor, 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.).

²⁶ Steger (2002). (The core principles of MFN and national treatment under GATT/WTO are evaluated to be “negative” integration rules rather than “positive” integration rules from the viewpoints that they do not tell governments what policies to adopt and that they are not positive obligations that require governments to harmonize their policies to international standards.).

2.2.2 Schedules of Concessions

Article II provides that products from one Member, upon importation into the market of another Member shall "... be exempt from ordinary customs duties in excess of those set forth and provided therein [in the Schedule of the importing Member]", thus establishing a ceiling on the level of customs duties that can be applied on a product whose tariff is bound. These products must also be exempt from all other duties and charges on or in connection with importation in excess of those imposed on the date "of this Agreement" or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing Member on that date.²⁷

An Understanding on this Article was negotiated in the Uruguay Round and is legally incorporated into GATT 1994. It provides, for the purposes of transparency, that the level, as of April 15, 1994, of these "other duties and charges" on tariff items included in the schedules be also registered therein and thus be subject to binding.

Current Status of Schedules of WTO Members

It was agreed at the Market Access Committee meeting of June 22, 1999 that Annex II of this document, setting out the status of schedules of the WTO Members, would be updated periodically. In this connection, the attached table is an update of the status of Members' schedules incorporating information up to March 17, 2009. The introductory text contained in Annex II of the original document has been updated to take into account developments since the last revision.

I. Introduction

All of the WTO Members have a schedule of tariff concessions which is either annexed to the Marrakesh Protocol to GATT 1994 or to a Protocol of Accession. Some Members also have schedules pre-dating the Uruguay Round which reflect concessions granted previously.

The attached table reflecting the current status of schedules of the WTO Members has been prepared for information purposes in order to assist, inter alia, the project team in the Secretariat updating the CTS files into HS2002 and into HS2007. The pending work on the schedules of concessions derives from obligations related to the introduction of the Harmonized System and its subsequent amendments, the results of the Uruguay Round, technical modifications or rectifications to the schedules, as well as renegotiations under GATT Article XXVIII. Some background information on these issues has been provided for ease of reference.

(continued)

²⁷ GATT, *supra* note 1. Art. 2.19(c).

The table consists of the following columns:

Column 1: Lists the WTO Members in alphabetical order. It also indicates whether or not the Member is a party to the Harmonized System Convention.

Column 2: Indicates the Roman numeral assigned to the Member's schedule. Its equivalent Arabic numeral is included in parenthesis for ease of reference.

Column 3: Indicates the situation of the Pre-Uruguay Round schedule, if any.

Column 4: Indicates whether the schedule is annexed to the Marrakesh Protocol or to a Protocol of Accession. The date of accession and references to the relevant documentation is included for the latter.

Column 5: Provides information on the transposition of Uruguay Round schedules into the Harmonized System and its subsequent amendments. In the case of Members having acceded after January 1, 1995, it also indicates the tariff nomenclature used in the schedule annexed to its protocol of accession.

Column 6: Provides information on the rectifications/modifications requested by the Member, if any.

Column 7: Provides information on the renegotiations under GATT Article XXVIII initiated by the Member, if any.

II. Harmonized System and its amendments

Introduction of Harmonized System

Following the entry into force of the Harmonized System (HS) on January 1, 1988 (HS88), the pre-UR schedules of those GATT Contracting Parties which were also contracting parties to the HS Convention were required to be transposed into the HS nomenclature. The GATT Committee on Tariff Concessions developed procedures for this purpose. A number of schedules were transposed, certified and annexed to protocols. Some Members undertook to renegotiate their schedules in connection with the implementation of the HS. The situation surrounding pre-UR schedules is set out in column 3 of the table. The term "None" is used for those Members that had no GATT schedule of concessions. It should, however, be noted that these Members did submit a schedule either during the Uruguay Round or at the time of their accession.

Source: Current Situation of Schedules of WTO Members. G/MA/W/23/Rev.7. http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm

2.3 GATT 1994: Part II

2.3.1 Non-Tariff Measures

A number of non-tariff measures fall under provisions in Part II of GATT 1994.²⁸ These articles cover, successively, measures related to national treatment with regard to internal taxation and regulations,²⁹ screen quotas for cinema films,³⁰ freedom of transit,³¹ anti-dumping and countervailing duties,³² valuation for customs purposes,³³ fees and formalities,³⁴ marks of origin,³⁵ quantitative restrictions,³⁶ subsidies,³⁷ restrictions imposed for balance-of payments reasons and government assistance to economic development.³⁸ Further provisions in Part II deal with general and security exceptions, and consultations and complaints.³⁹

2.3.2 National Treatment

Article III of GATT deals with the principle of national treatment on imported goods.⁴⁰ Paragraph 1 establishes the principle that internal taxes and other internal charges, laws, regulations and requirements, and internal quantitative regulations, should not be applied so as to afford protection to domestic production.⁴¹

The main obligations of national treatment refer to (i) internal taxes or other internal charges of any kind, which should not be imposed on imported products in excess of those applied to like domestic products or in a manner dissimilar to directly competitive or substitutable domestic products, and (ii) treatment in respect

²⁸ Jackson et al. (2008, *supra* note 3, at 216).

²⁹ GATT, *supra* note 1. Art. 3.

³⁰ GATT, *supra* note 1. Art. 4.

³¹ GATT, *supra* note 1. Art. 5.

³² GATT, *supra* note 1. Art. 6.

³³ GATT, *supra* note 1. Art. 7.

³⁴ GATT, *supra* note 1. Art. 8.

³⁵ GATT, *supra* note 1. Art. 9.

³⁶ GATT, *supra* note 1. Art. 11.

³⁷ GATT, *supra* note 1. Art. 16.

³⁸ GATT, *supra* note 1. Art. 12.

³⁹ GATT, *supra* note 1. Art. 14.

⁴⁰ The national treatment obligation in Article III of the GATT applies to de facto as well as de jure discrimination since the first affirmative ruling relating to a claim of de facto discrimination in the panel report on Japan-Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages, Nov. 10, 1987, GATT B.I.S.D. (34th Supp.) at 83 (1988). Steger (2002), *supra* note 26, at 141–142.

⁴¹ GATT, *supra* note 1. Art. 3.1.

of all laws, regulations and requirements affecting⁴² the internal sale, offering for sale, purchase, transportation, distribution or use of products, which should be accorded to imported products no less favorably than that accorded to like products of national origin.⁴³

Local content requirements are also dealt with through provisions on internal quantitative regulations, which indicate that no Member shall require that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources, or in such a manner as to allocate any such amount or proportion among external sources of supply.⁴⁴

2.3.3 Unfair Trade Practices

Articles VI (Anti-dumping and Countervailing Duties) and XVI (Subsidies), dealing with what are sometimes known as “unfair trade practices”, provide the basis for the much more detailed, and generally more constraining, rules developed in subsequent multilateral trade negotiations and now incorporated in the separate WTO Agreements dealing with anti-dumping, subsidies and countervailing duties, and agriculture.⁴⁵

Dumping is defined as the introduction of a product into the commerce of an importing country at less than its normal value, that is, less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting Member. Anti-dumping duties may be applied in order to offset or prevent dumping, and countervailing duties for the purpose of offsetting any subsidy on the manufacture, production or export of any merchandise. In both cases, such duties may only be imposed if imports of dumped or subsidized products cause or threaten to cause material injury to an established industry in the importing country or materially restrict the establishment of a domestic industry.⁴⁶

On subsidies in general, there is a requirement for the notification of all subsidy programs maintained by the contracting parties, and for the opportunity of consultations on limiting the subsidization whenever serious prejudice to the

⁴² The operative word “affecting” is a broad term that includes internal regulations that not only govern the sale, purchase, or distribution of imported products but also those which have a negative effect on the competitive opportunities enjoyed by imports vis-à-vis the domestic like product in the importing Member’s home market. *See* Report of the Panel. 1959. Italy – Discrimination against Imported Agricultural Machinery. L/833-7 S/60 (Jul. 15, 1958). GATT B.I.S.D. (7th Supp.) 60–64, *cited* by Kennedy (1998, p. 432).

⁴³ GATT, *supra* note 1. Arts. 3.2, 3.4.

⁴⁴ GATT, *supra* note 1. Arts. 3.5, 3.7.

⁴⁵ Qureshi (1996, *supra* note 19, at 78–81).

⁴⁶ *Id.*, at 29.

interests of a contracting party may be caused or threatened.⁴⁷ On export subsidies, it is recognized that they may have harmful effects, possibly causing undue disturbances on commercial interests, which in turn may hinder the achievement of the objectives of GATT.⁴⁸

2.3.4 Quantitative Restrictions

Quantitative restrictions (QRs) are generally prohibited from being imposed, whether on imports or exports.⁴⁹ The only restrictions on trade allowed are duties, taxes or other charges, and not prohibitions, quotas or licensing (quantitative restrictions).⁵⁰ The provisions for the prohibition of quantitative restrictions do not apply to restrictions temporarily applied to prevent critical shortages of foodstuffs, to restrictions necessary to apply standards for commodities or to any agricultural or fisheries products.⁵¹

There are a number of exceptions to this general rule. Several of the WTO Agreements contain their own provisions governing the use of QRs in their own particular areas of concern. For example, the WTO Agreement on Agriculture has rules for the phase-out of QRs in this sector. In addition, some provisions contain exceptions for reasons specified in these Articles, i.e. for balance of payments reasons, in emergency safeguard action, or for reasons such as protection of public health or national security. Notification of all QRs is required by all Members.⁵²

Prohibitions and quantitative restrictions, when applied, should be administered on a non-discriminatory basis;⁵³ that is, to all trading partners equally. In applying

⁴⁷ GATT, *supra* note 1. Art. 14.

⁴⁸ Qureshi (1996, *supra* note 19, at 27–29).

⁴⁹ Article 11 prohibits quantitative restrictions for two reasons: First, quotas lack the transparency of customs duties. Second, by creating an artificial short supply, quotas prevent the laws of supply and demand from determining the price at which domestic and imported goods should be sold. Kennedy (1998, *supra* note 42, at 433).

⁵⁰ For the widespread and continued use of quotas during the GATT period, *see id.*, at 433–434 (1998) (stating “When GATT 1947 entered into force, the use of quotas was widespread. Despite the Article XI commitment the use of quotas continues relatively unabated in several key economic sectors over the next five decades. In some instances, import and export quotas were formalized through legal agreement between exporting and importing countries, the most notorious of these being the Multitier Arrangement on textiles and clothing that was in effect continuously from 1947 through 1994. In other instances, export quotas were put in place through legal instruments labeled “voluntary export restraints” (“VERs”). The most noteworthy of these VERs are the 1981 agreement between the United States and Japan limiting exports of Japanese automobiles to the United States, and the VERs of the 1970s and 1980s on exports of steel products. Although VERs were passed off to the public as beneficial and harmless, there is little doubt that their sting was felt in the form of higher prices to consumers.”).

⁵¹ GATT, *supra* note 1. Art.11.2.

⁵² GATT, *supra* note 1. Arts 12, 18, 19, 20 & 21.

⁵³ GATT, *supra* note 1. Art. 18.

import restrictions, Members should aim at a distribution of trade approaching as closely as possible to the shares which various supplying countries would have obtained in the absence of the restrictions. Furthermore, when quotas are allocated among supplying countries, these should be allotted based upon the proportions supplied by the various supplying countries during a previous representative period.⁵⁴

Import Quotas

Import quotas are limitations on the quantity of goods that can be imported into the country during a specified period of time. An import quota is typically set below the free trade level of imports. In this case it is called a *binding quota*. If a quota is set at or above the free trade level of imports then it is referred to as a *non-binding quota*. Goods that are illegal within a country effectively have a quota set equal to zero. Thus many countries have a zero quota on narcotics and other illicit drugs.

There are two basic types of quotas: absolute quotas and tariff-rate quotas. Absolute quotas limit the quantity of imports to a specified level during a specified period of time. Sometimes these quotas are set globally and thus affect all imports while sometimes they are set only against specified countries. Absolute quotas are generally administered on a first-come first-serve basis. For this reason, many quotas are filled shortly after the opening of the quota period. Tariff-rate quotas allow a specified quantity of goods to be imported at a reduced tariff rate during the specified quota period.

In the US in 1996, milk, cream, brooms, ethyl alcohol, anchovies, tuna, olives and durum wheat were subject to tariff-rate quotas. Other quotas exist on peanuts, cotton, sugar and syrup.

In the US most quotas are administered by the US Customs Service. The exceptions include dairy products, administered by the Department of Agriculture, and watches and watch movements, administered by the Department of the Interior and the Commerce Department.

Source: *International Trade Theory and Policy – Chapter 10–2*. Last Updated on 6/13/06. <http://internationalecon.com/Trade/Tch10/T10-2.php>

2.3.5 Emergency Safeguard Action

Emergency safeguard action is provided for instances where emergency action on imports of particular products is needed, and for the basic principles upon which the

⁵⁴ Qureshi (*supra* note 19, at 38–39).

WTO Agreement on Safeguards⁵⁵ was negotiated during the Uruguay Round. It is intended to address a situation where, as a result of unforeseen developments and the effect of obligations under GATT, including tariff concessions, a product is being imported into a country in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products. In these circumstances, the importing Member will be free to suspend the obligation or withdraw or modify the concession, provided it fulfills certain requirements.⁵⁶

2.3.6 Application of Border Measures

A number of other principles and provisions set out in Part II of GATT 1994 relate to border measures, including screen quotas for cinema films, freedom of transit, customs valuation, fees and formalities, marks of origin, and transparency of trade regulations.⁵⁷

Issue of environmental border trade measures raised at Copenhagen

The WTO director-general Pascal Lamy described the outcome of the Copenhagen conference as “a step forward.” The Kyoto Protocol addresses about 30 % of global carbon emissions. In contrast, the framework accord hammered out in Copenhagen may encompass the majority of world emissions. “But much work remains to be done so that we can accelerate the pace of emissions reduction and make commitments taken in Copenhagen more binding,” he added. “Some have criticized the process of this meeting as cumbersome. But procedural difficulties are inevitable when leaders confront problems, which are global while remaining accountable largely to domestic politics. We are familiar with this in the WTO,” he further stated.

Multilateral processes involve a great many actors and this makes reaching consensus complicated. But in the end, it is only through a multilateral process that we can achieve results, which are legitimate and credible, Lamy said. “Border measures are a hotly debated policy tool that may be applied to imported products based on their carbon footprint. The details of how that footprint would be calculated in an increasingly globalized market, where products are manufactured in a number of different countries, has itself been part of the debate,” the organization said.

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⁵⁵ Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1125. (Safeguards Agreement).

⁵⁶ Qureshi (1996, *supra* note 19, at 38–39; 88–92).

⁵⁷ GATT, *supra* note 1. Part. II.

The conclusion of a global climate change agreement that determines what each country must do to reduce emissions based on the environmental principle of “common but differentiated responsibility” could alleviate some of the concerns linked to trade.

As part of the Doha mandate, the WTO Members agreed to negotiate greater market opening in environmental goods and services, the relationship between the WTO rules and trade obligations set out in multilateral environmental agreements (MEAs) and on the exchange of information between those institutions. The WTO added that agreement in these areas would help address climate change by outlining: a more open market for environmental goods and services; more coherence between trade and environment rules; better cooperation between the WTO and MEAs; and by reducing fisheries subsidies, which was also part of the Doha mandate.

Source: Issue of environmental border trade measures raised at Copenhagen. January 5, 2012. <http://www.engineeringnews.co.za/article/issue-of-environmental-border-trade-measures-raised-at-copenhagen-2010-01-05>

2.3.7 Freedom of Transit

Regarding freedom of transit, goods, and their means of transport, are defined as being in transit when their passage across a territory is only a portion of a complete journey beginning and terminating beyond the frontiers of the country through whose territory the traffic passes. Other principles applicable to this traffic are non-discrimination and reasonableness in relation to all charges, regulations and formalities in connection with transit.⁵⁸

2.3.8 Fees and Formalities

The principle is established that all fees and charges (other than duties) imposed on or in connection with import or export shall be limited to the approximate cost of services rendered, and shall not constitute indirect protection to domestic products or taxation for fiscal purposes. This principle applies to all fees, charges, formalities and requirements including those relating to consular transactions, quantitative restrictions, licensing, exchange control, and statistical services, as well as to documents, documentation and certification, to analysis and inspection, and to quarantine, sanitation and fumigation.⁵⁹

⁵⁸ GATT, *supra* note 1. Art. 5.

⁵⁹ GATT, *supra* note 1. Art. 8.

2.3.9 Exceptions

Article XX (General Exceptions) and Article XXI (Security Exceptions) recognize that governments may need to apply and enforce measures necessary⁶⁰ for general purposes, such as protection of public morals, human, animal or plant life and health, protection of national treasures, etc., and for security purposes. Nothing in GATT 1994 prevents governments from adopting and enforcing such measures. In the case of general exceptions, the measures adopted are subject to the requirements that they do not constitute a means of arbitrary or unjustifiable discrimination, and that they do not represent disguised restrictions on international trade.⁶¹

2.4 GATT 1994: Part III

2.4.1 Territorial Application

Among international agreements, a feature unique to GATT 1994 and the WTO Agreement, as it was to GATT 1947, is the concept of a customs territory, which is the territory to which the agreement applies. This concept derives from the existence in 1947, at the end of World War II, of metropolitan and dependent territories,

⁶⁰ GATT, *supra* note 1. Art. 20(b) authorizes measures “necessary to protect human, animal or plant life or health.” This provision allows Members to give priority to health over trade liberalization, provided a measure is “necessary.” In US-Gasoline case, the panel examined whether U.S. Clean Air Act regulations that discriminated against imported gasoline were “necessary,” within the meaning of Article 20(b). The panel agreed with the United States that “a policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health.” The panel asked whether alternative measures were reasonably available that were either GATT-consistent or less inconsistent with it than the existing U.S. regulations. The panel concluded that a regulatory scheme that permitted importers to use individual baselines similar to those available to U.S. refiners was one such alternative, in contrast to the statutorily mandated baselines that included penalties for submission of false foreign data. In the panel’s view, “the United States had not demonstrated that data available from foreign refiners was [sic] inherently less susceptible to established techniques of checking, verification, assessment and enforcement than data for other trade in goods subject to US regulation [e.g., under the antidumping or countervailing duty laws].” Panel Report, United States-Standards for Reformulated and Conventional Gasoline. WT/DS2/R. (Jan. 29, 1996), *cited by* Kennedy (1998, *supra* note 42, at 437–438).

⁶¹ GATT, *supra* note 1. Art. 20; The Appellate Body has prescribed a sequential analysis to determine whether measures meet the requirements of one of the Article 20 exceptions: In order that the justifying protection of article 20 may be extended to it, the measure at issue must not only come under one or another of the particular exceptions-paragraphs (a) to (j) – listed under Article 20; it must also satisfy the requirements imposed by the opening clauses of Article 20. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under the introductory clauses of Article 20. Appellate Body Report, United States-Standards for Reformulated and Conventional Gasoline, at 21–22, WT/DS2/AB/R (Apr. 29, 1996) (establishing the series of steps to be used by Panels in interpreting whether a measure falls under an Article XX exception).

and of customs regimes applied in the dependencies that might not be the same as in the metropolitan territory. This is the concept that has allowed not only sovereign countries but also territories such as Hong Kong, China, and Macao to be full Members (previously contracting parties under GATT 1947) of the WTO.⁶²

2.4.2 Customs Territory

A customs territory is defined, as any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of its trade with other territories.⁶³ Any state or separate customs territory with full autonomy in the conduct of its external commercial relations may be the Member of the WTO.⁶⁴

2.4.3 Tariff Negotiations

It is common that periodically Members will engage in rounds of multilateral trade negotiations for reduction of tariffs on a reciprocal and mutually advantageous basis.⁶⁵ Members are allowed to modify or withdraw tariff concessions included in their schedules. Such action can be taken only by negotiation and agreement of Members with whom the concession was initially negotiated and with any other Member having a principal supplying interest. Consultations have to be held also with any other Member which has a “substantial interest” in the concession.

The main principle is that in these negotiations compensatory adjustment should be made so as to retain the pre-existing level of reciprocal concessions. If the Member concerned is unable to give compensation through alternative concessions the affected Members get the right to withdraw equivalent concessions that they made to that Member.⁶⁶ The Understanding on the Interpretation of Article XXVIII of GATT 1994, *inter alia*, extends negotiating rights in favor of small and medium-sized exporting Members, through the definition of a “principal supplying interest” as that of a Member having “the highest ratio of exports affected by the concession to its total exports”.⁶⁷

⁶² GATT, *supra* note 1. Art. 24.

⁶³ *Id.*

⁶⁴ GATT, *supra* note 1. Art. 22.

⁶⁵ GATT, *supra* note 1. Art. 28.

⁶⁶ *Id.*

⁶⁷ *Id.*

Renegotiations under GATT Article XXVIII

Members are allowed to modify or withdraw concessions from their schedule through negotiation and agreement with other Members. Article XXVIII entitled “Modification of Schedules” is the main GATT 1994 provision dealing with the renegotiation of a tariff concession.

A 1957 note by the GATT Secretariat, concerning arrangements for negotiations under Article XXVIII, set out the procedural guidelines that were used until November 1980 when the current guidelines for procedures were adopted. Although the early practice makes it difficult to determine the exact number of renegotiations that took place under GATT, the Secretariat’s records show that at least 42 GATT Contracting Parties initiated roughly 300 renegotiations between 1951 and 1994.

The 1980 procedures provide for a Member undertaking GATT Article XXVIII negotiations to submit to the Secretariat: (i) a report and a joint letter upon completion of each bilateral negotiation and (ii) a final report upon completion of all its bilateral negotiations. In practice, however, only 19 final reports were received by the Secretariat for the 79 renegotiations initiated between 1981 and 1994. The status recorded by the Secretariat for renegotiations lacking a final report is diverse. While in a few cases the Contracting Parties withdrew the invocation of Article XXVIII, in others they only submitted partial information regarding the bilateral agreements reached. No further information has been received by the Secretariat after the initiation of these renegotiations and only a few of them were formally carried-over into the WTO.

It remains unclear for the majority of these Pre-UR renegotiations whether they were: (i) concluded with the relevant Contracting Parties and their results incorporated into the Schedule annexed to the Marrakesh Protocol to GATT 1994 (MP) during the Uruguay Round, (ii) concluded, but its results overridden by the Schedule annexed to the MP, (iii) concluded with all the relevant Contracting Parties, but never reported or included in a schedule, or (iv) are still ongoing.

There have been 34 requests to enter into renegotiations under GATT Article XXVIII since the establishment of the WTO in 1995, 4 of which have been withdrawn, 8 have been concluded and formally certified, and 5 have been concluded but have not been certified for various reasons. Although the remaining 17 are in principle still ongoing, it should be noted that 2 of them relate to schedules which were withdrawn in the context of an enlargement of the European Communities (i.e. Hungary and Bulgaria).

Column 7 reflects the status recorded by the Secretariat for all renegotiations invoked from 1 January 1981 when the current procedures

(continued)

started being implemented. The table also includes renegotiations related to GATT Article XXIV:6. The term “unclear” has been used for all those GATT renegotiations initiated between 1981 and 1994 in which there is no final report or any other formal document indicating the conclusion of such negotiations. It should finally be noted that 19 Article XXVIII renegotiations invoked before the end of the UR by the EEC-9 and some of the EC-15 member states are not reflected therein.

Source: Renegotiations under GATT Article XXVIII. http://www.wto.org/english/latop_e/schedules_e/goods_schedules_table_e.htm

2.5 GATT 1994: Part IV

Principles and objectives on trade and development set out in Article XXXVI of GATT 1994 refer to: rapid and sustained expansion of export earnings of developing countries; ensuring that less developed countries secure a share in the growth in international trade commensurate with the needs of their economic development (reflected in the Preamble of the WTO Agreement); improved market access conditions both for primary products and manufactures and semi-manufactures; increased collaboration with the financial institutions and United Nations organizations; and joint action by Members in the pursuit of these principles and objectives.⁶⁸

It is provided that developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries. An interpretative note clarifies that the sentence “do not expect reciprocity” means that developed countries do not expect developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs.⁶⁹

Three main commitments are established to be given effect “to the fullest extent possible” by developed countries: priority to the reduction and elimination of tariff and non-tariff barriers to products of export interest to developing countries; restraint in introducing or increasing tariff or non-tariff barriers on these products; and restraint on imposing new fiscal measures, and consideration to their reduction and elimination in the framework of fiscal policy adjustments, on primary products wholly or mainly produced in the territories of developing countries.⁷⁰

⁶⁸ GATT, *supra* note 1. Art. 36.

⁶⁹ GATT, *supra* note 1. Art. 36.8

⁷⁰ GATT, *supra* note 1. Art. 37.

Assignment

To ensure students become equipped with the capability to apply knowledge from the classroom to the field, students are, in this chapter, required to write a report, deliver a presentation and participate in a discussion on the following issues:

1. The difference between GATT 1947 and GATT 1994, focusing on legal status as multilateral agreements and the structure of the agreements.
2. The historical review on the conflicts and harmonization between developed countries and developing countries, focusing on the tariff-related trade measures.
3. The GATT/WTO's cooperation with other multilateral organizations including World Bank and International Monetary Bank in relation with world economic development.



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