

Research Article

THE GATT AND WTO'S LEGAL DISCIPLINES: ECONOMICS AND LAW FOR REMOVING BARRIERS TO INTERNATIONAL TRADE

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Abstract

The article analyzes the legal discipline of international trade, highlighting its evolution from a general trade agreement to the achievement of a truly appropriate institution for conducting actions aimed at freeing international trade from restrictive tariff and non-tariff political-economic practices. It looks at the historical formation of the GATT-WTO system, the areas in which the WTO operates, protectionist and unfair practices in international trade, subsidies, the possibilities of agreements between countries, the stipulation of quotas for trade, and the practice of dumping. It also looks at the rounds of negotiations that culminated in the creation of the World Trade Organization, its Constitutive Agreement, related agreements, and the principles of the GATT-WTO, such as the Principle of Most Favored Nation Treatment and the Principle of Nationality. The method of approach is the inductive method, and the method of procedure is the historical comparative method.

1. Introduction and historical background to the GATT-WTO

The article deals with the legal discipline of international trade, taking a historical perspective and culminating in the creation of the World Trade Organization (WTO), the appropriate institution for the liberation of international trade. It analyzes the areas in which the WTO operates, the restrictive tariff and non-tariff practices in international trade such as subsidies, the possibilities of agreements between countries, the stipulation of quotas for trade, and the practice of dumping. It lists the rounds of negotiations that culminated in the creation of the WTO, its agreements, and its principles. It aims to identify the need to break down protectionist barriers through a proper economic and legal institutional framework, such as the WTO.¹

As a result of the post-war restructuring of the world's political, legal, and economic systems in the 1940s, attempts were made to create three international organizations: the World Bank, the International Monetary Fund, and the International Trade Organization (ICO), the latter according to the unsuccessful Havana Charter in 1947. Accommodating the interests of twenty-three countries, including Brazil, the agreement known as the General Agreement on

¹ Cottier, Thomas. "International economic law in transition from trade liberalization to trade regulation." *Journal of international economic law* 17.3 (2014): 671-677.

Tariffs and Trade (GATT) emerged on the international scene as a multilateral treaty aimed at disciplining and increasing international trade in goods and harmonizing commercial practices.²

In fact, eight rounds of progressive negotiations were held to improve the agreement as trade relations between the GATT/47 contracting states evolved. These were the Geneva Round, Switzerland, in 1947, with 23 countries; the Annecy Round, France, in 1949, with 33 countries; the Torquay Round, England, in 1951, with 34 countries; and the Geneva Rounds, Switzerland, in 1956, with 22 countries; in 1960/62, with 45 countries, known as the Dillon Round; in 1964/67, with 48 countries, known as the Kennedy Round; in 1973/79, known as the Tokyo Round; and, in 1986/94, the Round that ended in Punta del Este, known as the Uruguay Round.³

In a sui generis way, on October 30, 1947, a trade agreement was signed in Geneva, Switzerland, on tariffs and trade, resulting in the signing of the GATT as an international commitment to eliminate protectionist measures in commercial practice. The primary objectives of its creation were related to the development of international trade, the improvement of people's standard of living, the search for full employment, the efficient use of world resources, and the increase in the income level of the various people involved, among others.⁴

The agreement recognized the existence of global economic disparities, providing concessions to developing countries, including allowing the creation of the General System of Preferences and sectoral agreements. In order to promote the free transit of goods, it established valuation ceilings and abolished restrictive practices such as the establishment of quotas, the setting of taxes, charges, emoluments, and excessive formalities by government authorities. It thus condemned all practices that could not be justified in such an environment of international competitiveness.⁵

A corollary of the free trade policy of GATT/47—and currently GATT/94—can be seen in the most preferred nation clause, whereby no benefit granted to one country shall be denied to the other members—Art. I of GATT/47; although, in fact, in order to accommodate interests, the Agreement itself makes exceptions that do not imply retaliation or abusive practices in international trade. Therefore, in specific situations, the contracting states can unilaterally adopt restrictive measures to protect public morals, human, animal, and plant life and health, trade in precious metals, national artistic, historical, and archaeological heritage, etc.

On April 15, 1994, the Uruguay Round of the GATT came to an end, establishing the long-dreamed-of International Trade Organization, this time called the World Trade Organization (WTO), a true institution for world trade with legal personality under international public law. The current structure of the WTO includes different codes for eliminating trade disparities and barriers to free trade—quantitative, tariff, and non-tariff restrictions in general.⁶

GATT/47 was, and GATT/94 is, a non-institutional agreement that, however, due to its consensual nature on the points addressed in relation to the various commercial practices, serves as a parameter for the various signatories, raising the standard of living of the various

² Schultz, Jennifer. "The GATT/WTO Committee on Trade and the Environment—Toward environmental reform." *American Journal of International Law* 89.2 (1995): 423-439.

³ Trachtman, Joel P. "The international economic law revolution." *U. Pa. J. Int'l Econ. L.* 17 (1996): 33.

⁴ Landau, Alice, and Alice Landau. "The GATT/WTO: instrumentalizing globalization." *Redrawing the Global Economy: Elements of Integration and Fragmentation* (2001): 79-108.

⁵ Dillon, Sara. "Trade and the Environment: A Challenge to the GATT/WTO Principle of Ever-Freer Trade." *John's J. Legal Comment.* 11 (1995): 351.

⁶ Howse, Robert. "The World Trade Organization 20 years on: global governance by judiciary." *European Journal of International Law* 27.1 (2016): 9-77.

peoples and the development of their economies through the increase in international commercial transactions.⁷

2. GATT-WTO areas of activity

The GATT/47, in thirty-eight articles, divided into four chapters, dealt with a wide variety of subjects, such as the most-favoured-nation clause, freedom of transit, the imposition of duties and formalities on imports and exports, anti-dumping, countervailing duty and subsidy policies, certification of origin, the general elimination of quantitative restrictions, exceptions to the non-discrimination rule, rules for the operation of state trading companies, restrictions to guarantee the balance of payments, the principles and objectives of the treaty, concession programmes, national treatment of internal regulation and taxation, special provisions relating to cinematographic films, the publication and administration of trade regulations, the non-discriminatory administration of quantitative restrictions, trade agreements, government assistance for economic development, emergency action for the import of particular products, insurance exceptions, consultations, joint actions by the contracting parties, nullities or impairments, the modification of programmes and the negotiation of tariffs, among other trade-related issues.⁸

The Magna Carta of International Trade has as its fundamental principles, among others, the following to remember: 1. non-discrimination between countries through the most preferred nation clause; 2. the maintenance of minimum trade restrictions by governments with a view to the stability of international trade; 3. the elimination of non-tariff barriers; 4. the disapproval of export subsidies and tariff barriers that must be reduced or extinguished; 5. regional agreements: Customs unions and free trade areas must preserve the basic principles of non-discrimination and multilateral trade; 6; the prioritization of multilateral trade free of restrictions and the encouragement of international trade arrangements; 7; balance of payments safeguards; 8; emergency import action safeguards; and 9; the determination of consultation, conciliation, and dispute resolution procedures, avoiding retaliatory conflicts between the contracting parties.⁹

The principles of GATT/47 were therefore maintained by GATT/94, as were the premises of the original treaty and the innovations of the Uruguay Round. Therefore, the immediate objective of GATT/94, as well as that of the WTO, is to eliminate all forms of trade discrimination, international protectionism, equalizing customs tariffs, and other barriers that interrupt or hinder the international flow of trade, aiming for world trade on an equitable basis.

Certain countries' hegemony, however, distorts trade relations by imposing conditions and terms on potentially less developed countries. Sometimes, efforts to improve regional trade terms lead to the creation of obstacles in relation to other nations. Much has been discussed about regionalization as a possible obstacle to international trade. In fact, regionalization is a prior and necessary step in the process of seeking large and free international trade. Countries must first adjust their edges and trade discrepancies so that, in a second step, after achieving a reasonable balance in supra-national regional markets, they can embark on bolder proposals,

⁷ Schwartz, Warren F., and Alan O. Sykes. "The economic structure of renegotiation and dispute resolution in the World Trade Organization." *The Journal of Legal Studies* 31.S1 (2002): S179-S204.

⁸ Kennedy, Kevin C. "The GATT-WTO system at fifty." *Wis. Int'l LJ* 16 (1997): 421.

⁹ Hafez, Zakir. "Weak discipline: GATT article XXIV and the emerging WTO jurisprudence on RTAs." *NDL Rev.* 79 (2003): 879.

aiming to enter into international negotiations on an equal footing with all other international trade agents.¹⁰

GATT/94 itself has an escape clause, Article XXIV, encouraging and recognizing the importance of transactions in local and regional markets, thereby creating sufficient conditions for broader integration with lower economic and social costs. The points made in the Understanding on the Interpretation of Article XXIV of GATT/1994 are important for understanding this provision. For example, § 6 says that regional agreements should be respected without making the countries that agreed to them pay the same amounts of money that were planned for the other members.¹¹

The GATT 1994 does not impose any obligations on Members benefiting from the reduction in tariffs resulting from the formation of a customs union or an interim agreement leading to the formation of a customs union to provide compensatory adjustment to the countries party to them. In any case, all regional agreements must be communicated to the WTO so that, through consultation and examination of the conditions of integration by a specific working group, their real bases and achievements in relation to the goal of free trade can be verified in light of GATT/94 legislation, according to §7 of the Understanding on the Interpretation of Article XXIV of GATT/1994.¹²

GATT/94, as well as the WTO, aligns its objectives with modern, liberal internal competition policies as well as international trade policies aimed at competitiveness between nations, eliminating barriers and restrictions to competitive transactions, always with an eye on the efficient use of economic resources, and maximizing expectations. It is therefore imperative to overcome protectionism, which can be seen in the stipulation of barriers to free trade, which can take three basic forms: the imposition of tariffs, quantitative restrictions, and the imposition of other barriers, administrative, phytosanitary, etc. There is growing concern about the increased use of non-tariff barriers in international trade and the need to define what is known as fair competition since the misapplication of trade protection and defense rules ends up generating negative results for world trade.¹³

The rationale for protectionism as a form of national economic policy can be seen in the allegations of national defense: of the domestic economy, of non-renewable natural resources, of better income distribution, of recovering balances of trade deficits, of creating and protecting employment levels, of protecting nascent or incipient industry, of avoiding unfair international competition, and of seeking domestic economic development based on the country's own resources, among other claims.

Within the neo-liberal political-economic model, the GATT/94 and the WTO are organized from an international market perspective in which the individualistic and rational methodology seeks the individual satisfaction of the agents' needs but consequently leads to general well-being—economic utilitarianism.¹⁴

¹⁰ Hafez, Zakir. "Weak discipline: GATT article XXIV and the emerging WTO jurisprudence on RTAs." *NDL Rev.* 79 (2003): 879.

¹¹ Shukla, S. P. "From the GATT to the WTO and Beyond." *Governing Globalization: Issues and Institutions* (2002): 254-286.

¹² Lockhart, Nicolas, and Andrew D. Mitchell. "Regional trade agreements under GATT 1994: an exception and its limits." *Nicolas Lockhart, Andrew D. Mitchell, CHALLENGES AND PROSPECTS FOR THE WTO* (2005): 217.

¹³ Cottier, Thomas. "The common law of international trade and the future of the World Trade Organization." *Journal of International Economic Law* 18.1 (2015): 3-20.

¹⁴ Ahn, Dukgeun. "Foe or friend of GATT Article XXIV: diversity in trade remedy rules." *Journal of International Economic Law* 11.1 (2008): 107-133.

As a body that implements international trade, the GATT-WTO system has in fact favored growth in the volume of goods traded over the last sixty-two years while still seeking to achieve the goal of free trade by eliminating barriers to trade, which in turn can be tariffs or non-tariffs.¹⁵

3. Barriers to international trade: tariff and non-tariff protectionism

Basically, the imposition of restrictions causes a real diversion of trade, covering up the inefficiency of the local industry, possible monopoly power, and effective damage to local consumers, whether due to the lack of substitute products, the imposition of high prices due to the lack of competitiveness caused by the imposition of barriers to entry by competitors, or the practice of other methods that prevent market equilibrium under conditions of internal competition. International trade is hindered sometimes by the protectionism of the industrialized economies and sometimes by the effective and not just formal maintenance of the preferential conditions set out in the GATT text.¹⁶

Protectionist practices can be direct or indirect. According to the doctrine, direct protectionist practices involve the imposition of tariffs and the stipulation of import quotas. On the other hand, indirect restrictionist measures, such as surveillance and safeguard measures, can affect fair imports, but they can cause injury to the domestic industry in a given territory. It is in this context that the difference between fair trade and unfair trade must be analyzed. Trade defense measures tend to nullify the harmful effects on the freedom of international trade in accordance with the dictates of the GATT-WTO. As a result, restrictive measures that come from an investigation into dumping or subsidies, for example, show that one or more companies or third states are responsible for unfair trade actions that can be traced back to a passive subject. The main problem lies in the appropriate use of the measures, avoiding unjustified trade diversion, and the potentiative exercise of the measures. With the evolution of the degree of internationalization of markets over the last two decades, many countries, including and especially those participating in the WTO, have used procedural and legal expedients linked to anti-dumping policy, countervailing duties, and safeguard measures to intimidate the entry of competing foreign products. These measures are more appropriate for trade defense and protectionism due to the possibility of discrimination against economic agents or states when they are applied, as well as the use of the process as a form of intimidation in doing new business, inhibiting many importers from contracting new entries under the conditions of the investigated products.¹⁷

Tariff barriers are commonly used in the form of transit tariffs, export tariffs, and import tariffs, as well as others, such as the Industrialized Products Tax in Brazil, which is levied on imported products, as well as the Tax on Operations Relating to the Movement of Goods and the Provision of Interstate and Intercity Transport and Communication Services. Trade tariffs can also be agreed upon in advance between the parties—conventional tariffs or not—general tariffs. The multiple tariff, in turn, encompasses benchmarks, maximum tariffs, and minimum tariffs, while the effective tariff refers to the level of protectionism finally established.

A traditional way of preventing free trade in goods and services and, consequently, competition in domestic consumption is the imposition of customs tariffs, which increase the

¹⁵ Mastromatteo, Andrea. "WTO and SOEs: Article XVII and Related Provisions of the GATT 1994." *World Trade Review* 16.4 (2017): 601-618.

¹⁶ van den Bossche, Peter LH, and Sarah Akpofure. "The Use and Abuse of the National Security Exception under Article XXI (b)(iii) of the GATT 1994." *A New Global Economic Order*. Brill Nijhoff, 2021. 121-168.

¹⁷ Cameron, James, and Kevin R. Gray. "Principles of international law in the WTO Dispute Settlement Body." *International & Comparative Law Quarterly* 50.2 (2001): 248-298.

value of the product when it is internalized in the importing country, making it an unfavorable option when the domestic consumer chooses. Despite its damage, the imposition of tariffs is less restrictive than the imposition of import quotas, as it does not discriminate against potential competitors who bear the same burden. Government action protects local industry, which benefits from the generic imposition of tariffs.

Various allegations justifying customs taxation bear a striking resemblance to those promoting customs protectionism. Thus, specific areas are protected for reasons of defense, security, protection of fledgling industries, and maintenance of work levels to occupy the domestic workforce. He examines how tariffs impact international trade, taking into account factors like a country's residents' inclination for isolation, their need for self-sufficiency, and economic arguments that balance costs and social benefits, among others.

Classical theory condemns the protectionist use of taxes on the grounds that they reduce the country's general wellbeing. However, it is recognized that a domestic industry protected by customs tariffs is better placed to implement its growth once it has been provided with the resources and technology to do so.

In situations of imperfect competition, where there are market failures to be eliminated, it is not uncommon for fiscal policy to strategically welcome foreign trade, bringing about results that are suitable for recovering a condition closer to perfect competition, obtaining, for example, the maximum utility of a monopoly, or conquering markets by granting subsidies.

On the other hand, raising the prices of imported goods through tariffs can cause serious disruption to international trade. When foreign goods become more expensive, there is effectively a phenomenon of import substitution due to the protectionist effect of tariffs aimed at defending domestic industry, which is not always efficient and can also lead to a transfer of income from consumers to inefficient producers. Another effect of imports subject to tariffs is the fiscal effect in terms of government revenue and the effect on consumption due to the reduction in the well-being of consumers who have fewer options to choose from and spend more money on products that are not always identical in quality to those imported from countries with advanced know-how.¹⁸

Tariff barriers are, in fact, important economic policy instruments that can either favor international trade or harm it due to excessive protectionism of local industry. The imposition of tariffs has various effects not only on the domestic economy but also on the economies of trading partners. According to economic theory's determinants, the proportion of influence these effects have on the domestic and international economic order will depend on the value of the tax, whether ad valorem or specific, as well as the slope of the demand and supply elasticity curves. Heller also defines what he calls the optimum tariff as one that allows the country imposing it to achieve the highest possible community indifference curve and, thus, the highest possible level of well-being.¹⁹

When imposing tariffs, there is, in fact, the possibility of using the tax as an instrument of economic policy capable of influencing the country's economic structure, either through the government's fiscal policy aimed at collecting revenue or through the para-fiscal use of the tax, including as a means of defending the national industry when charging tariffs on imported goods or imposing anti-dumping duties. Thus, fiscal policy can sometimes expand aggregate

¹⁸ Etinski, Rodoljub M. "A Critical Review of Interpretation of Articles III and XX of the GATT 1994." *Zbornik Radova* 52 (2018): 819.

¹⁹ Gagliani, Gabriele. "Interpreting and Applying Article XX (f) of the GATT 1994: "National Treasures" in International Trade Law." *Santander Art and Culture Law Review* 5.2 (2019): 35-56.

demand by reducing the tax burden or increasing government spending, or it can do the opposite through recessive policy.

Import tax, as a customs duty or tariff, has as its taxable event the entry of goods into the customs territory, and its calculation basis is the CIF price (cost, insurance, and freight) of the goods. In any case, when stipulating customs tariffs, the provisions of GATT/94 must be observed, which determine the extension of tariff favors granted to a certain trading partner to other states.

On the other hand, non-tariff barriers are measures controlled directly or indirectly by the government that alter the flow of international trade, either in terms of the quantity of goods traded or through trade diversion. There are three groups of non-tariff barriers: a) Quantitative Restrictions: Import bans, setting import quotas, the need for prior import licenses, voluntary export limitations, discriminatory practices in public sector procurement, setting regulations on the proportion of domestic inputs in value added, quotas, export restrictions, bilateral agreements with barter operations; b) Measures imposed on the price mechanism: variable taxes and supplementary levies on imports, advance deposits, minimum and maximum prices, and price controls, including customs valuation procedures, differentiated exchange rates, c) Indirect restrictions on imports: prohibitions and quotas deriving from government participation in the manufacture, sale, and marketing of certain products; restrictions deriving from government measures to encourage regional and sectoral development; tax and credit advantages and subsidies; restrictions relating to the means of information and internal marketing; credit restrictions on the importing sector; discriminatory internal taxes. Other restrictions include quality standards and health regulations, technical standards and industrial safety rules, arbitrary customs classification procedures, and government-funded research and development programs.²⁰

Non-tariff barriers are commonly disguised forms of trade protectionism and are more widely used than tariff barriers because they can be more easily concealed in relation to international non-discrimination regulations. It is not uncommon for governments to engage in anti-competitive behavior under the guise of prioritizing certain interests that are not necessarily justified, leading to trade diversion and inefficiency in the exploitation of factors of production on a global scale. Some of the behaviours that restrict international trade include: the demand for import tariffs and various fees that are not justifiable for free trade; the prohibition and imposition of import quotas; the stipulation of minimum and maximum prices to be paid for imported products; the determination of restrictions on state action in international trade; the discriminatory and arbitrary use in granting import permits; the stipulation of a minimum percentage of national inputs in the composition of the final product; quotas; the lack of financial, marketing and institutional support for exporters and importers on the part of governments; the subjection of foreign trade operations to bureaucratic scrutiny and discouraging practices at customs; the imposition of taxes and other burdens on imports; the stipulation of a maximum ceiling for the entry of duty-free goods into customs; the requirement of advance deposits; the determination of minimum and maximum prices and price controls; the practice of customs valuation and inspection procedures that inhibit imports; the imposition of disadvantageous exchange rates; the stipulation of quality standards and health regulations that are excessively distant from the reality of the negotiating countries; the indiscriminate use of investigations to apply anti-dumping measures as a means of stopping the free flow of trade; etc. The success of the WTO depends not only on opening up trade but, above all, on not using trade-

²⁰ Petersmann, Ernst-Ulrich. "The Need for Integrating Trade and Competition Rules in the Wto World Trade and Legal System 1." *The Legal and Moral Aspects of International Trade*. Routledge, 2002. 97-118.

restrictive measures such as those mentioned above; moreover, it is necessary to spread a culture of trade aimed at internationalizing the economy.²¹

Non-tariff barriers include technical barriers to trade necessary to protect, for example, health, the quality of goods produced or consumed, the safety of citizens, the environment, and consumers, among many others. In 1979, a Code of Standards was implemented to prevent the restrictive and impeding use of measures that characterize real barriers to trade, such as the aforementioned technical barriers. Currently, the WTO's Agreement on Technical Barriers to Trade complies with the three basic principles of GATT/94: the principle of non-discrimination, the principle of national treatment, and the principle of the most favored nation.²²

However, the principle of non-discrimination between member states allows for three exceptions, namely: regional integration as provided for in Article XXIV of GATT/94; exceptionally more favorable treatment for developing countries and countries with a planned economy in the process of trade liberalization. The principle of national treatment prevents discrimination between domestic and foreign products, taking into account their characteristics and peculiarities, and the principle of the most favored nation extends to other countries the benefits granted to another country in isolated trade negotiations.²³

Complementing the disciplines of the Agreement on Technical Barriers to Trade is the Code of Good Conduct for the Elaboration, Adoption, and Application of Standards, also annexed to the WTO's Constitutive Agreement.

Subsidies are also non-tariff restrictive measures in international trade and are condemned by the WTO as unfair practices in international trade that occur as a result of government aid to countries that wish to protect their local industry by making it internationally competitive through financial, credit, and other types of expedient or subterfuge that create artificial conditions of competition in the international environment. Government policies to promote specific sectors of the national economy align with the possibility of access to subsidies, yet they often overlook the damage or high costs associated with the actual diversion of trade. Producers, in a situation of subsidized production, are unaware of or do not operate under the real costs of the process, which leads to waste and misallocation of scarce productive factors.²⁴

A subsidy, according to the Agreement on Subsidies and Countervailing Measures, is currently defined in Art. 1, letters a and b; insofar as a given government practice involves the transfer or potential direct transfer of funds, the forgiveness of public revenue due or not due, the provision of goods or services other than those intended for general infrastructure, the acquisition of goods, payments to a fund system, or the determination of a private body to carry out one or more of the functions described above in a manner different from the usual way in which the government itself would carry out the function, form of revenue or price support in accordance with Article XVI of the GATT/94; adding that all these behaviours are investigable and therefore punishable when they involve an advantage for the subsidised party.

²¹ Cottier, Thomas. "International economic law in transition from trade liberalization to trade regulation." *Journal of international economic law* 17.3 (2014): 671-677.

²² Gagliani, Gabriele. "Interpreting and Applying Article XX (f) of the GATT 1994: "National Treasures" in International Trade Law." *Santander Art and Culture Law Review* 5.2 (2019): 35-56.

²³ Gaines, Sanford. "The WTO's reading of the GATT Article XX chapeau: a disguised restriction on environmental measures." *U. Pa. J. Int'l Econ. L.* 22 (2001): 739.

²⁴ Mrázová, Monika, David Vines, and Ben Zissimos. "Is the GATT/WTO's Article XXIV bad?." *Journal of International Economics* 89.1 (2013): 216-232.

Subsidies can be appealable or non-appealable, depending on the actual damage or threat of damage caused by their granting, and they can also be classified as direct or indirect.

Another non-tariff barrier to remember is the stipulation of bilateral agreements that stimulate inter-party trade or restrict it in an anti-competitive way, insofar as benefits and favors are not offered to other countries. Procedures of this kind run counter to the principle of the most favored nation stipulated within the framework of the WTO.

The stipulation of quotas or quantities of goods that can enter national borders also affects international trade. Specific supplier countries stipulate them within a fixed period of time, effectively discriminating against other countries or suppliers. The WTO condemns this extreme measure, which can lead to instability in the world market's price balance and insecurity in trade. Quantitative limitations encourage the creation of cartels, the creation and maintenance of monopoly power, and, consequently, the creation of barriers to the entry of new competitors into the national market. Quotas can be imposed on the physical quantity of goods or on the maximum value to be traded internationally, including through the use of export or import licenses, as well as by discriminating between countries.²⁵

Dumping is a practice that restricts international trade and is therefore punished by the WTO under the Agreement on the Implementation of Article VI of the GATT of 1994. In fact, no less restrictive in international trade is the practice of action characterized by the English verb to dump—to unload, to take away—which gives rise to the word dumping. From the point of view of international trade, it characterizes a form of unfair competition exercised by artificially lowering the prices of exported goods, making them competitive in the importing market.²⁶

Anti-dumping legislation has become, in many countries, a true protectionist instrument at the disposal of governments; to such an extent legislation has ceased to be a defence mechanism for private individuals and has become part of government economic policies. Dumping involves the import of products with a distorted market value in relation to the market of origin, which leads to the effective diversion of trade and production processes, mistaken or inefficient use of production factors, extinguishing local industries, or subjecting them to damage caused by predatory competition.

Developing countries use anti-dumping legislation to protect infant industries or more advanced sectors of their economy, while developed countries do so in retaliation or as an instrument of pressure in the name of free trade, which in fact imposes unfavorable trade tariffs on other countries in an attempt to annihilate any resistance or obstacle to the free exchange of products from those economic superpowers.²⁷

If dumping in itself is harmful to international trade, so is the indiscriminate use of anti-dumping measures. The practice of using protectionist anti-dumping legislation is not as impossible as one might first imagine. The whole process of investigating alleged dumping can take so long that it ends up hindering new import operations until the results of the investigation are obtained. The very imposition of duties can, in turn, shrink the market and discourage foreign competitors from entering. It should also be remembered that the option of applying anti-dumping legislation as a protectionist measure, although condemned by the WTO,

²⁵ Trachtman, Joel P., Andrew T. Guzman, and Alan O. Sykes. "International trade: regionalism." *Research Handbook in International Economic Law*. Northampton, MA: Edward Elgar (2007): 151-176.

²⁶ Howse, Robert. "The World Trade Organization 20 years on: global governance by judiciary." *European Journal of International Law* 27.1 (2016): 9-77.

²⁷ AlModarra, Bader Bakhit M. "Defining the Contours of the Public Morals Exception under Article XX of the GATT 1994." *Estey Journal of International Law and Trade Policy* 18.2 (2017): 142-157.

is politically correct compared to the condemned alternatives of maintaining customs barriers, quotas, unjustified demands, and even the use of safeguards. Decision-making in this sense, before being economic, becomes political. If the search for a competitive environment—generally the aim of antitrust legislation—is necessary for the spread of free trade policy, however, antidumping policy is intolerable, and if it is supposed to protect the competitor, it cannot cover up its inefficiency. This is why it is so important to maintain a competitive environment.²⁸

Anti-dumping actually protects a privileged class of competitors (producers of similar domestic products) to the detriment of competitiveness. Anti-dumping policy would therefore appear to be a corollary of trade protectionism, which is at odds with antitrust legislation in terms of price discrimination. While predatory pricing is reprehensible, the healthy favoring of the consumer market through prices that recover minimum average costs is appropriate and provides the competitiveness needed to dislodge the situation of inertia in which the domestic industry affected by dumping may find itself. Stimulating efficient external competitiveness can and should speed up the process of recycling this inefficient industry. On the other hand, the application of anti-dumping can be rethought as a way of avoiding the cost of temporary structural adjustments caused by the imposition of unfair prices on the domestic market; or to destabilize or eliminate protectionist barriers, which make market segmentation and dumping possible; or to finally make multilateral trade policy viable through the subterfuge of anti-dumping, which, in a softer way, provides specific and discreet protection for the affected economies, avoiding the wear and tear of trade retaliation and the rupture with principles eventually agreed at the WTO.²⁹

Another problem with anti-dumping legislation is the discretionary power that the legal text often gives the investigating authority when determining the parameters used to calculate the dumping margin and the respective damage; this is what J. A. Estrela Faria refers to as the temptation of the contracting parties themselves to use the criteria for defining dumping as protectionist measures.

There are many practices that, under the guise of real protectionist interests, assume generic and not always real defensive positions. Thus, zootechnical, bioethical, social, ecological, and many other technical, political, and administrative barriers are erected to prevent foreign producers from freely accessing markets. This is true trade diversion, insofar as, rather than actually trying to protect noble interests, they often preserve real niches of economic power in and over national economies, which in many cases is stronger than local political power.³⁰

The Agreement on Technical Barriers to Trade is part of Annex 1A of the WTO Constitutive Agreement/94. This document seeks to standardize conformity assessment systems, increasing the efficiency of production and the quality of products, resulting in adequate and rewarding international trade for both suppliers and consumers. It discourages the use of international technical standards as barriers to trade and encourages the rational use of technical regulations and standards, as well as stipulations for packaging, labeling, marking, and evaluation of various products, increasing product quality, ensuring better living conditions for consumers, and protecting nature—animals, plants, and the environment. This prevents the

²⁸ Srinivasan, Thirukodikaval N. "Nondiscrimination in GATT/WTO: was there anything to begin with and is there anything left?." *World Trade Review* 4.1 (2005): 69-95.

²⁹ Schultz, Jennifer. "The GATT/WTO Committee on Trade and the Environment—Toward environmental reform." *American Journal of International Law* 89.2 (1995): 423-439.

³⁰ Osakwe, Chiedu. "Developing Countries and GATT/WTO Rules: Dynamic Transformations in Trade Policy Behavior and Performance." *Minn. J. Int'l L.* 20 (2011): 365.

discriminatory, arbitrary, and unjustifiable use of practices that inhibit or distort trade. If there are rights or prerogatives inherent to different countries that must be preserved, world integration rules must also be guaranteed to create a favorable environment for the exchange of experiences, technology, and resources to increase the general well-being of people. As a general rule, foreign products are treated no less favorably than domestic or similar products originating in any other country. Likewise, trade restrictive measures are permitted provided that they conform to a legitimate objective such as the protection of human, animal, or plant health, national security, and the protection of the environment, while also taking into account aspects relating to the degree of development of the Member Countries possibly concerned, the availability of technical and scientific information and technology, and the appropriate utilization of the products. Within the WTO, it is desirable for there to be an exchange of information or consultation between the various Members regarding the possible adoption of regulations or standards that may affect trade between countries; the discussion and adoption of suggestions that make such legislation appropriate for encouraging international trade is prioritized; this is seen, for example, in paragraph 2.11 of the Agreement on Technical Barriers to Trade: Members shall ensure that all technical regulations that have been adopted are promptly published or otherwise made available so as to enable interested parties in other Members to become aware of them.³¹

One of the requirements stipulated for the creation and application of standards in general, within the framework of WTO Members, is compliance with the Code of Good Conduct for the Preparation, Adoption, and Application of Standards contained in Annex 3 of the WTO Constitutive Agreement/94; likewise, whenever possible, international conformity assessment systems should be adopted.³² A substantive provision of the Code of Good Conduct is that the standardization institution aims to draw up, adopt, or apply rules that do not create unnecessary obstacles to international trade.

Every effort should be made to cooperate between members in order to disseminate the rules, seek consensus, maintain information channels, and provide advice between members, while not forgetting that developing country members should receive special, differentiated, and more favorable treatment.

The WTO, as the body responsible for complying with the provisions of the Agreement on Technical Barriers to Trade and its other treaties and agreements, develops through rounds of negotiations in which, today, one hundred and fifty-three effective states take part, as well as thirty-two observer states. Here's what's happening.

4. Negotiating rounds and WTO agreements

Since no immediate consensus was reached on international trade when the attempt was made to institutionalize the ICO, rounds were held to discuss various economic and trade issues in order to achieve a gradual consensus, overcoming differences and accommodating interests on the part of the member countries of the agreement known as GATT, starting in 1947. There were eight rounds of negotiations, culminating in the Uruguay Round, which finally institutionalized the WTO on April 15, 1994, after dealing with various issues such as trade in goods and services, anti-dumping measures, subsidies and countervailing measures, safeguards,

³¹ Mastromatteo, Andrea. "WTO and SOEs: Article XVII and Related Provisions of the GATT 1994." *World Trade Review* 16.4 (2017): 601-618.

³² Islam, Md Rizwanul, and Shawkat Alam. "Preferential trade agreements and the scope of GATT article XXIV, GATS article V and the enabling clause: An appraisal of GATT/WTO jurisprudence." *Netherlands International Law Review* 56.1 (2009): 1-34.

intellectual property, agriculture, trade-related investments, non-tariff measures linked to trade, etc.³³

While the first five rounds dealt with lowering tariffs individually for each product, from 1964 onwards a system of linear tariff reductions was implemented, reaching an average of five percent in the Tokyo Round, as well as dealing with non-tariff issues in international trade.

In the Kennedy Round, the Agreement on the Implementation of Article VI of the GATT, known as the Anti-Dumping Code, was agreed upon, accommodating differences between member countries and perfecting the understanding of the rules for determining dumping and damage to the local industry. In fact, in the Kennedy Round of the GATT, which took place between 1964 and 1967, standard interpretative texts were drafted in order to make specific articles of the Agreement more comprehensible; among these is the Anti-Dumping Code from the Kennedy Round, which came into force on July 1, 1968, and was replaced by the Anti-Dumping Code drafted in the Tokyo Round of the GATT on January 1, 1980.³⁴

The Tokyo Round came about as a result of the need to adapt the GATT legislation to the global economic difficulties faced in the 1970s, in addition to the US impositions, which, backed by the Grandfather Clause, were avoiding the full application of the GATT provisions, as well as the then European Community making its foreign economic policy more aggressive. In the Tokyo Round, the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII for the GATT was drawn up. In this context of trade expansion, GATT/47 proved to be inefficient in terms of important aspects of international trade, such as the lack of an efficient dispute settlement system and the fact that its rules did not cover certain important sectors of international trade, such as services, intellectual property, investment, and purchases, including governmental ones; parameters for defining unfair trade practices, i.e., dumping; safeguards; and countervailing duties.³⁵

The Uruguay Round of the GATT/1947 was then held, which began on 20 September 1986 with the Ministerial Declaration on the Uruguay Round and ended with the signing of the Final Act at the Ministerial Meeting in Marrakech, Morocco, on 15 April 1994, resulting in major advances in the regulatory treatment of international trade with the conclusion of the Multilateral Trade Negotiations conducted under GATT/47, the institutionalisation of the WTO, the inclusion of controversial issues such as intellectual property and investments, services and agricultural exploitation, reducing subsidies granted to the sector, non-tariff barriers and progressively freeing up the sector, the dismantling of protectionist barriers and market reserves still maintained by the old Multifibre Agreement in the textile field and their inclusion in GATT/94, stricter regulations on government purchases, making them subject to the Government Procurement Code negotiated in the Tokyo Round, more appropriate disciplining of safeguard actions, as well as Anti-dumping Codes and subsidies; defining stricter criteria for calculating the dumping margin and the situations provided for in these laws, as well as dealing with issues such as intellectual property, investments and services; in the final analysis, the facilitation of the rule of law as an alternative to unlimited economic imperialism, this time not as a mere agreement but through the effective institutionalisation of an international trade body - the WTO - which now has improved mechanisms for resolving disputes, combating dumping

³³ Etinski, Rodoljub M. "A Critical Review of Interpretation of Articles III and XX of the GATT 1994." *Zbornik Radova* 52 (2018): 819.

³⁴ Bartels, Lorand. "'Interim agreements' under Article XXIV GATT." *World Trade Review* 8.2 (2009): 339-350.

³⁵ Kim, Jong Bum, and Joongi Kim. "The role of rules of origin to provide discipline to the GATT Article XXIV exception." *Journal of International Economic Law* 14.3 (2011): 613-638.

and subsidies, determining compensatory and safeguard measures, as well as reducing the discretion of the various states in the conduct of their economic policies.³⁶

With the end of the Uruguay Round of GATT/47, after almost fifty years, there remained sufficient cohesion on the part of the various countries—initially eighty and today one hundred and fifty-three—to implement a safe and favorable environment for free trade and strengthen multilateralism.

On April 15, 1994, the WTO institutionally implemented GATT/94 as a successor to GATT/47, making it possible to disseminate and apply trade rules that are agreed upon and accepted in their entirety by the signatory countries subject to its empire. It was a departure from the empire of international economic power to the empire of the law, and it should be noted that the latter, before being cogent, is persuasive, to the extent that it excludes defaulting, protectionist, and disloyal states from the international trade environment.

The WTO plays a decisive role in regulating international trade in that it stipulates, among other things, the most preferred nation clause, as well as determining the binding nature of its rules, which must also amend and underpin the domestic legislation of its members, and, finally, institutionalizing an effective dispute settlement system. Political or random favoritism is eliminated, and technical-rational trade criteria are imposed in the midst of rules that are absolutely and widely known by the trading partners.

Although the rule of law is not perfect, it at least avoids the injustice of the despotic behavior of the major trading superpowers, which act unilaterally and arbitrarily through the use of economic power, protectionist measures, and the imposition of bargaining power in order to constrain, above all, the people. The purpose of the new International Trade Law is for the signatory states to achieve and observe the various multilateral trade principles that prevail over unilateral impositions, bilateral negotiations, or closed regionalism. The negotiations that led to the creation of the WTO were the result of discontent on the part of both the developed countries and the Peds; the former were anxious about the need to include services in the GATT negotiations or to prevent the actions of so-called free riders, such as Japan, which, for the Americans, traded under unreasonable conditions that could not be curbed through multilateral principles and agreements, while the latter, the Peds, remained dissatisfied because of the exclusion from GATT of issues related to sectors crucial to their economies, such as trade in agricultural products and textiles and the unilateral imposition of measures, among others.³⁷

While the creation of the WTO has revolutionized international trade relations, respecting the position of the various Members and favoring the Peds in order to enable the essential development of the various peoples, it still faces structural problems, such as the failure to definitively eradicate the possibility of unilateral trade retaliation, the accommodation of regional economic associations in relation to the other Members, as well as conjunctural problems such as unemployment, the world recession, and the differentiation of developed economies in relation to developing economies.³⁸

³⁶ Mastromatteo, Andrea. "WTO and SOEs: Overview of Article XVII and related provisions of the GATT 1994." *Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 8* (2017).

³⁷ Fabbriotti, Alberta. "Article XXVIII, ad Art. XXVIII, GATT, Understanding on the Interpretation of Art. XXVIII of the GATT 1994." *Max Planck Commentaries on World Trade Law—Trade in Goods*. Vol. 5. Martinus Nijhoff Publishers, 2011. 692-715.

³⁸ Trachtman, Joel P. "Toward open recognition? Standardization and regional integration under Article XXIV of GATT." *Journal of International Economic Law* 6.2 (2003): 459-492.

The innovations of the new International Trade Treaty, as well as broadening the understanding of the provisions previously agreed under GATT/1947, set bold tariff targets, providing for tariff equalization through five reductions, starting on January 1, 1999.

The final minutes drawn up at the meeting in Marrakech by the one hundred and twenty-five countries on April 15, 1994 consist of the following documents: the Agreement Establishing the World Trade Organization (WTO) and its four annexes. Annex A, in turn, contains three annexes: Annex (1A), which deals with Multilateral Agreements on Trade in Goods: the General Agreement on Tariffs and Trade 1994 - GATT/94; the Understanding on the Interpretation of Article II: 1(b) of GATT /94; the Understanding on the Interpretation of Article XVII of GATT/94; the Understanding on Balance of Payments Provisions of GATT/94; the Understanding on the Interpretation of Article XXIV of GATT/94; o Understanding on Waivers of Obligations under GATT/94; o Understanding on the Interpretation of Article XXVIII of GATT/94; o Understanding on the Interpretation of Article XXXV of GATT/94; o Marrakech Protocol of GATT/94; o Agreement on Agriculture; the Agreement on the Application of Sanitary and Phytosanitary Measures; the Agreement on Textiles and Clothing; the Agreement on Technical Barriers to Trade; the Agreement on Trade-Related Investment Measures; the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade/94; the Agreement on Pre-shipment Inspection; the Agreement on Rules of Origin; the Agreement on Import Licensing Procedures; the Agreement on Subsidies and Countervailing Measures and the Agreement on Safeguards.³⁹ Annex (1B) refers to the General Agreement on Trade in Services, and Annex (1C) presents the Agreement on Trade-Related Aspects of Intellectual Property Rights. Annex 2 refers to the Understanding on the Rules and Procedures for the Settlement of Disputes, while Annex 3 sets out the Trade Policy Review Mechanisms. Finally, Annex 4 lists the plurilateral trade agreements, including the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Beef Agreement.⁴⁰

The Agreement Establishing the WTO System (GATT/94) is open to acceptance as a whole, while the plurilateral agreements in Annex 4 of GATT/94 are governed by the provisions of each one individually. The basic principles of these agreements are: the sustainable development of world trade and economic activity; the raising of living standards; full employment; a considerable and progressive increase in real income and effective demand; an increase in the production and trade of goods and services and the optimization of the use of world resources; an increase in the international movement and transfer of goods, services, people, and investments; the strengthening of global macroeconomic trade policies; as well as a discussion forum to facilitate negotiations involving its Members and the rational use of world resources within a sustainable development perspective. It also considers the need to make positive efforts for the development of the Peds, enabling them to participate in the increase of international trade. The WTO has an institutional character, constituting an international public law body responsible for conducting trade relations between its members in matters related to the agreements and related legal instruments included in the GATT/94 Annexes. Its functions, according to Article 3 of the Constitutive Agreement, involve: 1. overseeing the application, administration, and operation of GATT/94 and the Multilateral Trade Agreements, as well as providing a legal framework for the application, administration, operation, and negotiations between its Members concerning their plurilateral trade relations; 2. administering the

³⁹ Mrázová, Monika, David Vines, and Ben Zissimos. "Is the GATT/WTO's Article XXIV bad?." *Journal of International Economics* 89.1 (2013): 216-232.

⁴⁰ Wolfrum, Rüdiger, and Peter-Tobias Stoll. "Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994." *WTO-Institutions and Dispute Settlement*. Brill Nijhoff, 2006. 240-254.

understanding for the application of the results obtained in the settlement of disputes and the Trade Policy Review Mechanism (TPRM) established in Annex 3 of GATT/94 and 3. to cooperate, together with the International Monetary Fund and the International Bank for Reconstruction and Development, in the achievement of macroeconomic policies on a global scale, forming the tripod of the world economic system.⁴¹

The structure of the WTO involves the Ministerial Conference, the General Council, which can fulfill the functions of the Dispute Settlement Body and the Trade Policy Review Body established in the TPRM; the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council); as well as the committees established by the Ministerial Conference: the Committee on Trade and Development, the Committee on Balance of Payments Restrictions, and the Committee on Budgetary, Financial, and Administrative Affairs; and, finally, the Permanent Secretariat headed by a Director General.⁴²

The WTO decision-making process strives for consensus, which, once it is not reached and unless there is a specific provision to the contrary determined by an agreement, can be taken by vote, in which one vote corresponds to one member state. Decision-making takes on a democratic character, respecting the will of the Members, and any disagreement as to the understanding or interpretation of the decisions taken becomes the subject of analysis by the Ministerial Conference and the General Council, which have exclusive authority to do so; and in the case of analyzing matters involving one of the Multilateral Agreements on Trade in Goods, they must base their decision on a recommendation from the Council responsible for the operation of the specific Agreement. This decision is taken by a majority of three-quarters of the Members, subject, however, to the provisions on the number of votes for specific amendments laid down in Article X of the WTO's Constitutive Agreement, which outlines the possibilities for amendments to the various WTO Agreements.⁴³

Final considerations

The article deals with the evolution of the legal discipline of trade at the international level, highlighting the General Agreement on Tariffs and Trade (GATT), which was created in 1947 and, in 1994, came under the auspices of the World Trade Organization, the appropriate institution for conducting actions aimed at freeing international trade from restrictive tariff and non-tariff practices.

The GATT-WTO system involves trying to correct the distortions that lead to trade diversion in search of the best allocation conditions for the various factors of production on a global scale, overcoming xenophobic and protectionist attitudes in international trade. To this end, International Economic Law, through the constitutive agreements arising from the Uruguay Round of GATT/47, is of the utmost importance in that it establishes an appropriate forum for efficient legal decision-making, eliminating the excesses caused by the possible unilateral attitude of one of the one hundred and fifty-three countries that make up the WTO today.

The Constitutive Agreement, the related agreements, and the principles of the GATT-WTO, such as the Principle of Most Favored Nation Treatment and the Principle of Nationality,

⁴¹ Dattu, Riyaz, and John Boscariol. "GATT article XXI, Helms-Burton and the continuing abuse of the national security exception." *Can. Bus. LJ* 28 (1997): 198.

⁴² Hafez, Zakir. "Weak discipline: GATT article XXIV and the emerging WTO jurisprudence on RTAs." *NDL Rev.* 79 (2003): 879.

⁴³ Bartels, Lorand, and Christian Häberli. "Binding tariff preferences for developing countries under article II GATT." *Journal of International Economic Law* 13.4 (2010): 969-995.

have the main purpose of persuading the various governments to share their own international commercial environment of healthy competition with efficient use of scarce resources and, furthermore, in the search for optimum solutions for dealing with the various verifiable challenges, whether at the international level or even on the territory of the WTO contracting countries themselves. To this end, the areas in which the GATT-WTO system operates aim, in particular, to overcome barriers to international trade, be they tariffs or non-tariffs, according to rounds of negotiations that gradually fade away the selfishness and commercial distancing in the various corners of the globe.

Direct protectionism, such as tariffs and the imposition of quotas on imports, as well as indirect restrictionism practices, such as the use of technical barriers to trade, must be abolished under the WTO Order, which should be an instrument to prevent the diversion of trade and never a legal means to favor the excesses of the superpowers, the subjugation and impoverishment of the people, and, finally, to exacerbate the economic and political differences between the various nations.

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