



# **Dispute Settlement in the World Trade Organization**

**Practice and Procedure**



by  
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and  
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## Preface

This is a work for practitioners, for diplomats and government lawyers who prepare and present cases to dispute settlement panels of the World Trade Organization (WTO) and its Appellate Body, and for private practitioners who advise or represent governments and private clients with an interest in the outcomes of these proceedings. It grew from the experience of its authors, a private practitioner who has advised and represented governments and private parties under both the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT), and a former official of the Legal Affairs Division of GATT and the WTO who advised and assisted numerous panels. We have attempted to address the kinds of procedural questions that confronted us in the very practical world of dispute settlement. We deal with the substantive law of the WTO only incidentally, in connection with procedural issues.

To assist the reader, the appendices contain the texts of the agreements that are the subject of the book, most notably the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*. They also contain the provisions of other WTO agreements relevant to dispute settlement. The full texts of these agreements are available from the World Trade Organization and from its page on the World Wide Web, [www.wto.org](http://www.wto.org). All footnote numbering in the appendices containing particular provisions of agreements corresponds to the numbering in the full text. Since Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* are central to the interpretation of the WTO texts, these too are included in the appendices.

Chapter 3 is based upon David Palmeter and Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AJIL 398 (1998), © The American Society of International Law, substantial portions of which are used with permission.

## **Preface**

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## CHAPTER 1

# Overview

### §1.01 THE ITO, THE GATT, AND THE WTO

#### [1] Bretton Woods and the Havana Charter

Even as World War II was being fought, allied leaders began to plan for the post-war world which, they intended, would not be characterized by the economic isolationism that had marked the pre-war years, particularly the 1930s, and which, many believed, contributed in no small way to the deepening of the Great Depression and the onset of war. In a 1941 speech entitled “Post-War Commercial Policy,” United States Undersecretary of State Sumner Wells said:

Nations have more often than not undertaken economic discriminations and raised up trade barriers with complete disregard for the damaging effects on the trade and livelihood of other peoples, and ironically enough, with similar disregard for the harmful resultant effects upon their own export trade.

The resultant misery, bewilderment, and resentment, together with other equally pernicious contributing causes, paved the way for the rise of those very dictatorships which have plunged almost the entire world into war.<sup>1</sup>

These economic concerns eventually led to the famed July 1944 conference at Bretton Woods, New Hampshire, and the resulting “Bretton

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<sup>1</sup>U.S. DEP’T OF STATE, PUB. NO. 1660, Commercial Policy Series 71 (1941), *quoted in* JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 38 (Bobbs-Merrill, 1969).

Woods organizations,” the International Bank for Reconstruction and Development (commonly known as the World Bank) and the International Monetary Fund. Probably because Bretton Woods was attended only by representatives of finance ministries and not by representatives of trade ministries, an agreement covering trade was not negotiated there. A trade agreement was very much in the minds of allied economic leaders, however, and in early December 1945, the United States issued a proposal for an International Trade Organization, the ITO. But it was not the time for such an ambitious proposal. To the contrary, almost five years to the day later, on December 6, 1950, the United States Department of State announced that the ITO was dead, killed by the United States Congress which — eerily reminiscent of the United States Senate’s treatment of the Treaty of Versailles and the League of Nations — refused to approve it.<sup>2</sup>

Still all was not lost. An odd portion of the ITO, in an odd way, survived. It was known as the General Agreement on Tariffs and Trade, or GATT, and it lasted for nearly half a century, for 47 years. On January 1, 1995, it was replaced by the World Trade Organization, the WTO, an entity broader both in its reach and in its effectiveness, but which is not at all like the ITO was intended to be.

## [2] The negotiation of GATT

The ITO was ambitious, certainly too ambitious for the United States Congress and perhaps, with the advantage of hindsight, too ambitious by almost any reasonable standard. It was negotiated over a two year period, from 1946 through 1948, at a series of meetings in London, New York, Geneva, and finally at a United Nations Conference on Trade and Employment in Havana, Cuba, which produced the “Havana Charter for an International Trade Organization.” As the conference name suggests, the ITO encompassed not only trade policy, but also employment policy. In addi-

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<sup>2</sup>This section draws heavily on RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE: THE ORIGINS AND PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER* (Columbia Univ. Press ed., 1980); ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (Butterworth 2d ed. 1990); JACKSON, *supra* note 1, and on the WORLD TRADE ORGANIZATION, *ANALYTICAL INDEX, GUIDE TO GATT LAW AND PRACTICE* (1995). In addition, JOHN JACKSON, *THE WORLD TRADING SYSTEM* (MIT Press 2d ed. 1997) provides an excellent history and description of the world trading system.

tion, it covered commodity agreements, economic development, and restrictive business practices.

While the more ambitious provisions of the ITO were being negotiated, however, governments were interested in relaxing tariffs and other trade restrictions more rapidly. A Drafting Committee, under the sponsorship of the Preparatory Committee charged with drafting the ITO charter, meeting in January and February 1947 at Lake Success, New York, produced a full draft of the GATT. From April through October 1947, the members of the Preparatory Committee conducted a round of tariff negotiations in the course of their ITO work at the European Office of the United Nations in Geneva. This became the first of GATT's eventual eight rounds of negotiations. It produced the "Geneva Final Act," consisting of the Lake Success text of GATT and the schedules of tariff commitments made by the 25 governments taking part.<sup>3</sup> It also included a "Protocol of Provisional Application" or "PPA," a measure intended to be a temporary expedient, which ended up being fundamental to GATT for its 47-year existence.

### [3] The Protocol of Provisional Application (PPA)

The broad scope of the ITO called for changes in the laws of many signatory governments and, consequently, eventual legislative approval under their various constitutional systems before it could become effective. Some governments did not want to wait until that process was completed and, accordingly, at the end of October 1947, eight of them agreed to apply GATT provisionally as of January 1, 1948.<sup>4</sup> Under the terms of the PPA, the eight undertook to apply parts I and III of GATT fully, and to apply part II only "to the fullest extent not inconsistent with existing legislation."<sup>5</sup> Part I contained just two articles, dealing with non-discrimination among competing foreign suppliers (most-favored-nation, or MFN) and the schedule of tariff rates just negotiated. Part III contained articles dealing, for the most part,

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<sup>3</sup>FINAL ACT ADOPTED AT THE CONCLUSION OF THE SECOND SESSION OF THE PREPARATORY COMMITTEE OF THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT, UN Sales No. 1947.II/10; 55 UNTS 187 (1947).

<sup>4</sup>The eight were: Australia, Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom, and the United States.

<sup>5</sup>55 U.N.T.S. 308, 1 (a) and (b) (1947).

with administrative matters. The substantive heart of GATT, Part II, consisted of Articles III through XXIII. These included provisions covering national treatment, antidumping and countervailing duties, valuation of imports for customs purposes, marks of origin, import and export quotas and limitations, restrictions on imports for balance of payments purposes, exchange arrangements, subsidies, state trading enterprises, governmental assistance to economic development, emergency action on imports of particular products, exceptions to GATT obligations, including exceptions necessary to protect human, plant, and animal life, health, and safety; and exceptions for national security purposes. Part II thus provides the necessary market access complement to Part I.

Together, Parts I and II set out the basic policy agreed to in GATT for trade liberalization that is based on (i) preference for tariff protection to other forms of protection, such as quantitative restrictions or "quotas"; (ii) following on this, abolition (in principle, but not always in practice) of all quotas; (iii) application of quotas only exceptionally and only with multilateral permission; (iv) most-favored-nation (MFN) treatment, granted in principle to all GATT parties, subject to specific, narrowly-drawn, exceptions; (v) national treatment granted to all products of GATT parties that have lawfully cleared customs.

The application of Part II only to the extent that its articles were consistent with existing legislation created what became known as the "grandfather rights."<sup>6</sup> Consequently, parties with grandfathered rights were allowed to continue applying GATT-inconsistent measures notwithstanding their obligations under the General Agreement. Article XXIX:2 of GATT shows how temporary this was intended to be. It provides, "Part II of this Agreement shall be suspended on the day on which the Havana Charter comes into force." This was expected to occur within a fairly short time, so that inconsistent domestic legislation was not expected to be long-lived. But that day never came, and because the Havana Charter never came into force, GATT, for its entire 47 years, was applied on a "provisional" basis.

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<sup>6</sup>An example would be the U.S. countervailing duty law which did not call for a determination of material injury, as called for by Article VI in Part II of GATT, until the United States agreed to include such a requirement for signatories to the so-called 1979 Tokyo Round Subsidies Code or for other countries that entered into comparable bilateral agreements with the United States.



#### [4] GATT's 47 "provisional" years

Between the October 1947 issuance of the Protocol of Provisional Application and its effectiveness on January 1, 1948, most of the other countries participating in the Geneva tariff negotiations also agreed to apply the Protocol. The 1947 Geneva negotiations were followed by seven additional negotiations, called "rounds," each of which involved more countries as additional countries acceded to the General Agreement:

<i>Round<sup>d</sup></i>	<i>Dates</i>	<i>Number of Parties<sup>e</sup></i>
Geneva	1947	19
Annecy	1949	27
Torquay	1950	33
Geneva	1956	36
Dillon	1960-61	43
Kennedy	1962-67	74
Tokyo	1973-79	85
Uruguay	1986-94	128

All of the rounds through the 1960-61 Dillon Round dealt with tariff cuts. In the Kennedy Round, a first, relatively unsuccessful attempt was made to deal with so-called "non-tariff barriers," or NTBs which, as tariffs were cut progressively, became more prominent as trade barriers. A Kennedy Round Antidumping Code and an agreement dealing with a highly protectionist U.S. method of valuing certain chemicals and footwear for customs purposes were not accepted by the U.S. Congress on the stated

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<sup>d</sup>The first four rounds are named for the place where they were held, Geneva; Annecy, France; and Torquay, England. The Dillon Round was named after the United States Under Secretary of State C. Douglas Dillon, and the Kennedy Round after President John F. Kennedy, who were instrumental in starting the rounds. The Tokyo and Uruguay Rounds were named after the city and the country, respectively, where trade ministers agreed to launch the rounds.

<sup>e</sup>Computations of the total number of parties vary from source to source, because some of the original 1947 group subsequently withdrew from GATT (e.g., China, Czechoslovakia) and because countries that acceded to GATT during the course of a round would be counted at the end, but not the beginning. Counts of participants in GATT activities may vary too depending on how the European Union is accounted for — as a single entity or as individual Members.