

GENERAL AGREEMENT ON TARIFFS AND TRADE

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Background

The General Agreement on Tariffs and Trade (hereinafter “GATT”) of 1947 emerged from the post-Second World War negotiations on international economic cooperation. These negotiations resulted in the Bretton Woods agreements – the International Monetary Fund and the International Bank for Reconstruction and Development – but there was the belief that the Bretton Woods institutions needed to be complemented by an organization dealing with trade. The negotiations for the Havana Charter, that would incorporate an international trade organization (hereinafter “ITO”), were based on the view held in both the United States and the United Kingdom, who took the lead in the negotiations, that trade liberalization was essential to avoid the protectionism of the inter-War years which had been harmful to most economies. The United States was interested in seeing the end of British imperial preferences and the United Kingdom was interested in the lowering of the high United States tariffs.

However, in the initial negotiations for a comprehensive international trade organization, it became clear that negotiations would take some time and a group of States decided to negotiate a parallel separate arrangement of a more limited scale which, by focussing on reducing State barriers to trade in particular tariffs, would realize early gains for States from trade liberalization. Hence, the negotiation of a general agreement on tariffs and trade which would essentially cover one of the chapters of the ITO and could be integrated into the ITO once it came into existence.

The negotiations for the GATT, in which the United States and the United Kingdom delegations also took the lead, were completed in less than one year, notwithstanding quite fundamental differences between the American and British views. The common concern of both the United States and the United Kingdom was to avoid discrimination in trade, although they had different views on how this should be achieved. GATT was an agreement with economic objectives; the key negotiators were primarily economists and their ultimate agreement reflected the assumptions of the time about the economic benefits of trade. The text, which was drafted by a member of the American delegation, also an economist, was completed in October 1947 and GATT entered into force on a provisional basis on 1 January 1948.

Initially there were 23 GATT signatories. By the time GATT was folded into the World Trade Organization (hereinafter “WTO”), there were 128 GATT contracting parties. Accession to GATT was open not just to fully sovereign States, but also to governments that were “acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations” (article XXXIII). As a result, Hong Kong became a GATT contracting party.

There were essentially two tracks to the GATT negotiations. First, there was the text of GATT itself and second, the actual tariff reduction negotiations. GATT was not only a set of obligations regarding what States could do in regulating trade, it was also a framework for tariff reductions, which in the long term became one of the signature successes of GATT. But GATT was the only instrument that emerged from the negotiations of 1946-48 and its “provisional” nature was to continue for another 47 years. Although the Havana Charter embodying an international trade organization was completed in March 1948, it was

never ratified by the United States senate and it never entered into force. And, until the negotiation of the WTO, no effort was made to turn GATT into a permanent and not a provisional agreement.

The fact that GATT was seen as having a provisional nature, to be ended when the ITO came into being, affected its implementation, the way it functioned and how it was perceived. It had no real institutional structure; its signatories were designated as the CONTRACTING PARTIES, and it was administered by an “interim” secretariat which had been put in place to be the secretariat for the future ITO. Partly because it was an instrument negotiated by economists, GATT was seen not as a treaty but rather as a “contract” and for many years did not enter the horizon of public international lawyers. The language was often opaque and understanding it required knowledge of how domestic customs regimes operated. It was the work of John Jackson and Robert Hudec that made GATT accessible to international lawyers.

The GATT Text

The GATT text is a mixture of explicit obligations imposed on parties, statements about what the parties should (rather than “shall”) do, and statements about what is desirable. It is not, as one might expect of a treaty, a document that is simply expressive of legal obligations. This reflects in part the nature of its drafting by economists, but also an indication of what governments were at that time prepared to go along with. It is instructive that the more specific and more wide-ranging ITO never received the approbation of States.

The text of the treaty is also highly unusual in that in Annex I it is accompanied by “Notes and Supplementary Provisions” which provide explanations and clarifications of the articles of the agreement and are “an integral part” of the agreement. These notes and supplementary provisions are essentially explanations by the negotiators of how the text is to be understood and they have become important in the interpretation of GATT. Thus, the articles of GATT are to be read in the light of – and often alongside – the supplementary notes, referred to as “ad Articles.”

GATT contains not only provisions of varying degrees of normativity, but also provisions of more or less connection to the central goals of the agreement. In some cases, they reflected issues of prominence at the time, but which are of less significance in the evolution of the agreement or of importance today. In this Note, I will focus principally on the core provisions of the agreement, those that reflected the principal objective of liberalizing trade but will make reference to provisions of less importance in the past some of which gained much greater importance with the entry into force of the WTO.

Core Obligations

1. Non-discrimination

The preamble to GATT makes clear that the agreement was directed to “the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce”. The central core of these goals is found in the first three articles of GATT. The fundamental principle of non-discrimination expressed in article I as “general most favoured nation treatment” (MFN), is as follows:

“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 obligation to provide all contracting parties with any benefit conferred on a contracting party is made explicit in respect of tariffs by article II. This article provides that contracting parties shall not impose duties on importation from other contracting parties in excess of those provided for in their tariff

schedules attached to the Agreement. These schedules were the result of the tariff negotiations undertaken at the time of the negotiation of GATT. This application of the MFN principle to all contracting parties in this way constituted a multilateralization of the MFN obligation which hitherto had been found only in bilateral treaties.

Article III embodies the second major pillar of non-discrimination, the national treatment principle. The basic principle of national treatment, expressed in paragraph 1, is that imported products should not be subject to treatment through taxes, laws or regulations that affords protection to domestic production. This is made explicit in paragraph 2 which provides that taxes applied to imported products are not to be in excess of taxes applied to “like domestic products”. Equally, paragraph 4 enjoins States from applying their “laws, regulations and requirements” in a way that accords less favourable treatment to imported products than that accorded to domestic products.

2. Quantitative Restrictions on Import and Export

The approach in GATT was to liberalize trade through permitting tariffs which could be negotiated down over time. But it was also recognized that other border measures, such as quotas, should be eliminated. This is the content of article XI, which validates “duties, taxes and charges”, but proscribes “prohibitions or restrictions” on the importation or exportation of products or on sale for export. There are in fact many exceptions to this, in particular agricultural trade and measures to deal with critical food shortages. Article XI, however, lays the basis for what were to become more stringent restrictions on import and export controls under the WTO.

3. Safeguards

The risks that countries face by lowering tariffs is that there may be a drastic and often unanticipated impact on domestic production from the competition from increased imports. Article XIX dealt with this by permitting contracting parties to take “safeguard” action, which involved suspending the obligation or concession that has resulted in increased imports causing or threatening to cause serious injury to domestic producers of like, or directly competitive, products. Specific conditions for the invocation of this power are set out in article XIX, including advance notice to GATT CONTRACTING PARTIES.

Exceptions

In addition to safeguards and the exceptions set out in many of the articles of GATT, both general exceptions and security exceptions are provided to GATT obligations. Some of the general exceptions relate to matters of particular importance at the time, such as the importation or exportation of gold and silver, but many of these exceptions were to have great significance in the evolution of the GATT, including measures necessary to protect human, animal or plant life or health and measures relating to the conservation of exhaustible natural resources. An exception for measures necessary to protect public morals, although dormant for many years, was a later to become important under the WTO.

Invocation of an exception was subject to the preambular requirement in article XX that it was not to be applied in a manner that would constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade. The interpretation of this provision has become a major issue in the application of article XX exceptions.

Article XXI deals with security exceptions. The primary provisions of the article are designed to protect a contracting party from having to disclose information that is contrary to its security interests and not to prevent a contracting party from taking action to protect its security interests. The critical point is that in both instances the security interests are defined on their face by the contracting party itself: a contracting party does not have to disclose information the disclosure of which “it considers contrary to its essential

security interests”, and a contracting party can take action “which it considers necessary for the protection of its essential security interests”. Whether this was self-judging in fact was a matter of speculation under GATT and later has been the subject of panel decisions under the WTO.

Exceptions to an obligation of a contracting party may also be created by waiver by the CONTRACTING PARTIES acting by a two thirds majority (article XXV).

Customs Unions and Free Trade Areas

The MFN principle posed a challenge for preferential arrangements, such as customs unions and free trade areas, that had been entered into by the States that had negotiated GATT. States were not prepared, however, to abandon those arrangements. Instead, in article XXIV they permitted their continuation as well as the conclusion of new customs unions and free trade areas provided that they met certain conditions. The rationale for allowing customs unions and free trade areas is set out in article XXIV, para 4, where the parties recognize the desirability of closer economic integration between the economies of States provided that it facilitates trade between those economies and does not pose barriers to other States.

Accordingly, the conditions for establishing or maintaining customs unions and free trade areas is that the “general incidence” of duties and regulations applicable to States not party to the customs union or free trade area are not “higher or more restrictive” than the duties and regulations of the parties to the customs union or free trade area were before the arrangement for economic integration was entered into. Moreover, in order to ensure that customs unions and free trade areas are in fact trade liberalizing, article XXIV defines a customs union as one where the duties and regulations of commerce between the constituent members are, with certain exceptions, eliminated on substantially all of the trade in products originating within their territories. The same requirement is applicable to free trade areas.

These rules relating to what constitutes a customs union or a free trade area and when they are GATT-consistent have proved notoriously difficult to apply and as a result no real control over preferential economic arrangements was ever exercised by GATT. The most important development in respect of customs unions during the GATT period was the creation of the European Economic Community (hereinafter “EEC”). There was close cooperation between GATT contracting parties and the negotiators of the EEC and ultimately no objection was raised against the EEC under article XXIV. By the time of the Dillon Round, 1959-1962, the EEC was a reality in international trade negotiations. Although it never became a member of GATT, the European Communities, as the EEC had become, was an original member of the WTO.

Other GATT Provisions

In addition to the core obligations of GATT there are a variety of other provisions dealing with specific issues that were of significance at the time, or hortatory provisions that did not include specific obligations. These include provisions relating to cinematographic films, freedom of transit, and restrictions relating to safeguarding balance of payments. More substantive provisions relate to antidumping and countervailing duties, marks of origin, subsidies and State trading. Some of these were to gain greater prominence with the advent of the WTO.

Part IV of GATT 1947, on Trade and Development, was added in 1965, following concerns that GATT did not recognize the special needs of developing countries and that an across-the-board application of MFN was not to their advantage. Thus, they sought preferential arrangements. Although there had been some recognition in the original GATT text of the need for economic development, the idea of preferential treatment as a means to that end was controversial. The provisions of article XXXVI recognize the problem of development, article XXXVII provides for commitments by developed contracting parties and article XXXVII provides for joint action. But the action contemplated is for developed States to take account of

the particular products of developing countries in negotiating tariff concessions, not to deviate from MFN and provide preferential treatment for developing countries. It was not until the 1979 Decision on Preferential and More Favourable Treatment (the “Enabling Clause”) that developed contracting parties were granted an exemption from MFN in order to provide special or differential treatment to developing countries in their tariff concessions. But it was an option to grant preferential treatment; there was no obligation to do so.

Institutional Provisions

Since GATT was only an interim arrangement pending the entry into force of the ITO, no provisions were made for institutions through which the arrangement would function. The CONTRACTING PARTIES were to meet from time to time and by their “joint action” under article XXV were to facilitate and further the objectives of the Agreement. Each contracting party was to have one vote and decisions were to be taken by majority vote, although the practice developed of consensus decision-making. The only specific power granted to the CONTRACTING PARTIES under article XXV was to authorize waivers of GATT obligations. When the CONTRACTING PARTIES acted collectively like this, they were known as the GATT Council, a plenary and not an executive organ, and for which there is no provision in GATT itself.

One thing that GATT did address was how disagreements between the parties over the operation of the Agreement were to be dealt with. Article XXII provides for the parties to consult. A contracting party is to give “sympathetic consideration” to representations of another contracting party “with respect to any matter affecting the operation of the Agreement”. If no satisfactory solution can be reached through consultation, then a contracting party can consult with the full membership the CONTRACTING PARTIES about the matter.

Headed “Nullification or Impairment”, article XXIII provides more specifically for disagreements between contracting parties. It deals with circumstances where a contracting party considers that a benefit accruing to it under the Agreement has been “nullified or impaired” or the attainment of an objective under the Agreement has been impaired. This can result from the failure of another contracting party “to carry out its obligations under this Agreement” or action taken by another contracting party “whether or not it conflicts with the provisions of this Agreement”, or “the existence of any other situation”.

In such circumstances, the contracting party may make written representations to the other contracting party with a view to achieving a satisfactory settlement of the matter. If the matter has still not been resolved, the contracting party can refer it to the CONTRACTING PARTIES. The CONTRACTING PARTIES are to investigate the matter and can make recommendations to the parties or make a ruling. If the CONTRACTING PARTIES consider the matter sufficiently serious it can authorize a contracting party to suspend the application to another contracting party of concessions or other obligations under the Agreement.

There are three important aspect to the provisions of article XXIII.

First, the right to make representations to another party and to go to the CONTRACTING PARTIES applied both where the other contracting party had allegedly violated the terms of the Agreement, and where that contracting party had taken action that did not violate the terms of the Agreement, known as “non-violation nullification or impairment”. This was a response to one of the principal concerns of the negotiators, that tariff concessions could be undermined by action taken by a government that was not inconsistent with the Agreement, but which effectively took away the benefit that another contracting party was expecting from an agreed tariff concession, for example through the introduction of a tariff classification which took a contracting party’s products outside the products benefitting from the concession.

Second, while the CONTRACTING PARTIES were to investigate complaints, make recommendations to a contracting party and make rulings, no process was provided on how this was to be done. The CONTRACTING PARTIES comprised all of the parties to GATT and thus investigations, recommendations and rulings were to be made collectively.

Third, article XXIII provides for retaliation against a contracting party that has acted to nullify or impair benefits to another contracting party. The CONTRACTING PARTIES can authorize a contracting party to suspend concessions or other obligations to another contracting party. Article XXIII therefore includes a sanctioning system where nullification or impairment has been established.

The Contribution of GATT

Notwithstanding its tentative and interim nature GATT operated for almost 50 years before being subsumed within the WTO. The Uruguay Round of Multilateral Trade Negotiations, which resulted in the WTO, did not amend GATT. Rather it incorporated GATT as one of the multilateral agreements on trade in goods as GATT 1994. This included GATT 1947, the legal agreements that entered into force during the operation of GATT 1947, all protocols and certifications of tariff concessions under GATT, all protocols of accession, all waivers that had been granted under GATT, and the Understandings on the interpretation of specific provisions of GATT. In short, all that had happened under GATT was incorporated into the WTO as GATT 1994. The original GATT 1947 was kept intact although now as part of GATT 1994. All of this became to be known in the WTO as “the GATT acquis”.

But the influence of GATT 1947 went beyond its incorporation into GATT 1994. Many of the WTO multilateral trade agreements entered into during the Uruguay Round were in fact extrapolations of provisions of GATT. These included the agreements on sanitary and phytosanitary measures, antidumping, subsidies and countervailing measures and safeguards. All of these agreements emanate from specific provisions of GATT 1947, but they did not abrogate those GATT provisions. One of the challenges in interpretation of the WTO multilateral trade agreements has been to articulate their precise relationship to the existing provisions in GATT.

There are two other major ways in which GATT 1947 provided the basis for a new regime for international trade: first, tariff negotiations and second, dispute settlement.

Tariff Negotiations

Article XXVIII bis provided that the GATT CONTRACTING PARTIES could sponsor negotiations on tariff reductions, recognizing that tariff reduction was of greatest importance to the expansion of international trade. It also provided that tariff negotiations could be carried on a product-by-product basis and success would depend on the participation of parties which conduct a substantial portion of their trade with each other. This, of course, recognized the centrality of MFN. What those parties agreed to would by virtue of GATT article I be provided to all contracting parties.

Tariff reduction through trade negotiations was a major achievement of GATT. There were eight negotiating “rounds” during the GATT era, culminating in the Uruguay Round which also led to the creation of the WTO. Initially the negotiating rounds were conducted on a bilateral basis under an “offer and request” system in which each country identified other countries for which it was prepared to reduce tariffs in exchange for reciprocal tariff reductions of benefit to the requesting country. The agreement to lower tariffs resulting from these negotiations were known as tariff “bindings”. Later “rounds” were conducted more on a multilateral basis with agreement on “across the board” tariff reductions. These negotiating rounds were dominated by the biggest economies engaged in trade – the United States, European countries, and Japan.

GATT negotiating rounds were highly successful in lowering tariffs, leading to almost a 40% reduction in tariffs on industrial goods. Later negotiating rounds began including commitments to reduce non-tariff barriers to trade. In the Kennedy Round (1964-1967) antidumping was addressed and in the Tokyo Round (1973-1979) agreements (“codes”) were concluded on among other matters, antidumping, subsidies government procurement and technical barriers to trade. These codes were not automatically part of a State’s GATT obligations. States had to agree specifically to each code and they never received acceptance by all GATT contracting parties. However, these codes laid the basis for the more comprehensive treatment of their subjects in the WTO agreements.

Dispute Settlement

The way in which disputes were dealt with under GATT evolved from a ruling from the chair on a dispute, to establishing a working party to consider the matter and advise the CONTRACTING PARTIES, to a more formal system which would involve a three-person “panel”. The panel was to investigate the matter, seek to work out a settlement between the disputing parties, and ultimately advise the CONTRACTING PARTIES on whether there had been nullification or impairment and make a recommendation for the resolution of the dispute. GATT panels would receive written submissions from the parties, hold two meetings with them, deliver an interim report to the parties for comment and then deliver a final report. That process with some variations was incorporated into the dispute settlement process adopted in the WTO’s Understanding on Dispute Settlement which is the basis for WTO dispute settlement today. GATT panel decisions are frequently referred to by WTO panels in interpreting the WTO agreements.

An impediment to the efficient functioning of dispute settlement under GATT 1947 was the practice of decision-making by consensus. A decision to establish a panel required consensus, and a decision to endorse the recommendation of a panel also required consensus. In each case this meant that the support of the party against which the dispute had been brought, and in the case of the recommendation of the panel report the support of the losing party, was necessary. A major change under WTO dispute settlement was the reversal of the consensus rule so there had to be a consensus against establishing a panel, and a consensus to reject the recommendation of a panel. Thus, the WTO took the GATT dispute settlement system and turned it effectively into a process that was compulsory and binding.

Retaliation through the withdrawal of concessions was never really used during GATT. In one case retaliation was authorized but in fact was never undertaken. However, under the WTO authorized withdrawal of concessions has taken on a much larger role.

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Related Materials

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