

LL.M. in International Legal Studies



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Part I & II

GATT hierarchy of instruments of protection

Introduction

- GATT does not outlaw trade protection as such, but merely regulates the use of the main instruments of protections commonly used – these are:
 - Production subsidies
 - Import tariffs
 - Import quotas and
 - Voluntary export restraints (VERs)

Production subsidies

- Production subsidies are in principle allowed
- They have to be notified to the GATT
- Under certain conditions, they may trigger compensatory or defensive actions by adversely affected trading partners

Import tariffs

- Import tariffs = taxes collected on imported goods
- They are preferable to administrative import quotas and VERs because they do not interfere with the market mechanism or competitive process
- -> Import tariffs are not only permitted but even favoured under the GATT

Import quotas

- Import quotas = limitations on the quantity of goods that can be imported into a country during a specified period of time
- Two basic types of quotas:
 - **Absolute quotas** limit the **quantity** of imports to a specified level during a specified period of time
 - **Tariff-rate quotas** allow a specified quantity of goods to be imported at a **reduced tariff rate** during the specified quota period

Voluntary export restraints (VERs)

- Voluntary export restraints = restrictions set by a government on the **quantity of goods** that can be **exported** out of a country during a specified period of time
- VERs are rarely completely voluntary
 - Typically VERs arise when the import-competing industries seek protection from a surge of imports from particular exporting countries
 - Often they are offered by an exporting country to appease the importing country and to avoid the effects of possible trade restraints on the part of the importer

Negative effects of import quotas and VERs

- Import quotas and VERs -> shift quota rents abroad, favour the cartelization of domestic and foreign industry and are likely to exceed the costs of protection occasioned by the use of import tariffs
- Import quotas taken by importing countries are superior to VERs negotiated with supplying countries

- Import quotas are prohibited under the GATT – certain exceptions which must be administered in a non-discriminatory manner
- Voluntary export restraints are generally implemented through discriminatory export quotas - prohibited by the GATT

GATT legal framework : **Substantive GATT law**

Artikel I GATT
Most-Favoured-Nation Principle

Scope of application

- Basic MFN provision = Art. I (1) GATT
- Any advantage given to *any* country must be accorded to all WTO Members
- Art. I (1) covers advantages, favors, privileges, immunities granted by a WTO Member to *any* country, including countries being not WTO Members
- Advantages need to be extended **immediately** and **unconditionally**

- Art. I (1) GATT establishes an **unconditional** MFN obligation ->
- Any advantage given to one state (state A) must be accorded to all WTO Members, whether or not they meet any conditions imposed on state A
- MFN principle refers only to **foreign products** and not to domestic products (these are covered by Art. III GATT)
- MFN-principle is also set out by Art. II GATS and Art. 4 TRIPS

MFN clause covers

- duties and charges levied on goods or related payment transfers
- the methods of levying such duties and charges
- rules and formalities related to importation and exportation
- internal taxation and internal regulations covered by Art. III (4) GATT
- Covers only „**like products**“: sub-classification of tariff lines opens possibilities for evasion of obligation

Exceptions

- 2 major exceptions to MFN:
 - (1) Regional Integration (Art. XXIV GATT)
 - Customs Unions and Free-Trade-Areas
 - (2) Special and Differential Treatment of Developing Countries
 - Enabling Clause (1979)

Artikel III GATT
(National Treatment)

Definition

- **National Treatment** = Domestic and foreign products must not be treated differently -> requires that imported goods be treated no less favourably than the same or similar domestically-produced goods
- **Art. III (1) GATT** – general principle according to which internal regulations and taxes should not be applied „so as to afford protection to domestic production“

Art. III (2): Internal Taxes

- **Article III (2) GATT** : WTO Members shall not apply standards higher than those imposed on domestic products
- between imported goods and “like” domestic goods,
- or between imported goods and “a **directly competitive or substitutable product.**”

Internal Regulation and Laws

- Article III (4) GATT: General obligation to accord imported products treatment no less favourable than that accorded to like products of national origin
- This obligation refers to **internal laws and regulations** affecting the **sale and use** of such product
- → Scope of national treatment has been read in broad terms

The concept of „Like Product“

- Definition of the term „like product“ determines the scope and relevance of Art. III GATT
- Art. III (2) and (4) use the term „like product“ – Art. III (2) extends the application of national treatment also to products which are „**directly comparable or substitutable**“
- Criteria for the determination of „likeness“ developed by case law under GATT 1947 and under WTO, *cf. e.g.*
- ***Japan – Taxes on Alcoholic Beverages***, AB-Report, ***EC – Asbestos***, AB-Report

- General qualifications which have to be considered (non-exhaustive list):
 - Characteristics of the product
 - End-use of the product
 - How the respective products are qualified in the concession schedule of members
 - Consumers' tastes and habits

Japan – Taxes on Alcoholic Beverages

- **Measure at issue:** A Japanese **Liquor Tax Law** established a system of **internal taxes** applicable to all liquors at **different tax rates**, depending on which category they fell within. The tax law at issue taxed *shochu*, a domestic product, at a lower rate than the other – almost exclusively imported - products (vodka and other alcoholic beverages such as liqueurs, gin, genever, rum, whisky and brandy)

- The Panel found that *shochu* and vodka are **like products** and that Japan, by taxing the latter in excess of the former, was in violation of its obligation under Article III:2, first sentence, GATT 1994.
- Second, it held that *shochu*, whisky, brandy, rum, gin, genever, and liqueurs are "**directly competitive or substitutable products**" and that Japan, by not taxing them similarly, was in violation of its obligation under Article III:2, second sentence, GATT 1994.
- As a result, the Panel made the recommendation that the Dispute Settlement Body requested Japan to bring the domestic Liquor Tax law **into conformity** with its obligation under the General Agreement on Tariffs and Trade 1994.

- The AB held that three separate issues had to be addressed to determine whether an internal tax measure was inconsistent with Article III:2, second sentence.
- These three – separate - issues are
- (i) whether the imported product and the domestic products are "**directly competitive or substitutable products** which are in **competition** with each other";
- (ii) whether the directly competitive or substitutable imported and domestic products are "**not similarly taxed**"; and
- (iii) whether the dissimilar taxation of the directly competitive or substitutable imported products is "applied...so as to **afford protection to domestic production**".

Exceptions

- Art. III (8) a) GATT: laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes (government procurement)
- Art. III (8) b): payment of subsidies to domestic producers
- Art. XIX: safeguard measures
- Art. XX: general exceptions
- Art. XXI: security exceptions

Art. XI GATT
Elimination of Quantitative
Restrictions

Scope of application

- Art. XI (1) GATT: **general prohibition of quantitative restrictions**
- Prohibits the use of quotas, import or export licenses, or similar measures related to the import or export of goods
- Art. XI speaks of „other measures having an equivalent effect“ -> it is not the legal form of the measure, but the is **effect** on trade which is important

- Covers barriers resulting from different social, environmental and consumer protection standards
- Negative definition of quantitative restrictions in Art. XI (1) – **restrictions other than** duties, taxes or charges

- In *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, the Panel confirmed:
- Broad scope of the term „measure“
- Only applicable to governmental measures

Exceptions

- Article XI (2) GATT allows for:
- Temporary export restrictions of foodstuffs or other „essential“ products when there is a shortage of such products on the national market
- Import restrictions on agricultural and fishery products
- Restrictions on basic products following from an international agreement on such products

Further exceptions

- Agreements on Agriculture and on Textiles and Clothing
- Exceptions for balance-of-payment purposes
- The development exception (Art. XVIII C - „infant industries“)
- Safeguard measures (Art. XIX GATT)
- General exceptions (Art. XX)
- Security exceptions (Art. XXI)