Restrictions

Session 4
05 November 2015
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The prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. A basic principle of the GATT system is that tariffs are the preferred and acceptable form of protection .... The prohibition against quantitative restrictions is a reflection that tariffs are GATT's border protection 'of choice'. Quantitative restrictions impose absolute limits on imports, while tariffs do not. In contrast to MFN tariffs which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade distorting effect, their allocation can be problematic and their administration may not be transparent.

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Panel in *Turkey – Textiles* (para 9.63)
What are “prohibitions”? 

- A prohibition is a “legal ban on the trade or importation of a specified commodity”

(Appellate Body, China – Raw Materials, para. 319)
What are “restrictions ... other than duties, taxes or other charges”?

- Also called “non-tariff barriers” (NTB)
  - Quotas
  - Import or export licenses
  - “other measures”
    - “Broad residual category” (Panel Report, Argentina – Hides and Leather, para. 11.17)
    - “Condition or burden that has a limiting effect” (Appellate Body Report, Argentina – Import Restrictions, para. 5.217)
      - However, not every condition or burden will be inconsistent, only those that are limiting (as demonstrated quantitatively or through the design, architecture and revealing structure).
    - “Article XI protects competitive opportunities of imported products” (Panel Report, Argentina – Hides and Leather, para. 11.17)
Which measures are not covered by Article XI?

- Duties, taxes and other charges (governed by Article II:1 of the GATT);
- Internal laws, regulations and requirements (governed by Article III:4 of the GATT), including those enforced at the time or point of importation (as clarified in the Note to Article III); and
- Formalities connected with importation and exportation (governed by Article VIII of the GATT) and administrative procedures used to implement import licensing requirements (governed by the Agreement on Import Licensing Procedures).
Does a measure fall under Article III:4 or XI?

E.g. a sales, marketing and importation ban? Why does it matter?

Country 2 (Importing)

“foreign arm” of the horizontally applicable ban – looks like a ban on importation, but is not.

Ban on sales and marketing

Country 1 (Exporting)
Government limits the entry of textile and apparel to 11 of the country’s 26 ports of entry

Additionally, goods from Panama can entry Colombia customs territory only through 2 designated ports

Panel finds that the port restrictions have a *limiting effect by affecting competitive opportunities for imports* – violation of Article XI

- Higher shipping costs
- Disincentives to import from Panama
- Uncertainty and effect on business and investment plans
Key facts: Indian government requires that importers of automotive kits (car manufacturers) sign an MOU pursuant to which their exports must be equal to their imports ("trade balancing requirement")

Key question: Are the MOUs restrictions "on imports"? Do they impose a limitation? Is it more onerous to import with that condition, generating a disincentive to import?

Panel: there need not be a precise numerical limit to fall under Article XI. Here the limit is the practically possible level of export a given manufacturer can make
Japan – Semiconductors (GATT Panel)

- Does a measure have to be legally binding to fall under Article XI?
- Government builds an administrative structure that, while not formally binding, creates (peer) pressure on industry to limit production and exportation
  - Direct requests
  - Requirement to provide information
  - Monitoring of production costs
  - Institution of supply and demand forecasts
- Panel: A non-mandatory measure is assimilated to a mandatory measure if
  - Creates sufficient incentives or disincentives to trade
  - Operation of the measure depends on Government's action or intervention
Argentina – Hides and Leather

- Representatives of the tanning (processing) industry are present at customs clearance of hides (raw material)
- Panel: "Mere presence of tanners does not lead to the conclusion that there is a restriction"
  - No evidence that customs officials bow to pressure; no evidence of delays; no evidence of "chilling effect"
- No violation of Article XI
  - But a violation of Article X:3(a) – requirement of reasonable administration
Argentina – Import Restrictions

- Several requirements are found to violate Article XI
  - Trade balance or export surplus condition
  - Import reduction requirement
  - Required increase of local content
  - Investment and non-repatriation requirement
  - Uncertainty generated by the unwritten and discretionary nature of the requirements
- "DJAI" procedures
  - Automatic vs. non-automatic
  - Relationship between Article XI and VIII
    - A measure can be covered by both provisions
A budgetary provision can also violate Article XI

In *US – Poultry*, US Congress cuts funding for the implementation of a measure that permits importation of poultry from China

This measure is covered by and violates Article XI
It is consistent case law that Article XI does not protect trade flows. Therefore, a complainant need not show actual trade effects (e.g. a reduction in imports) to prove a violation of Article XI.

- Rather, focus on the “design” and “structure” of the measure

- Why?
  - Simpler – isolating economic effects of one measure with certainty can be almost impossible
  - Not to oblige complainant to wait, to be able to challenge a measure immediately upon adoption
Are the following measures covered by Article XI?

- Issuance of import licenses with a delay of 12 days.
- A quota on imports of leather that is not exhausted and therefore does not effectively reduce the quantity of imports.
- A tariff rate quota with an above quota rate so high that no imports beyond the quota take place.
- A requirement by France that all imports of electronic equipment be channelled through a customs office in Poitiers.
- A requirement by Colombia that all imports of textiles from Panama be channelled through two of Colombia’s eleven customs offices.
- A prohibition to sell imported beef in stores that sell domestic beef.
Are the following measures covered by Article XI?

- Farmers in an importing country periodically physically attack trucks containing agricultural products from another country after they clear customs. They destroy the cargo. The government (police) of the importing country does not intervene.

- Can governmental inaction become a "measure" subject to Article XI?
Voluntary export restraints

What are “voluntary export restraints”?

As the name suggests, under a “voluntary export restraint” an exporting country agrees “voluntarily” to limit the quantities of its exports (“grey-area measures”).

Why would an exporting country impose this limitation on itself?

A 1987 report by the GATT Secretariat explained:

“In many cases these actions have been accepted primarily because of the threat that the alternatives would be unilateral action which (even if in conformity with the General Agreement) could involve considerably more severe cutbacks in the trade of the exporting country.”

“In particular developing countries considered in many cases that they had no choice but to accept a VER. One important factor appears to be the assessment that actions applied unilaterally by the importing country would tend to be more permanent and less transparent than actions the administration of which is left to the exporting country”

(“Grey-Area” Measures – Background note by the Secretariat, MTN.GNG/NG9/W6, 16 September 1987)
Voluntary export restraints

Voluntary Export Restraints are prohibited under Article 11.1(b) of the Safeguards Agreement:

• “[A] Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side”.
  • Examples of “similar measures” include: export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection (footnote 4 of the Safeguards Agreement).

• These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members.

• Any such measure in effect on the date of entry into force of the WTO Agreement (1995) shall be brought into conformity with the Safeguards Agreement or phased out according to Article 11.2.
Automatic and non-automatic import licensing procedures

The “Agreement on Import Licensing Procedures” establishes disciplines for “automatic import licensing” and “non-automatic import licensing”.

**Does this mean that all automatic and non-automatic import licensing regimes are consistent with other covered agreements? Does the Agreement on ILP recognize their legality?**

The Agreement on ILP regulates the **administrative procedures** to operate import licensing regimes, but **does not regulate their substantive content**.

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**Import licensing regime**

- **Administrative procedures**: Agreement on ILP
- **Substantive content**: WTO covered agreements
Automatic and non-automatic import licensing procedures

Procedures vs. Substantive content

In *Korea – Various measures on beef*, the US alleged that Korea’s import regime was trade-restrictive and thus inconsistent with Article 3.2 of the Agreement on ILP. The Panel found:

- “[T]he Panel notes that many of the US claims regarding alleged violations of the Licensing Agreement are concerned with the substantive provisions of Korea’s import [...] regime. It has been repeatedly said that such substantive matters are of no relevance to the Licensing Agreement which is concerned with the administrative rules of import licensing systems.”

- “For these reasons, the Panel does not reach any general conclusion on the compatibility of Korea’s import licensing system with the WTO Agreement”.

(Panel report, *Korea – Various measures on beef*, paras. 784-785)
In terms of substantive content:

**Automatic licenses:** are not inconsistent with Article XI:1 of the GATT.

**China – Raw Materials:**

- “[T]he Panel considers that a licensing system that operates such that a licence to import or export is granted upon application to each and every applicant would not run afoul of Article XI:1.”
- “This is because such a system does not imply any restriction or limiting effect on importation or exportation in connection with the application and granting of the licence.”
- “An example of such a system is one that is designed to gather statistical information or for monitoring purposes, but presents no impediment to obtaining the licence as it is granted in every case.”

(Panel Report, *China – Raw Materials*, para. 7.916.)
Automatic and non-automatic import licensing procedures

**Non-automatic licenses** are supposed to administer an underlying measure that is WTO-consistent. Example: a WTO-consistent quota, SPS/TBT measures, TRQs.

However, if the non-automatic license regime does not administer anything, then it may amount to an import/export restriction in violation of Article XI:1 of the GATT 1947.

*India – Quantitative Restrictions*: “discretionary or non-automatic licensing systems by their very nature operate as limitations on action since certain imports may not be permitted” (Panel Report, *India – Quantitative Restrictions* para. 5.129).

*China – Raw Materials*: “The possibility to deny the licence would be ever present; hence, the system by its very nature would always have a restrictive or limiting effect. It makes no difference, in the Panel's view, that discretion may be applied in a particular case such that a licence is authorized. The system offers no certainty that licences will be granted and hence it is not permissible” (Panel Report, *China – Raw Materials*, para. 7.921).
Disciplines contained in the Agreement on ILP

“Import licensing” is defined as “administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member” (Art. 1.1).

General obligations:

- The rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner (Art. 1.3).
- Application forms and application procedures “shall be as simple as possible” (Arts. 1.5, 1.6).
- “No application shall be refused for minor documentation errors which do not alter basic data contained therein” (Art. 1.7)
Automatic import licensing – Article 2 of the Agreement on ILP

- Automatic licensing procedures shall not be administered in such a manner as to have restricting effects on imports subject to automatic licensing.

- An automatic licensing procedure does not have restricting effects if:
  - Persons or firms that fulfil the requirements for engaging in import operations for affected products are equally eligible to apply for and obtain import licences.
  - Applications may be submitted on any working day prior to customs clearance of goods.
  - Applications, when submitted in appropriate and complete form are approved immediately on receipt (if administratively feasible), but within a maximum of 10 working days.
Automatic and non-automatic import licensing procedures

Non- Automatic import licensing – Article 3 of the Agreement on ILP

“Non-automatic licensing shall not have *trade-restrictive or trade–distortive effects* on imports additional to those caused by the imposition of the restriction” (Art. 3.2).

In *EC – Poultry*, the AB rejected Brazil’s claim that the EC’s licensing procedures were trade-distortive in violation of Art. 3.2 of the Agreement on ILP:

- “Brazil has not, in our view, clearly explained [...] how the licensing procedure *caused* the decline in market share”.
- Particular circumstances: the EC Regulation gave Brazil a 45% share of the TRQ, which was the same as Brazil’s share of exports before the TRQ, Brazil’s volume of exports had risen since the TRQ, and Brazil fully utilized the import licences.
- The AB found that Brazil did not demonstrate a causal link between the claimed trade distortion and the EC licensing *procedure*.

Non-Automatic import licensing – Article 3 of the Agreement on ILP

Other obligations:

- Members administering quotas shall publish the overall amount of quotas, as well as the opening and closing dates of quotas (Art. 3.5(b)).
- Period for processing applications shall be:
  - No longer than 30 days if applications are processed on a first-come first-served basis; and
  - No longer than 60 days if all applications are considered simultaneously. (Art. 3.5(f) Agreement on ILP)
Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties\(^\text{FN}\), except as otherwise provided for in Article 5 and Annex 5.

FN: These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties ...
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FN: These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.
Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties¹⁷, except as otherwise provided for in Article 5 and Annex 5.

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Article 4.2 of the Agreement on Agriculture

- Treatment of agricultural products under the GATT 1947
- Concept of "tariffication" in the Uruguay Round
- Measures prohibited under footnote 1
  - Quantitative import restrictions and charges
  - State trading enterprises
  - Voluntary export restraints
  - Similar border measures
- Other than ordinary customs duties
  - A measure falling under footnote 1 is, by definition, not an ordinary customs duty
Case law under Article 4.2

- "Variable import levy"
  - Chile – Price Band System and Peru – Additional Duties
  - "Inherently variable" if a formula is present that ensures constant variation of a duty
  - Lack of transparency and predictability?
  - Insulates domestic market from international price variations?
Case law under Article 4.2

Sistema de Franja de Precios
Decreto Supremo N°115-2001-EF

FRANJA DE PRECIOS

PRECIOS CIF de Referencia
Derecho variable adicional

PRECIO TECHO US$ 209/TM
Rebaja Arancelaria
PRECIO PISO US$ 162/TM
Case law under Article 4.2

- "Minimum import prices"
  - *Chile – Price Band System* and *Peru – Additional Duties*
- "Similar to variable import levies, but typically work with the transaction value of a shipment, rather than a reference price"
- "Other than ordinary customs duties"
  - No separate analysis required under Article 4.2
  - Gives rise to a violation of Article II:1(b), second sentence, if no "other duty and charge" recorded in the WTO schedule