

Trade Facilitation and the WTO

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Edited by

Sheela Rai and Jane K. Winn

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Edited by Sheela Rai and Jane K. Winn
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Editorial Assistance: Ganesh Prasad Gopalkrishnan,
Deeksha Singh Chauhan, J. Shivam Kumar,
Tanya Bajpai, Nishita Agrawal and Apoorva Satapathy

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National Law University Odisha, Centre for International Trade
Law (CITL)

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FOREWORD

National Law University Odisha (NLUO) promotes synergy between teaching and research. To facilitate this objective, we have set up various Research Centres, and the Centre for International Trade Law (CITL) is one of them. The Centre has been active since its inception. I am happy to note that this Centre actively undertakes research and publishes in the contemporary areas of International Trade Law.

With the adoption of the Agreement on Trade Facilitation on 22nd February 2017, as part of the Bali Package, trade costs are expected to reduce to a significant degree as a result of more rationalised and upgraded customs' procedures. The idea and advantages of trade facilitation have caught the imagination of policy makers and there are proposals to have similar Agreements for services and investment as well. This edited volume is significant because it will stimulate discussion among scholars, practitioners, and policy makers on the various aspects of trade facilitation.

Prof. Jane K. Winn, Professor of Law at the University of Washington School of Law, offered a Global Initiative of Academic Networks course under a scheme by the Ministry of Human Resource Development (MHRD) on International Electronic Commerce Law at NLUO. I appreciate the effort of my colleague Prof. Sheela Rai and my friend Prof. Jane K. Winn and the NLUO Centre for International Trade Law to bring out this book at a crucial time.

I would like to wish the NLUO Centre for International Trade Law a much deserved success for this book and for their future endeavours.

Prof. (Dr.) Srikrishna Deva Rao
Vice-Chancellor, NLUO, Cuttack

PREFACE

Agreement on Trade Facilitation is one item of the Doha Development Agenda which has been successfully completed. Substantive obligations towards liberalisation may largely remain a paper work if the cost of trading is not checked in terms of money, time, and effort. Unnecessary customs formalities and barriers work as a disincentive to trade and reduce the advantages of declining substantive barriers to trade. Hence efforts to reduce bureaucratic red-tape have been made since the 1920s. Effective provisions were introduced in the GATT to ensure that results of trade liberalisation negotiations were not bypassed by procedural bottlenecks and associated costs. The provisions of GATT (Articles V, VIII, &X) are now supplemented by the Agreement on Trade Facilitation. The articles contained in this book have provided comments and critical analysis on the different aspects of trade facilitation measures and the Trade Facilitation Agreement.

Provision under the GATT for trade facilitation and their interpretation in various cases are the jurisprudential base that would support the Trade Facilitation Agreement in future. The paper by Sheela Rai, A. Eluckiaa and Kapil Sharma traces the history of trade facilitation provisions of GATT and their jurisprudential development, which is followed by a general introduction to the Agreement and its negotiating background by Prof. A. Jayagovind. The use of technology is essential for upgradation of customs procedures and reduction of time and costs. Articles by Miriam Goldby, Teresa Rodríguez De Las Heras Ballell and Jane K. Winn discuss the use of technology in trade facilitation. Miriam Goldby discusses the advantages of paperless customs procedure and the existing and necessary international and domestic regulations. Teresa Rodríguez De Las Heras Ballell discusses the use of platform based models for facilitating international trade and cooperation among Members and Jane K. Winn highlights, in her paper, the resistance of Members to a global digital trade facilitation platform in favour of national trade facilitation systems and discusses how that movement towards national single window clearance, as required by the Trade Facilitation Agreement, may also be slow.

Developing countries were generally resistant to the idea of a binding Agreement on Trade Facilitation for economic reasons. Papers by Rutendo

Tavengerwei and Semanti Choudhury trace the negotiating history of the Agreement and the reasons for resistance of the developing countries. The papers then analyse the special and differential treatment under the Agreement and how far it has advanced over the special and differential treatment provisions in other parts of the WTO Agreement. While in other parts of the WTO Agreement the provision is largely a formality, the authors find that it is comparatively more helpful under the Trade Facilitation Agreement.

India was not supportive of Agreement on Trade Facilitation. Developing countries, including India, were not opposed to the idea of trade facilitation measures but wanted them to be voluntary rather than coerced by an international agreement. They felt that this way they could adjust the needed structural and infrastructure reforms at the customs ports within their economic constraints. Papers by Saloni Khanderia Yadav and Utkarsh Mishra discuss the status of India vis-à-vis its obligations under the Trade Facilitation Agreement. Although not rated favourably by the “Doing Business Report” of the World Bank, both the writers find that India has appreciably improvised on its customs procedures and cannot be rated unfavourably against the checklist of requirements of the Agreement.

With the successful inclusion of the Agreement on Trade Facilitation for goods, efforts are being made to have counterpart in other sectors as well. India has proposed an Agreement on Trade Facilitation in Services. The paper by Sheela Rai tries to examine the feasibility of the proposed Agreement by juxtaposing it against the proposed Disciplines on Domestic Regulations (DDRs). The analysis results in the conclusion that most of the provisions of the Agreement on Trade Facilitation in Services are already contained in some form in the Disciplines on Domestic Regulations. But DDRs have a wider agenda, which also includes substantive standards. The author concludes that it would be better to bifurcate the effort and have two Agreements with one taking care of trade procedures and other substantive aspects of domestic regulations. The paper on investment facilitation by A. Eluckiaa and Kapil Sharma examines the proposal submitted for an Agreement on Investment Facilitation. India as expected is resistant to the idea. This paper discusses the various efforts and opinions in relation to investment facilitation and a comprehensive Agreement on Investment. The authors conclude that trade facilitation and investment facilitation are linked and facilitating this synergy would be beneficial for the WTO Members.

Through various chapters, this book, discusses every aspect of trade facilitation as incorporated or proposed for incorporation under the WTO. We thank the authors of the articles for their contributions and responding to all the requests for clarification, and so on, promptly. The first editing stages was completed by the student members of the NLUO Centre for International Trade Law (CITL) and Ganesh Prasad Gopalkrishnan, former student of NLUO. We acknowledge their efforts with thanks as their efforts helped to reduce the work at the final stage of editing. This work would not have been possible without the constant support of Prof. Sri Krishna Deva Rao, Vice Chancellor, NLUO, who ensured that no procedural hassle prevented the production of the book. We would finally like to thank Joanne Parsons for proof reading the manuscript carefully and the publishers, Cambridge Scholars Press, for their support in the production of the work.

Jane K. Winn and Sheela Rai

CHAPTER I

PRELUDE TO THE TRADE
FACILITATION AGREEMENT:
GATT JURISPRUDENCE ON TRADE
FACILITATION

SHEELA RAI, A. ELUCKIAA, & KAPIL SHARMA

It was the devastation of the Second World War that made the winners realise that beggar thy neighbour policy leaves losers everywhere. Mutual cooperation and peaceful co-existence are better than weighing and balancing one's power against another country. In the era of mass production of consumer items, every country would need both raw materials for factories and markets for finished goods. Globalisation through colonisation was neither feasible nor acceptable to the new economic and military powers with few colonies in their basket. Hence, a reduction in trade barriers and non-discriminatory access to resources and markets were considered necessary for a world yearning for peace and prosperity. However, despite the assertions of advocates, self-interest and the free market are usually in a combative relationship endangering the existence of mutual cooperation and peaceful co-existence. It is left to international diplomacy to maintain the precarious balance between the self-interest of big corporations on the one hand and liberal market on the other hand. After the attempt to bring International Trade Organization (ITO) into the world was aborted, the orphaned existence of General Agreement on Trade and Tariff (GATT) for 50 years in a divided world, as well as its success in creating a parent organisation for itself in 1994, owes much to the mature diplomacy of persons involved. Additionally, the build-up of jurisprudence providing international commercial relations created a strong legal base from which many WTO (World Trade Organization) Agreements have sprouted, with the Agreement on Trade Facilitation being the most recent one.

GATT aims at progressive reduction in trade barriers to facilitate the flow of goods across the border. This is achieved through substantive norms restricting the power of WTO Members to prevent the import and export of goods through quantitative restrictions, tariff barriers, or discriminatory treatment. These substantive norms are complemented by administrative norms which ensure that substantive norms are not bypassed by procedural rules. Norms relating to trade facilitation contained in Articles V, VIII, and X are some of them. In the GATT era, these provisions were basic guarantees for substantive gains relating to trade liberalisation and ensured that the results of hard negotiations would not be buried under bureaucratic formalities. These provisions of GATT, as interpreted and developed through case laws, need to be examined properly before we can discuss the Trade Facilitation Agreement.

Freedom of Transit: GATT Article V

In the early years of the seventeenth century Portugal and Spain claimed exclusive right to trade with the East. Their claim was based on the Treaty of Tordesillas, according to which Spain and Portugal had divided the newly discovered ocean routes exclusively between them. Hugo Grotius in the Freedom of the Seas claims “Every nation is free to travel to every other nation, and to trade with it” (Grotius 1609). According to Grotius, since trade was a necessary phenomenon, the right to access trading routes and places was also necessary. On the basis of historical antecedents, he claimed not only freedom of high seas but also what we know today as freedom of transit.

We read of a similar case in the history of Moses, which we find mentioned also in the writings of Augustine, where the Israelites justly smote with the edge of the sword the Amorites because they had denied the Israelites an innocent passage through their territory, a right which according to the Law of Human Society ought in all justice to have been allowed. In defense to this principle Hercules attacked the king of Orchomenus in Boeotia; and the Greeks under their leader Agamemnon waged war against the king Mysia on the ground that, as Baldus has said, high roads were free by nature. Again, as we read in Tacitus, the Germans accused the Romans of ‘preventing all intercourse between them and of closing up to them the rivers and roads, and almost the very air of heaven’ (Grotius 1609)

The principle of freedom of transit found formal recognition in the Barcelona Convention in 1921. It recognised that it was “well to proclaim the right of free transit and to make regulations thereon as being one of the

best means of developing cooperation between States”.¹ It was applied to “Persons baggage and goods, and also vessels, coaching and good stock, and other means of transport”.² It required parties to “facilitate free transit by rail or waterways on routes in use convenient for international transit”.³ Traffic in transit was not to be subject to unnecessary expenses except “solely to defray expenses of supervision and administration entailed by such transit”.⁴ Limited exceptions were allowed for reasons of security, public health, and as a precaution against diseases of animals or plants.

Freedom of transit was incorporated into Article V of GATT and Article 33 of the Havana Charter. The two provisions are largely identical and in turn largely based on the Statute for Freedom of Transit. Article V defines goods in transit as goods, which have their origin and destination beyond the territorial boundaries of the contracting party. It applies to traffic in transit, which is also defined in similar way but does not apply to aircraft although it applies to goods transported through air. It imposes the following obligations on the Members: (a) freedom of transit should be provided through routes most convenient for international transit; (b) no distinction should be made which is based on the “flag of the vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, or vessels or of other means of transport”;⁵ (c) Members may have customs laws and regulations to regulate the goods and traffic in transit through their territory but these should be administered without undue delay or unnecessary and excessive administrative charges, as well as in compliance with the most favoured nation treatment requirements; (d) imported goods should not be discriminated against on the grounds that they have been in transit through a particular country.

While Article V is largely based on Statute for Freedom of Transit, three differences have been pointed out between them (Wolfrum, Stoll & Hestermeyer 2011). One, the Statute has a larger coverage as it also applies to persons in transit but because GATT is a trade agreement on goods it, therefore, covers only goods (including baggage) and vessels. Secondly, the Statute covers aircrafts also in “other means of transport”.

¹ Preamble to the Barcelona Convention 1921

² Article 1 of the Statute on Freedom of Transit; the Statue of Transit is part of the Barcelona Convention.

³ Article 2 of the Statute on Freedom of Transit

⁴ Id. Article 3

⁵ Article V: 2

However, the negotiators of both GATT and the Havana Charter specifically excluded “aircraft” because it was a matter covered by the International Civil Aviation Organization. However, the air transit of goods is covered.⁶ Thirdly, para 6 of Article V of GATT specifically provides that the country of destination would not discriminate against products on the ground of the route of their transit. This is also provided for in Article 2 of the Statute on Freedom of Transit as part of a general provision stating: “No distinction shall be made which is based on the nationality of persons, the flag of vessels, the place of origin, departure, entry, exit or destination, or any circumstances relating to the ownership of goods or vessels, coaching of goods stock or other means of transport.” The difference is that Article V includes an exception to this general non-discriminatory provision. Article V:6 allows any contracting party to maintain “direct consignment requirement” for eligibility to preferential rate of duty or if it “has relation to the contracting party’s prescribed method of valuation for customs purposes.” A fourth difference that can be pointed out is the provision for exceptions. Article V does not have exceptions mentioned in the Barcelona Convention but that is because the exceptions under GATT are contained in Articles XX and XXI. The exceptions contained in Article XX are wider than those contained in Article 5 of the Statute of the Freedom of Transit.

So far the Panel has decided one case where there was an issue in relation to Article V. The case was *Colombia-Indicative Prices and Restrictions on Ports of Entry*.⁷ This case was focused on controlling smuggling and other illegal activities and in it the Columbian customs authority provided for certain port of entry restrictions whereby textiles, apparel, and footwear arriving from Panama and China could only enter Bogota airport or Barranquilla seaport. However, goods, which did not have Panama as their destination and were in transit could be trans-shipped through any of the 11 ports which were open for the import and transit of textiles, apparel, and footwear. The panel agreed with Columbia that Article V:1 and V:2 only covered “goods in transit” which meant that goods were destined for consumption to a third country, that was not Columbia. To this extent Columbian law did not violate Article V’s paragraph 1 or 2. However, there was another aspect of Columbian law which led the Panel to believe that Columbia was violating Article V: 2. This was because the goods arriving from Panama and in transit through Columbia required trans-shipment under the Columbian law. The Panel rejected Columbia’s

⁶ Article V: 7 of GATT and Article 33: 8 of the Havana Charter

⁷ WT/DS366/R

defence that since there was no land route from Panama to Columbia, goods would always need a change of mode of transport. Panama had also unsuccessfully argued that goods could pass through Columbia without requiring trans-shipment.⁸

Fees and Formalities connected with Importation and Exportation: GATT Article VIII

In whatever controlled or liberal form it may take place, trade is necessary to sustain human society and the national economy. For ordinary traders, the ease of trading is as important as the freedom to trade. Hence, efforts to liberalise trade started first with attempts to minimise unnecessary bureaucratic procedures and excessive charges for different services. These non-tariff barriers had become a bigger irritant to traders, due to their unpredictability and the amount of time they take. The red tape and unpredictable charges at every step are trade distorting and uneconomical. In 1927, the World Economic Conference recommended “Consular fees should be a charge, fixed in amount and not exceeding the cost of issue, rather than an additional source of revenue. Arbitrary or variable consular fees cause not only an increase of charges, which is at times unexpected, but also an unwarrantable uncertainty in trade.”⁹ The 1923 International Convention Relating to the Simplification of Customs Formalities was the first comprehensive effort for the international regulation of various customs clearing procedures and charges for services rendered. It was finalised with the purpose that commercial relations were not “hindered by excessive, unnecessary or arbitrary customs or other similar formalities”¹⁰ and that signatories revise “the provisions affecting customs or other similar formalities which were prescribed by their laws, or by rules, regulations or instructions issued by their administrative authorities, with a view to their simplification and adaptation, from time to time, to the needs of foreign trade and to the avoidance of all hindrance to such trade, except that which is absolutely necessary in order to safeguard the essential interests of the State.”¹¹ The Convention is comprehensive. It encompasses provisions which are now in Articles VIII and X of GATT along with

⁸ According to Panama’s example, goods could come to Ecuador proceed to Venezuela, and then enter Columbia.

⁹ League of Nations Doc. C. 356.M. 129.1927.II para 5(1)

¹⁰ Article 1 of the International Convention Relating to the Simplification of Customs Formalities

¹¹ Ibid.

other parts of the WTO Agreement, such as Rules of Origin, Import Licensing, and so on.

Article VIII of GATT was not a mandatory provision in its original adoption. It was made mandatory in the review session amendments to Part II of the General Agreement, which entered into force in October 1957.¹² It applies to “fees, charges, formalities and requirements imposed by government authorities in connection with importation and exportation”.¹³ These may include consular transaction such as consular invoices and certificates; quantitative restrictions; licensing; exchange control; statistical services; documents, documentation, and certification; analysis and inspections; and quarantine, sanitation, and fumigation.¹⁴ Article VIII aims to ensure that (a) fees and charges in connection with importation and exportation are approximate to the cost of service provided and not used with protectionist purpose or as a fiscal measure; (b) there is a reduction in the number and diversity of fees and charges; (c) customs formalities are simplified and documentation requirements are minimised; (d) excessive penalties are not imposed for minor breaches in customs formalities and the concerned party is given reasonable opportunity to rectify the shortcoming.

It is noted that Article II:2(c) allows WTO Members to impose “fees and other charges commensurate with the cost of services rendered” in addition to the “ordinary customs duties” or “other duties and charges” mentioned in Article II:1(a). Such “fees and other charges” are not taken into account when assessing whether Members duties and charges are within the bound rate for customs duties and charges as given in the Member’s schedule of concessions annexed to Article II of GATT. It has been held in *US-Customs User Fee*¹⁵ that although there is a slight difference in the wording of Article II: 2 (c) and VIII: 1, the meaning of the two and obligations imposed on Members are the same.

Articles II and VIII of GATT read together mean that taxes at the border, in whatever form, have to be within the bound rate of the Member’s schedule of concessions and fees. Additionally, charges imposed for services rendered may be beyond the bound rate, provided such fees and charges are “commensurate to the services rendered”. The difference

¹² *US Customs User Fee* Para 74

¹³ Article VIII: 4

¹⁴ *Ibid.*

¹⁵ L/6264 - 35S/245

between Article II: 2(c) and Article VIII is that while the former is an exception, the latter imposes a positive obligation irrespective of the fact whether Article II is violated or not and whether any product is subject to tariff binding.¹⁶ Hence, Article VIII applies to “fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III)”.¹⁷

This brings us to an important issue of distinction between “tax” or “duty” on the one hand and “fee” on the other. A straightforward distinction is that taxes and duties, whatever name is given, are imposed and collected by the State in its sovereign capacity. Duties on imports or exports are part of the government’s economic policy and provide a means to regulate the quantity of import and export of products. Under the mandate of GATT, the regulation of imports and exports shall not occur through quantitative restriction but only through tariffs. Hence, Article XI provides for the general elimination of quantitative restrictions and under Article II a Member provides a schedule of concession for various products providing bound rates to which concerned Members have committed for imposition of customs duties. There is no way to challenge a tax as excessive except that it crosses the bound rate; although economists may advance competing theories and continue to debate about the rationale of the nature or amount of tax. There are, no doubt, various reasons for the imposition of taxes, most important being the collection of revenue. But this collection is not in the form of “consideration” for any services rendered. This is what distinguishes fees from tax. Fees or charges in nature of fees are consideration for particular services rendered. “Fee” does not become a “tax” just because the government or a government agency has rendered the service. Hence fees may be challenged as being excessive or not commensurate to services rendered as happened in the *European Communities-Program of Minimum Import Prices Licenses and Surety Deposits for Certain Processed Fruits and Vegetables*.¹⁸ In this case the US challenged the EC measure in relation to the interest charges and costs related to the lodging of security associated with the import certificate as a protectionist measure and argued that it was in violation of Article VIII: 1(a). The Panel noted that the incidence of the charges did not exceed 0.005 per cent and was limited with regard to the approximate costs of administration. According to the Panel, the “costs of services rendered”

¹⁶ Ibid.

¹⁷ Article VIII: 1(a)

¹⁸ L/4687 - 25S/68

would include costs of administration and so the charges were not inconsistent with Article VIII: 1(a).

In *US-Customs User Fee*¹⁹ and *Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*,²⁰ the Panel distinguished between tax and fee. It is noteworthy that in *US-Customs User Fee* the Panel made general observations that the term “service” as used in Article II: 2(c) and Article VIII did not mean “service” in the economic sense of the term because they do not “endow goods with safety or quality characteristics deemed necessary for commerce”.²¹ According to the Panel “they are not desired by the importers who are subject to them. Nor do they add value to the goods in any commercial sense.”²² The Panel considered that it was actually a sort of tax. “It must be presumed, therefore, that the drafters meant the term ‘services’ to be used in a more artful political sense: i.e., government activities closely enough connected to the processes of customs entry that they might, with no more than the customary artistic license accorded to taxing authorities, be called a ‘service’ to the importer in question. No other interpretation can make Articles II: 2(c) and VIII:1(a) conform to their generally accepted meaning.”²³ The Panel, however, held that charges under Article VIII: 1(a) had to satisfy three criteria:

- (a) The charge must be “limited in amount to the approximate cost of services rendered”
- (b) It must not “represent an indirect protection to domestic product”
- (c) It must not “represent—a taxation—of imports for fiscal purposes.

Based on the facts of the case, the Panel also distinguished between fee and tax. In this case the US collected fee on an ad valorem basis. The ad valorem fee was calculated by dividing the total cost of customs processing by the total value of the imports processed. Complainants in this case had argued that the “cost of service rendered” should mean cost of actual service rendered to individual importer with respect to the customs entry in question. The US argued that the “cost of services” did not mean exact conformity between fees and cost. According to the US, the “cost of service” requirement would be “satisfied if the total revenues

¹⁹ L/6264-35S/245

²⁰ WT/DS56/R

²¹ Report of the Panel, Para 77

²² Ibid.

²³ Ibid.

from the fee did not exceed the total cost of the government activities in question, and if the fee were otherwise fair and equitable in its application”.²⁴ The Panel agreed with the complainants that “cost of service” would only include services rendered to an individual importer. According to the Panel, this interpretation was in keeping with general practice when “services” are charged for, which is to charge the same fee for the same service received. If the US contention that the cost of service rendered meant the total cost of the relevant government activities was accepted, there would be no express standard under Article II: 2(c) and VIII:1(a) to apportion such fees among individual importers.

At the same time, observing that the fee and charges under Article II: 2(c) and VIII:1(a) were a type of tax, the Panel further noted that the provision should be carefully interpreted because excessive charges would serve protectionist purposes and could violate the bound rate under Article II:1(a). Hence, in any case, charges should be commensurate to services rendered. Ad valorem collection of charges would “permit a broader variety of import fees to be imposed, and the greater availability and convenience of such fees would, the Panel believed, lead to an increase in both the number and the level of such fees”²⁵ and the collection of customs fees and charges would not be commensurate to services rendered. The finding of the Panel in this case was reiterated by the Panel in *Argentina: Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*.²⁶ In this case, Argentina argued that the ad valorem charge for statistical services without minimum or maximum limit was not for any service rendered to an individual importer but to foreign trade operators in general and foreign trade as an activity *per se*. According to the Panel:

An *ad valorem* duty with no fixed maximum fee, by its very nature, is not “limited in amount to the approximate cost of services rendered”. For example, high-price items necessarily will bear a much greater tax burden than low-price goods, yet the service accorded to both is essentially the same. An unlimited *ad valorem* charge on imported goods violates the provisions of Article VIII because such a charge cannot be related to the cost of the service rendered.²⁷

The difference between trade barriers in the form of tariffs or quotas was highlighted again in *China-Measures Relating to the Exportation of*

²⁴ Report of the Panel, Para 79

²⁵ Report of the Panel, Para 85

²⁶ WT/DS56/R

²⁷ Report of the Panel, 6.75

*Various Raw Materials.*²⁸ In this case, China allocated export quotas for bauxite, fluorspar, and silicon carbide through a bidding process. The enterprise winning the bid had to pay the winning price, which was equal to the bid price multiplied by bid quantity. The US held that the bid price was a “fee or charge” imposed in connection with exportation and was violative of Article VIII because it was not commensurate with the services rendered. China argued that Article VIII:1(a) covered the “fee and charge” applied “in connection with the processing of customs entries applied at the border”. The US referred to the terms, “quantitative restrictions” and “licensing” used in Article VIII: 4 to emphasise that all fees or charges connected with export restraints or license fees are prohibited. But the Panel emphasised the term, “in connection with exportation” used in article VIII: 1(a) “and thus not each and every fee, charge, formality and requirement associated with quantitative restrictions or export licensing fall within the scope of Article VIII”. According to the Panel, Article VIII: 1(a) and Article VIII: 4 are limited to fees and charges connected with “services rendered” and hence would “typically include specific fees, charges, formalities or requirements, associated with customs-related documentation, certification and inspection, and statistical matters”.²⁹ It agreed with China that the bid winning price reflected the value which the exporter attached to the right to export and since the bidding process took place sometime before the exporter makes a binding commitment, it was not an activity connected with customs formalities. Successful applicants after the bidding process could enter into sales contracts and thereafter present the goods at the border for exportation. The enterprise winning the bid may decide not to export at all or may decide to export less than the allocated quota. The precise moment when the enterprise would export was also not clear from the bidding process. According to the Panel, this type of arrangement was not a fee or charge on or in connection with exportation. Highlighting the difference between Article XI: 1 of GATT and Article VIII:1(a) the Panel observed:

[a] quantitative restriction or a licensing requirement of the kind at issue in this case does not on its own amount to a fee or charge within the meaning of Article VIII:1(a). As noted above, quantitative restrictions and licensing requirements are regulated generally under Article XI: 1 of the GATT 1994. Under Article VIII, fees or charges imposed in connection with exportation must involve a service rendered, and must be limited in

²⁸ WT/DS394/R

²⁹ Report of the Panel, 7.832

amount to the approximate cost of services rendered. If one or more of these requirements are missing, Article VIII does not apply.³⁰

In conclusion, one can say that the fees and charges collected at the border are not barriers to importing or exporting; therefore, they are not a tariff or tax within the meaning of Article II: 1(a). They are charged as consideration for services rendered even if the exporter or the importer does not desire them. However, since the government usually renders such services and these fees and charges are generally fixed and collected by the State, there is always a possibility they may be a disguised tax on imports or exports. Therefore, provision under Article VIII is important to ensure that such fees and charges are “commensurate to the services rendered” in order to maintain their character as a fee and prevent them from becoming a tax.

Publication and Administration of Trade Regulation: GATT Article X

Articles 4 and 6 of the International Convention relating to the Simplification of Customs Formalities³¹ provide the basis for Article X of GATT but the language of the text of Article X was heavily influenced by US legislation. The US enacted an Administrative Procedures Act in 1946, which made the administrative processes of the US transparent. However, many countries lacked such a provision in their domestic law. Therefore, the US proposed a transparency clause in the Havana Charter and GATT, which was incorporated in Article 38 and Article X respectively. Obligations imposed on Members under Article X are:

- (a) Publication of all laws, regulations, judicial decisions and administrative rulings of general application on any matter related to import or export of goods such as rates of duty, classification of goods, customs procedures etc.
- (b) Publication of any agreement, which the government may have with any government agency or government agency of any other Member which may affect international trade policy
- (c) Measures of general application relating to rates of duty or charges or new and burdensome obligations are to be published before being enforced

³⁰ Report of the Panel 7.846

³¹ International Convention relating to the Simplification of Customs Formalities and Protocol of Signature (Treaty Series No. 16 [1925]).

- (d) Confidential information that may impede law enforcement or be contrary to public interest or adversely affect commercial interest need not be published
- (e) Laws regulations, decisions and rulings have to be administered in a uniform and impartial manner
- (f) Independent judicial, arbitral, and administrative tribunals have to be instituted to review and correct any administrative action relating to customs matters. Decisions of such tribunals have to be implemented unless an appeal is filed against such decisions at a higher forum.

Article X is sometimes dubbed as a provision of transparency and due process. This provision provides for “full disclosure of governmental acts” affecting the Member states and other traders.³² The objective behind this provision is that Members and other traders affected by governmental rules should have a reasonable opportunity firstly, to acquire information about such governmental measures and, secondly, to act on such measures. It may be that traders may have to adjust their activities accordingly or seek amendments.³³

At the time of adoption of Article X, there was no discussion on this provision. A Canadian negotiator is quoted saying that this Article does not contain any substantive requirement and is not of any concern (Ostry 2002). Although the original intention behind the introduction of this Article was to create a level playing field for the US exporters in line with the transparency provision in US Administrative Procedures Act, 1946, this provision also curbs the discretion of the States through transparency and due process.

Few cases involved the question of the violation of Article X in the GATT era disputes. There are only nine decisions from the GATT era that deal with the violation of Article X and most of these cases involved the US.³⁴

³² *US Restrictions on Imports of Cotton and Man-Made Fibre Underwear* WT/DS24/AB/R at p. 21

³³ In *US Underwear*, the AB enunciated the objective behind Article X. at p. 21.

³⁴ *US Countervailing Duties on Non-Rubber Footwear from Brazil* (DS18/R-39S/128); *Canada Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* (DS17/R-39S/27); *European Economic Community—Regulation on Imports of Parts and Components* (L/6657-37S/132); *Canada—Import Restrictions on Ice Cream and Yoghurt* (L/6568 - 36S/68); *European Economic Community—Restrictions on Imports of Apple* (L/6513-36S/135); *European Economic Community—Restrictions on Imports of Dessert Apples*

In the GATT era, the violation of Article X was always considered as a subsidiary claim and, in most of the cases, when violation of some other GATT provision was established, the Panel did not deliberate on the issue of the violation of Article X. Generally, the violations of transparency in administrative procedures were interpreted under the “other measures” mentioned in Article XI. It only occurred in *Japan—Trade in Semi-Conductors (Japan—Semi-Conductors)*,³⁵ when the EEC complained that there was lack of information on the monitoring scheme for the export prices of semi-conductors to third-country markets and that there was lack of information concerning conditions for improved access to Japanese markets. The Panel found that there was lack of transparency, which contravened Article X; however, the Panel did not decide on that issue since the measure was also found to be inconsistent with Article XI. This is the first case where the Panel underscored the importance of Article X, although it did not decide on the issue.

In *Canada—Import, Distribution, and Sale of Alcoholic Drinks by Provincial Marketing Agencies*,³⁶ the retail prices that were charged by the provincial liquor boards for imported alcoholic beverages composed of (i) Invoice price; (ii) Federal custom duties collected at the bound rates; (iii) Standard freight to a set destination; (iv) Additional price increases (mark-ups); and (v) Federal and provincial sales taxes. The additional price increases were sometimes higher on imported alcoholic products than on like domestic alcoholic beverages.³⁷ The Panel concluded that the differential mark-ups (mark-ups which were higher on imported alcoholic beverages than domestic ones) could only be justified under Article II: 4 because they had additional costs required for marketing the imported products. The Panel also concluded that the fiscal elements of the mark-ups could also be justified under Article III as Article III: 2 refers not just to internal taxes but also to “other internal charges”. To be justified under Article III, the fiscal elements of mark-ups should not be applied to imported or domestic products so as to afford protection to domestic production. At this juncture, the Panel also noted “if fiscal elements were to be considered as internal taxes, mark-ups would also have to be

(L/6491-36S/93); *Republic of Korea—Restrictions on Imports of Beef* (L/6503-36S/268); *Japan—Trade in Semi-Conductors* (L/6309-35S/116); *Japan—Restrictions on Imports of Certain Agricultural Products* (L/6253-35S/163); *Japanese Measures on Imports of Leather* (L/5623-31S/94).

³⁵ (L/6309-35S/116)

³⁶ (L/6304-35S/37), Para 4.20

³⁷ Report of the Panel, Para 4.11

administered in conformity with other provisions of the General Agreement, in particular Article X dealing with the Publication and Administration of Trade Regulations”.³⁸ This case can be considered as the first that insisted Article X should be complied with alongside the other substantive provisions in GATT 1947.

An important case on Article X in the GATT era is *EEC—Restrictions on Imports of Dessert Apples (EEC-Dessert Apples)*.³⁹ The measure at issue was the licensing and deposit system on dessert apple imports, which was introduced by the EEC. Chile complained that the measure violated Article X: 1 and X:3(a) of GATT 1947. With regard to Article X:1, Chile contended that EEC established the licensing system in just two weeks after the publication of its initial requirements; therefore, giving them scant time to organise their administrative machinery and for traders to get acquainted with the new rules. This led to the violation of the requirement of “published promptly in such a manner as to enable governments and traders to become acquainted with them”.⁴⁰ With regard to the violation of Article X: 3, Chile argued that there was no uniformity in the implementation throughout the Community as some countries required a pro-forma invoice or different procedures for a bank guarantee, and so on. This resulted in licenses being restrictive and non-automatic in character. Chile also contended that the one-month validity period for import licenses (which was later expanded to 40 days but by then Chile had suspended its trade) was too short and violated the requirement of a “reasonable manner” under Article X: 3(a). The EEC contended that the Community’s import licensing system was published promptly in the Official Journal. One Regulation was published three days from its adoption and came into force on the eighth day from the date of publication. This was accepted by the Panel, as there are no time limits or delays expressly mentioned under Article X. However, Article X prohibits backdated quotas, which the Panel found was in violation of Article XIII by the EEC against Chile. With regard to the uniformity issue, the Panel did not find any violation of Article X: 3(a) and held that the EEC Commission Regulations were directly applicable in all ten Member states with some minor administrative variations.

After 1947, there were various efforts to strengthen this provision. Firstly, the Report on Trade Information and Trade Promotion Advisory Service

³⁸ Id. Para 4.20

³⁹ (L/6491 - 36S/93)

⁴⁰ Report of the Panel, Para 6.1

and the Recommendation on Co-operation in the Field of Trade Information and Trade Promotion were adopted in March 1964 which reiterated that the contracting parties should “promptly” forward the copies of laws, regulations, decisions, rulings, and agreements mentioned under paragraph 1 of Article X to the Secretariat.

In the Tokyo Round, an understanding titled “Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance”⁴¹ was adopted on 28 November 1979. This reaffirmed the commitment of the contracting parties regarding publication and notification and also urged the contracting parties to undertake, to the maximum extent possible, the notification of the adoption of trade measures affecting the operation of GATT in advance of its implementation. If such prior notification was not possible, then it could be notified promptly *ex post facto*. The Director-General submitted a proposal on “Notification and Surveillance” suggesting the implementation mechanisms for the provisions contained in Paragraphs 2 and 3 of the Understanding.⁴² Subsequent to this proposal, it was decided to establish a Council for Overview of Developments in the International Trading Environment. This Council, along with the Trade Policy Review Mechanism, was intended to replace the reviews in special council meetings pursuant to Paragraph 24 of the 1979 Understanding. In 1989, the Trade Policy Review Mechanism (TPRM) was established for the collective evaluation, by all contracting States, of the trade policies and practices of individual contracting States and their impact on the multilateral trade regime. Part B of the TPRM under Annex 3 of the WTO Agreement provides for monitoring domestic transparency in government decision-making in the making of trade policies.

During the Uruguay Round, a Decision on Notification Procedures was adopted on 15 April 1994, which called for a Central Registry of Notifications and a review of the notification obligations and notification procedures by the WTO Council on Trade in Goods. Accordingly, the WTO General Council established the Central Registry on 31st January 1995. A reference to Article X has been made in other Annex 1A

⁴¹ (L/4907)

⁴² This proposal was adopted on 26 March 1980. The proposal (i) invited the contracting States to submit notifications in accordance with the calendar set out in the Annexure, (ii) invited the contracting States to submit notifications under Paragraph 3 of the Understanding, especially the notifications covering the measures which are not made under other GATT procedures and (iii) called for a semi-annual review of trade developments by a Council.

Agreements of the WTO as well e.g., the Customs Valuation Agreement, Agreement on Rules of Origin, and Agreement on Safeguards.⁴³

The scope of Article X has been described in the *EC-Poultry* case, which argues that the provision deals only with the publication and administration of governmental measures and not with the substantive content of such measures.⁴⁴ In this case, Brazil challenged the regulations concerning the import licensing set out in Regulation 1431/94 by the European Communities. Brazil contended that the generally applicable rules of the EC relating to frozen poultry meat imports do not let Brazilian exporters know whether their shipment will be governed by in-quota trade rules or out-of-quota trade rules and this omission violated Article X. There was a tariff rate quota prescribed by the EC in the rules of general application and according to this quota any imports over the threshold mentioned in such rules of general application could not benefit from the tariff-rate quota. Imports under the threshold were governed by in-quota trade rules and the imports over the threshold were governed by out-of-quota trade rules. The arrangements, which determined whether a particular shipment was within the tariff quota, were primarily made among the private operators. The EC contended that its general trade regulations were transparent and if it applied its regulations in the manner suggested by Brazil, it could amount to the Member country managing the terms and conditions of the trade completely. The Panel in this case dismissed Brazil's claim under Article X. The Panel held that the laws, regulations, judicial decisions, and administrative rulings mentioned under Article X were to be used as a general application and, therefore, the licences issued to a specific company or to specific shipment cannot be considered as a measure of a "general application" and dismissed Brazil's claim.⁴⁵ The Appellate Body held that Brazil's appeal concerned the substantive content of the EC rules and, therefore, the appeal was outside the scope of Article X.

⁴³ Some other WTO Agreements have their own provisions with regard to bringing transparency in administrative procedures, such as the Agreement on Sanitary and Phytosanitary Measures, Agreement on Technical Barriers to Trade, Anti-Dumping Agreement, Import Licensing Agreement, Agreement on Subsidies and Countervailing Measures. The General Agreement on Trade in Services and the Agreement on Trade Related Aspects of Intellectual Property Rights also have a provision similar to Article X of GATT, 1994.

⁴⁴ WT/DS69/R, Panel Report, Para 269 and 270

⁴⁵ Panel Report, Para 269 and 270

In the *US-Underwear*⁴⁶, the Appellate Body held that “the relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions.”⁴⁷ In the *EC-IT Products* case, the Panel held that “Article X: 1 addresses the due process notion of notice by requiring publication that is prompt and that ensures those who need to be aware of certain laws, regulations, judicial decisions and administrative rulings of general application can become acquainted with them.”⁴⁸ In this case, the US and Chinese Taipei complained about the violation of Article X: 1 by the EC as certain EC measures (CNEN amendments) demonstrated the regulation of a general application pertaining to the classification of products for customs purposes. This measure came into operation when it was voted upon in the Customs Code Committee in October 2006 and in April 2007. However, the measures were only published in May 2008. This delay of one year was challenged as a violation of the requirement of publishing the measures promptly under Article X: 1. The EC contended that the alleged measures were non-binding in nature and had an inherent informative character and that the measures were merely preparatory acts, which were not “made effective”. Chinese Taipei contended that the measures were regulations or administrative rulings within the meaning of Article X: 1 even if they were not formally called “regulations”.

The Panel observed that since CNENs were important in enabling the EC to maintain the uniform application of the Common Customs Tariff and if CNENs were not covered under the obligations in Article X: 1, it would defeat the transparency and due process purpose of Article X. They, therefore, held that CNENs qualified as “laws, regulations, judicial decisions, [and] administrative rulings”. The Panel also held that since the application of CNEN was not limited to a single importer or a single import, it was considered to have a “general application” under Article X: 1. The Panel accepted the US and Chinese Taipei’s arguments that the measure in question pertained to the classification of products for customs purposes. The Panel looking into the circumstances and evidence held that the measures were “made effective” within the meaning of Article X: 1 of the GATT 1994, even before CNEN amendments were adopted by the Commission and published. The Panel held that the publication of the CNEN amendment in the Comitology website was prompt and the publication of CNEN amendments in the EU official journal was held to be

⁴⁶ WT/DS24/AB/R

⁴⁷ WT/DS24/AB/R, Page no 22. See also *EC-Selected Customs Matters* WT/DS315/R

⁴⁸ WT/DS375/R, Report of Panel, Para 7.1015

not prompt. But the Panel held that the posting of draft CNEN on the Comitology website did not constitute as a publication in such a manner as to enable governments and traders to become acquainted with them. Therefore, there was a violation of Article X: 1.

Elements of Article X of GATT 1994

1. *Laws, Regulations, Judicial Decisions, and Administrative Rulings of General Application*

Article X: 1 relates to the publication and administration of laws, regulations, judicial decisions, and administrative rulings of general applications. The obligations under Article X: 1 to publish trade regulations consist of the following elements, namely:

- (i) Existence of laws, regulations, judicial decisions, and administrative rulings of general application which are made effective by a Member state and should pertain to the classification or valuation of products for customs purposes;
- (ii) The obligation to publish such rules promptly in such a manner as to enable governments and traders to become acquainted with them.

As decided in *EC-Selected Customs Matters*,⁴⁹ this Article only deals with the publication and administration of such rules and not their substantive content.

Article X:1 applies to laws, regulations, judicial decisions, and administrative rulings which are “made effective” by a contracting party. The phrase, “made effective”, was interpreted in the *EC-IT Products* case. The Panel noted that Article X: 1 does not provide measures that have to be adopted to be effective. When the Customs Code Committee voted on the measure, the custom authorities applied it. Therefore, the Panel held that the measures were made effective even before they were promptly published. The Panel noted that the phrase, “made effective”, also includes those measures, which are brought into effect in practice.

Specific Measure vs. General Application

The phrase “general application” found in Article X: 1 has been interpreted in various cases. In *EC-Selected Customs Matters*,⁵⁰ the Panel

⁴⁹WT/DS315/R

held that laws, regulations, judicial decisions, and administrative rulings are of general application only if they apply to a range of cases and should not be limited in their scope of application. Panel noted that en the Appellate Body also in *US-Underwear* examined whether the safeguard restraint measure imposed by the US against Costa Rica is a measure of general application within Article X: 2. The Panel had found it to be a measure of general application under Article X: 2. The Appellate Body agreed with the Panel's decision and noted that the measure did not try to be specific to certain individuals or entities, which were engaged in exporting textiles.⁵¹ In *Japan: Measures Affecting Consumer Photographic Film and Paper*,⁵² the Panel held that the requirement of laws, regulations, judicial decisions, and administrative rulings of general application under Article X: 1 should extend to the administrative rulings in individual cases if such rulings establish or revise principles or criteria applicable in future cases. Article X: 1 explicitly states that it deals with rules of "general application". This means that Article X does not deal with specific transactions.

2. Published Promptly in Such a Manner as to Enable Governments and Traders to Become Acquainted with Them

Generally, GATT's provisions are only concerned with transparency between Members but this provision has extended the requirement of transparency in governmental measures vis-à-vis traders as well. In the *Argentina Hides and Leathers* case, the Panel held that Article X examines the real effect of a governmental measure on traders.⁵³

3. Confidential Information

There is an exception given to a publication requirement under Article X: 1 in case the information is confidential in nature, which would impede law enforcement or is otherwise contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises. In the *Argentina Hides and Leather* case,⁵⁴ the Appellate Body provided that from the language of Article X: 1, it is evident that the absence of a requirement for the release of confidential information does not confer an

⁵⁰ Ibid.

⁵¹ WT/DS315/AB/R

⁵² WT/DS44/R

⁵³ WT/DS155/R, Para 11.77

⁵⁴ WT/DS155/AB/R

obligation on the part of the Member states to protect the confidential information.

4. *Official Publication Prior to Enforcement (Article X: 2)*

Article X: 2 provides that in the case of any measure with a general application from a Member which increases custom duties or other charges, or imposes any restriction or requirement which are more burdensome than previous measures, cannot be enforced before it is officially published.

In the *EC and Its Member States: Tariff Treatment of Certain Information Technology Products*,⁵⁵ the Panel held that there are five essential conditions under Article X:2—(a) The existence of a measure; (b) The measure should be of general application; (c) The measure should have been taken by a contracting Member; (d) The measure should be as mentioned in Article X:2; (e) The measure was enforced before the official publication.

The Panel in this case held that a measure under Article X: 2 must be of such a nature which affects an advance in the rate of duty under an established and uniform practice—that is, the advance in a rate of duty must be applied in practice uniformly and its application should be established on a secure basis. As per the facts of this case, the Panel observed that the measure in question did not specify the rates of duty but still could result in the exclusion of certain set top boxes, which had a communication function from duty free treatment. Therefore, the Panel held that since the CNEN amendments had an effect which resulted in advance in the rate of duty, there was a violation of Article X: 2.

5. *Uniform, Impartial and Reasonable Manner: Article X: 3(a)*

Article X: 3(a) is all about basic principles of “fair, equitable, neutral and equal treatment” in administering the laws, regulations, judicial decisions, and administrative rulings. This article establishes the minimum standards of transparency and procedural fairness. The phrase “uniform, impartial and reasonable manner” does not apply to the laws, regulations, judicial decisions, and administrative rulings but rather to the administration of these laws, regulations, judicial decisions, and administrative rulings.⁵⁶

⁵⁵ WT/DS375/R

⁵⁶ *EC-Selected Customs Matters*, Report of Panel, Para 7.116