

INTERNATIONAL TRADE LAW AND THE WTO

Editors

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Preface

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The birth of the World Trade Organization (WTO) has brought a message to the arena of international trade that the WTO is not only about regulation but creating a sense of global community with the trading system. It has further acted as a guide to the development of that trading system. International trade law of the WTO has evolved and expanded to become a significant area of international law and a vital subject to be studied, researched and talked about in circles of researchers, teachers, practitioners and policy and law creators, working in both the public and private realm.

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International Trade Law and the WTO provides an overview of different aspects of WTO law. It recognises that international trade law interacts with numerous other subjects such as the environment, human rights, and international law. It includes contributions from scholars who have diverse expertise from states across the world. This is of particular importance considering the continued differences between developed and developing countries on the topic of trade. The varied backgrounds of the authors also ensure that equal weight is given to a wide range of perspectives of the international trade regime.

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This book explores the interaction between globalisation and trade; traces the origin of the WTO; examines WTO dispute settlement; Most Favoured Nation treatment and national treatment principle; barriers to trade in goods and services; dumping and anti-dumping measures, subsidies and countervailing measures; general and security exceptions; safeguards; regional integration exceptions, balance-of-payments exceptions, infant-industry-protection exception, generalised system of preferences exception; relation between WTO and environment; WTO and human rights; agricultural products, and WTO; intellectual property and development. In doing so it offers an extensive overview of WTO law, as well as issues that will be the research agenda for the decades ahead. The up-to-date and authoritative information that is contained in different chapters makes the book an essential reference to students, teachers, researchers, practitioners, and those involved in policy and law creation.

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Introduction

*Indira Carr, Shawkat Alam and
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1 Overview

Cross-border trade is not a phenomenon that is novel or unique to modern times. The importance of the spice, amber and silk routes traversing Asia, the Mediterranean and North and East Africa for trading in these and other goods in the ancient world is well known. Cross-border commerce generated wealth not only for those who engaged in it but also for the kingdoms through which the goods traversed. The Roman Empire, which had trade routes going through its lands and along its shores, for instance, used a variety of mechanisms to raise revenues. Use of import duties on wares arriving at their trading posts and regulation of the routes were an integral part of their economic policy.¹ This age-old practice of using tariffs such as duties and customs regulations remains to this day. They are not simply a means of raising revenues but they also restrict market access to foreign producers. Imposing duties on imported goods is often justified on the grounds of welfare, though 'Welfare for whom?' one might ask. It is for the welfare of the domestic industry whose goods are likely to be cheaper than the imported goods. The question of efficiency, consumer expectations or choices are not really a part of this equation. Recent history does provide illustrations of newly independent countries levying high duties on imported goods and adopting a quota system to protect their fledgling industries and to encourage growth. India provides a good illustration of the use of such techniques in their economic growth policy and planning techniques.² Protectionism, however, is not conducive to global economic growth and this was realised soon after the Second World War when there

1 See Chapter IV, SE Sidebotham, *Roman Economic Policy in the Erythra Thalassa 30 BC-AD* (Leiden: EJ Brill, 1996), 217; J Toutain, *The Economic Life of the Ancient World* (reprinted by Arno Press, New York, 1979).

2 See JCH Chai and KC Roy, *Economic Reform in China and India* (Glos, UK: Edward Elgar, 2006); S Chand and K Sen, 'Trade Liberalisation and Productivity Growth: Evidence from Indian Manufacturing,' *Review of Development Economics* 6 (2002): 120.

was a concentrated effort to manage the international trade through joint negotiations and agreements. At the Bretton Woods Conference, held in July 1944, it was agreed that the solution to avoiding economic depression after the First World War (which had contributed to the rise of Hitler), and to promote economic prosperity, was to move away from protectionism and promote open markets. A resolution was adopted in 1946 by the UN Economic and Social Council, and negotiations subsequently took place at a number of locations; New York (1947), Geneva (1947) and Havana (1948). By the end of 1947, the *General Agreement on Tariffs and Trade* (GATT) and schedules of tariff reductions were drafted, though the International Trade Organization (ITO) Charter was yet to be drafted. The countries around the negotiation table, however, decided to bring these documents into force by adopting a Protocol.³ The hope was that the ITO Charter would be agreed in 1948 and suitable amendments to the GATT would be made to maintain consistency with the ITO Charter. Unfortunately, the ITO Charter never came into force due to political shifts in the US.⁴ The GATT thus became an international organisation and was based in Geneva. The three cornerstones of the GATT 1947 are the principles of (1) non-discrimination as amongst states parties (Most Favoured Nation principle, Art I), (2) lowering of tariffs as agreed (Art II) and the prohibition of certain types of restrictive practices such as quotas and import licences (Art XI), and (3) removing protectionism by requiring national treatment of all imports in relation to taxes and regulations (National Treatment principle - Art II). The removal of trade barriers was without question the basic aim of the GATT. However, certain exceptions were allowed for use by state parties to enable Contracting States to meet other policy objectives. These included exceptions for quotas for the purposes of balance-of-payments (Arts XII, XIII, XV, and XVII), for national security (Art XXI), and adoption of measures for the protection of public morals, health and safety of human, animal and plant life, and the conservation of natural resources (Art XX).

Under GATT 1947, eight negotiation rounds were held which were primarily aimed at reducing tariffs. In the last round, the Uruguay Round held between 1986-1994, it was suggested that the opportunity should be taken to create a world trade organisation which would include within it a dispute settle mechanism.⁵ This was received favourably and the end result was the creation of the World Trade Organization (WTO).⁶ By signing the

3 Protocol of Provision Application to the General Agreement on Tariffs and Trade, 55 UNTS 308, 30 October 1947.

4 The ITO Charter was submitted to US Congress by President Truman. However the congressional support was not eventually sought when the Congress came under the control of the Congress in the 1948 election.

5 See JH Jackson, *Restructuring the GATT System* (New York: Council on Foreign Relations Press, 1990).

6 The initial title suggested in the Draft Final Act of the Uruguay Round was Multilateral Trade Organization but this was changed to World Trade Organization.

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WTO Agreement, states are also agreeing to be bound by the agreements in Annexes 1, 2 and 3. The annexed agreements modernises the GATT 1947 enormously by including trade in services, trade related aspects of intellectual property rights and the extremely sensitive area of agriculture. The new agreements are also included in the Annexes, for example, the GATT 1994 is found in Annex 1A and includes the GATT 1947.

This book aims to provide the reader with a comprehensive account of the international trading system. It does this by starting with the origins of the GATT 1947 and the WTO and the developments such as the *General Agreement on Trade in Services* (GATS), the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the TRIPS Agreement) and the dispute settlement mechanism brought about by the agreements within the WTO regime.

2 Scope

Contributors to *International Trade Law and the WTO* have diverse expertise from states across the world. This is of particular importance considering the continued differences between developed and developing countries on the topic of trade. Furthermore, the varied backgrounds of the authors will ensure that numerous perspectives on the topic trade are given equal weight.

International Trade Law and the WTO will assist researchers, teachers, students, practitioners, and those involved in policy and law creation. Firstly, it will assist those involved in university subjects related to trade law, the environment, and international law. These courses have become embedded in university offerings throughout the world. Secondly, it will provide practitioners and policy and law creators, working in both the public and private realm, with a reference guide. Lastly, it will provide all of the groups mentioned above with an insight into contemporary issues relating to trade law.

International Trade Law and the WTO is a comprehensive overview of trade law and its development. The complexity of trade law and its interaction with numerous other subjects, such as the environment, human rights, and international law, means that this *book* only covers the most relevant topics of the time. Selection of chapters has also been based on the presentation of diverse views. It follows that the text provides accounts of topics across-the-board, though particularly focuses on emerging, contemporary issues. It will assist in motivating readers to produce their own accounts of the current topic of trade law.

For more on the WTO see TP Stewart ed, *The World Trade Organization: Multilateral Trade Framework for the 21st Century and US Implementing Legislation* (Washington DC: American Bar Association, 1996).

3 Structure

The first chapter by J Patrick Kelly, entitled 'Trade, Globalisation and Economic Policy', states that two primary forces drive the unprecedented increase in globalisation. The first trend has been the massive growth of international trade and foreign investment, along with the phased out reduction of tariffs and non-tariff barriers to trade and investment under the GATT. The second trend has been the rapid increase in technological innovations. The author also analyses the arguments for and against globalisation. The author highlights the legal uncertainty and inconsistency problem for exporters and importers. So 'there has been a concerted movement toward international agreements that provide uniform law to be applied within the domestic jurisdiction of each signatory nation'. The author is of the opinion that international agreements like the United Nations Convention on the International Sale of Goods and international institutions like the WTO will create uniform legal standards. The author also expresses the view that 'poverty is continuing to decline around the world ... The continuing reduction of world poverty makes trade, not just an economic and legal issue, but also a moral one'.

Similarly, Padideh Ala'i in her 'Origins of GATT/WTO' chapter, considers the move beyond the legal realm. First, she takes us through the reasons for the setting up of the GATT and gives a brief analysis of the fundamental principles of the GATT 1947. The chapter then moves on to providing an overview of the main areas covered by the eight rounds negotiated under the GATT 1947, thus setting the scene for the creation of the WTO and the multilateral and plurilateral agreements attached as annexes to the WTO Agreement. As she correctly observes, the WTO is dealing with a different world where non-trade interests have taken on greater importance. These include sustainable development and protection of the environment, which are challenges that the WTO has to adjust to when addressing disputes where free trade, ethos and the environmental policies of a state appear to clash.

Elimma C Ezeani, in her chapter 'WTO Dispute Settlement', then discusses the background to the WTO dispute settlement mechanism, and mentions that it was developed by the WTO to maintain a fair balance between all the interests of Member States. The WTO framework for dispute settlement is set out in the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes*, which provides means to settle disputes between Member States. The author considers the WTO dispute process as 'a sophisticated, innovative, and highly significant achievement of the multilateral trading system'. She also expresses the view that assurance of timely implementation of the recommendations following a dispute is an important factor, and Member States must 'fulfil their obligations in this regard if the security of the rule-based system is to be preserved'.

Jakkrit Kuanpoth, in takes a more specific app GATS and TRIPS. The GATT requires that any by a Member State to ar so that countries can com The MFN principle has b regime that provides a s ment for service provide states that if a WTO Mer national of another WTO of all WTO Members. Th playing significant role in

Chang-fa Lo continu Treatment Obligations', v GATT, GATS and TRIPS. that the imported produ competitive of any other prevents possible protecti obligation in GATS ensu Member, services and serv with treatment no less favo service suppliers in such s tions set out in its Schedule obligation in TRIPS ensure other WTO Members sam the protection of intellec treatment requirements a trading system. They ensu service suppliers and int protectionism'.

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Jakkrit Kuanpoth, in his chapter 'The Most Favoured Nation Principle' takes a more specific approach, and discusses the principle under the GATT, GATS and TRIPS. The Most Favoured Nation (MFN) principle under the GATT requires that any advantage, favour, privileges or immunity granted by a Member State to another shall be equally accorded to every Member so that countries can compete in foreign markets without any disadvantage. The MFN principle has been incorporated in the GATS to create a balanced regime that provides a stable, predictable and secure investment environment for service providers. The MFN principle under the TRIPS Agreement states that if a WTO Member gives certain intellectual property rights to a national of another WTO Member, these rights must be extended to nationals of all WTO Members. The author is of opinion that MFN principle has been playing significant role in liberalising trade.

Chang-fa Lo continues the specific analysis in his chapter 'National Treatment Obligations', which examines national treatment obligations in GATT, GATS and TRIPS. The national treatment obligation in GATT ensures that the imported products of any WTO Member State will have similar competitive of any other WTO Member State with domestic products, and prevents possible protection of domestic production. The national treatment obligation in GATS ensures that for those sectors committed by a WTO Member, services and service suppliers from other WTO Members are given with treatment no less favourable than it accords to its domestic services and service suppliers in such sectors. This is subject to conditions and qualifications set out in its Schedule of Specific Commitments. The national treatment obligation in TRIPS ensures that each WTO Member shall give the nations of other WTO Members same protection granted to its own nations concerning the protection of intellectual property. The author considers the national treatment requirements as 'very important components in the international trading system. They ensure the equal position of foreign products, services, service suppliers and intellectual property rights holders so as to prevent protectionism'.

Shawkat Alam and Md Rizwanul Islam in their chapter entitled 'Barriers to Trade in Goods and Services' discuss the two categories of barriers to market access, including tariff and non-tariff barriers. The authors indicate that a key factor is that tariffs raise income, whereas non-tariff barriers do not have such an aim. It is for this reason, and the fact that tariff barriers are clearly examinable, that those involved in free trade tend to favour such an approach. However, Alam and Islam show that tariffs can still drastically impact market access, especially in countries with lower socio-economic status. It follows that this chapter provides an overview of the current issues surrounding tariff and non-tariff barriers.

Razeen Sappideen and Ling Ling He in their chapter entitled 'Dumping and Anti-Dumping Measures' examine the general WTO principles on dumping and anti-dumping. Dumping takes place when a product of one

country is introduced into the commerce of another country at less than the normal value of the product in the domestic market of the exporting country. Dumping is condemned if material injury is suffered by the domestic industry producing the like product in the importing country. Dumping cannot be committed without the existence of a causal relationship between dumping and injury of retardation. The authors explain how dumping is determined, how injury is determined, and how a causal link is determined. To offset this unfair trade practice ie, dumping, WTO permits its Members to take anti-dumping measures. Under the *Anti-Dumping Agreement* (ADM), WTO Members can impose three types of anti-dumping measures where appropriate, namely, provisional measures, price undertakings, and imposition and collection of anti-dumping duties. The authors examine these measures. The dispute in relation to anti-dumping measures is governed by the *WTO Dispute Settlement Understanding*. The authors express the view that although anti-dumping disputes has been decreasing 'in recent years, there is no doubt that the anti-dumping battle between the trading partners will continue, especially between the leading developed and developing trading partners...'

Cindy Galway Buys, in 'Subsidies and Countervailing Duties', discusses another controversial issue by stating that governments support domestic industries through subsidisation. A subsidy is defined in the *WTO Agreement on Subsidies and Countervailing Measures* (SCM Agreement) as a financial contribution by a government that confers a benefit that is specific to a particular industry. The author notes that since the government in subsidy usually provides a financial contribution to producer, subsidies tend to make the subsidised goods less expensive to produce and sell. The author opines that '[s]ubsidies can be useful tools for governments wishing to promote legitimate economics and social policies, such as providing support to a fledgling industry that will bring new technology to the country or to an industry that produces goods considered critical to the country's economy or national security or goods that promote environmental conversation'. However, subsidies make it more difficult for non-subsidised producers to compete with subsidised producers. It creates an unequal playing field that distorts trade. So WTO law allows the imposition of countervailing duties (CVDs) on goods to offset the benefit provided to the recipient by the subsidy.

As stated by Padideh Alai's there are potential tensions between free trade and emerging non-trade values. However, the GATT 1994 and GATS do allow general exceptions in Article XX and Article XIV respectively. These exceptions are the subject of examination by Glyn Ayres and Andrew D Mitchell in their chapter 'General and Security Exceptions under the GATT 1994 and the GATS'. The chapter outlines in detail the general exceptions contained in both of the above articles, and uses a number of disputes such as *US - Gambling, China - Publications and Audiovisual Products, US - Shrimp*

and *US - Gasoline* to explain how the various exceptions such as protection of public morals and public order or conservation of exhaustible natural resources are applied. The chapter also examines the national security exception under GATT 1994 Article XXI and GATS Article XIV *bis*. Ayres and Mitchell are of the view that the exceptions contained in the GATT and GATS indicate that the international trading order does not expect states to liberalise trade at all costs.

David A Gantz in his chapter entitled 'GATT/WTO Rules Governing the Use of Safeguard Measures' discusses the concept of safeguards under WTO law. He states that its basis under WTO law is Article XIX of the GATT, which permits WTO Members to impose safeguards measures (quotas, higher tariffs or both) where a domestic industry suffers from serious injury as a result of unforeseen developments, and of the effect of obligations incurred by a Member under this agreement, including tariff concessions. The author mentions arguments for and against safeguards and expresses the view that '[a]t the end of the day, whatever the merits of the economic arguments for and against safeguards, the application of safeguards law may come down to political expediency'. Further, he points out that safeguard measures enable governments to address the pressures felt by domestic industries and workers in the face of surging imports that are not dumped or subsidised. Safeguards measures allow a response that does not require burdening the treasury directly, or legislating more lasting forms of trade restrictions such as higher tariffs.

Tareq MR Chowdhury and Md Jahid Hossain Bhuiyan, in their chapter 'Regional Integration Exceptions, Balance-of-Payments Exceptions, Infant-Industry-Protection Exception, and Generalised System of Preferences Exception Under the GATT and GATS' state that the cornerstone of trade-liberalisation is the concept of equal treatment for all trading partners. They also indicate that the WTO discourages the setting up of customs union or free-trade area because such arrangements would be contradictory to the WTO's MFN principle. However, taking into consideration the benefit of regional integration to countries for their regional economic development, GATT, WTO, and GATS allow regional trading arrangements. The authors discuss this regional integration exception under the GATT and GATS. Sometimes a country faces difficulties to counter balance-of-payments problems, and therefore WTO law allows the country to impose quantitative restrictions to tackle the problem. This is known as the balance-of-payments exception. The WTO law also allows generalised system of preferences (GSP) in order to advance the economic prospects of developing countries. WTO further compromised its provisions by allowing developing countries to give temporary protection to its infant-industries by means of impositions of certain duty or import restrictions. The authors are of the opinion that 'the allowed exceptions have injected dynamism into international trade and the pragmatic outlook of WTO'.

Indira Carr's 'WTO and Environment' chapter takes the exceptions further by focusing solely on the tension between free trade and the environment that was exposed by the Tuna-Dolphin dispute under GATT 1947. Using cases, such as *US - Gasoline*, *Shrimp - Turtle*, *EC - Asbestos* and *Brazil - Tyres*, the chapter argues that it is an over-simplification to say that the WTO agreements are unfriendly towards the environment. It puts forward the view that the environmental agenda is embedded in the Preamble to the WTO Agreement and that the growing jurisprudence indicates that environmental issues are being taken seriously by the dispute settlement body.

Raj Bhala in 'Four Points about Trade and Human Rights' discusses the relationship between international trade and human rights, and notes that their relationship has attracted considerable attention during and after the Uruguay Round of multilateral trade negotiations of 1986-1994. According to the author, "human rights" are multifaceted liberties that extend beyond fundamental ones. They inhere in a person precisely because the person is a human being, that is, they are inextricably linked to or vested with life...'. The author discusses the provisions of international human rights documents that are relevant, or potentially so, to trade. The author then identifies and discusses trade-related human rights in the text of GATT and associated WTO Agreements, and then explains how the United States pursues human rights related concerns in its free-trade agreements (FTAs). The author also expresses the view that depending on the portfolio of most international trade lawyers, their task is either to liberalise or protect market for goods, services, and intellectual property. Thus they do not pay much attention on the relationship between their work and its impact on human rights. On the other hand, human rights lawyers are concerned with the effects of unbridled free-trade on human rights. So the four points that are lost, or not fully appreciated are: (a) theoretical linkages between trade and human rights, (b) the significance of the existing international human rights law, (c) human rights related provisions in multilateral trade law, and (d) the efforts to use FTAs to promote certain human rights.

As stated earlier, the WTO agreements address some sensitive subjects - these being agriculture and intellectual property rights. Joseph A McMahon's chapter on agriculture provides a historical account of the agricultural policies since GATT 1947. It examines in detail the *Agreement on Agriculture* designed to shape the future of agricultural policies of the Contracting States. But, as he states, this agreement was just the first step in reform of trade in agriculture. There are a number of shortcomings with this agreement, notably amongst them the abuse of the tariff systems by the state parties. There have been thus further negotiations on agriculture since the Doha Ministerial Conference and the penultimate section of the McMahon chapter looks at these negotiations in some detail.

The book concludes with a chapter on 'Intellectual Property, TRIPS and Development'. The link between intellectual property, primarily aimed

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at protecting innovation was, as Anne Fitzgerald and Rami Olwan state, recognised in the Uruguay Round. The chapter gives a useful introduction to the nature of intellectual property, the justifications for protecting intellectual property and the international framework for protecting such rights. It then moves on to examine the provisions of TRIPS before focusing on some disputes that have arisen under TRIPS. There is a useful discussion of the relationship of intellectual property protection and the needs of developing states who had always perceived such rights through a negative lens, as protecting the developed nations. As Fitzgerald and Olwan say, 'the relationship between the operation of intellectual property systems and development must be addressed in a systemic way by the international community' such that the interests of the developing and least developing countries are also advanced.

4 Emerging Themes and Final Words

International Trade Law and the WTO examines a number of diverse areas, including a variety of perspectives. Nevertheless, it presents a number of common ideas. First, it shows a move beyond the purely legal and economic realm of trade into a consideration of the environment, human rights, and the developed and developing country divide. The continued role of globalisation is a major factor in this common theme. The impact of globalisation is now evident on more or less all parts of political, social and economic life today. It reconceives the notion of the 'world community'.⁷ It has a significant role in reducing poverty and expanding the middle class in most parts of the world. WTO facilitates these impacts of globalisation. Before the Uruguay Round (1989-94) developed and developing countries tended to be in opposing groups. The Uruguay Round, however, saw a swing in North-South politics in the GATT/WTO system. At present, the participation of the developing countries in the WTO system is much more discernible. This trend has been playing an important role in trade liberalisation. However, there are some notable areas like textiles, clothing, and agriculture where alliances of developing countries still play a significant role in trade negotiations. WTO needs to pay more attention in addressing these important issues.

Second, the chapters show that trade law is constantly evolving through case law and new agreements. The area of trade is far from static, and this *book* shows that new developments are constantly emerging. Last, existing provisions within the law are not static, and new connections with the environment, human rights, and international law in general make this a pertinent time for the release of this text.

⁷ <<http://engarticles.gazeta.kz/art.asp?aid=17209>> accessed 11 April 2012.

The World Trade Organization (WTO) regulates the world trading system and provides a crucial platform for the development of a sense of global community. *International Trade Law and the WTO* provides an extensive overview of different aspects of WTO law. The book examines the basic structure of the WTO, its functions, and decision-making. The book highlights critical linkages between international trade law, the environment, human rights and international law, and explores key economic and legal concepts. Scholars with diverse expertise from around the world consider the differences between developed and developing countries in a global context. They canvass ongoing challenges in relation to trade and associated legal and regulatory frameworks, and present a research agenda for the decades ahead.

International Trade Law and the WTO explores the interaction between globalisation and trade. The book traces the origin of the WTO and examines key themes, including: WTO dispute settlement; the principle of Most Favoured Nation treatment and national treatment; barriers to trade in goods and services; dumping and anti-dumping measures; subsidies and countervailing measures; general and security exceptions; safeguards; regional integration, infant-industry-protection and generalised system of preferences exceptions; interfaces between the WTO, the environment and human rights; and agreements on agriculture and intellectual property.

This book is an essential reference for students, teachers, researchers, practitioners and those involved in policy development and law reform in the area of international trade.

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