

Perspectives on the changing spirit of GATT

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Keywords

GATT, WTO, Uruguay round, common commercial policy, non-tariff barriers, non-discrimination, dispute resolution, law

Abstract

Traditionally, the ECJ has treated the international legal framework of the external trade law of the Community with judicial self restraint. Especially the GATT was perceived as a forum for interstate negotiations driven by the spirit of intergovernmental reciprocity. Thus, the ECJ has concluded that the GATT should be protected from intrusion by national authorities and cannot be invoked directly before the court. However, in the context of new developments, GATT and WTO-law are increasingly seen differently: International trade rules can serve as a quasi-constitutional constraint on excessive national trade policy. Basic principles such as the Most Favored Nation clause, the principle of non-discrimination and the prohibition of quantitative restrictions are reinterpreted as protection of economic rights of individuals rather than as protection of interstate reciprocity. Application of GATT-rules by national authorities is thus essential for the effective implementation of the "spirit" of GATT to fight a potential bias in favor of protectionism. This article comments on the historic conditions and the development of this fundamental change in the perception of the spirit of the GATT and tries to assess its consequences.

Kurzfassung

Der europäische Gerichtshof hat die völkerrechtlichen Grenzen der europäischen Außenhandelspolitik traditionell mit Zurückhaltung behandelt: Insbesondere das GATT-Recht ist als Forum für zwischenstaatliche Verhandlungen wahrgenommen worden, das entscheidend vom Prinzip der intergouvernementalen Reziprozität geprägt ist. Die innergemeinschaftliche Anwendung von GATT-Prinzipien erschien in diesem Zusammenhang als unangebrachtes Eindringen in die zwischenstaatliche Diplomatie. Im Kontext neuerer Entwicklungen beginnt sich jedoch eine andere Interpretation des GATT-Rechts als quasi-konstitutionelle Schranke fuer exzessive Maßnahmen innerstaatlicher Außenhandelspolitik durchzusetzen. Elementare inhaltliche Prinzipien der GATT-Rechtsordnung, wie etwa die Meistbegünstigungsklausel, das Prinzip der Inländergleichbehandlung und das Verbot mengenmäßiger Beschränkungen werden als Schutz fuer wirtschaftliche Individualrechte interpretiert. Somit wird die innerstaatliche Anwendung dieser Prinzipien zu einem wesentlichen Aspekt der Implementierung. Dieser Beitrag versucht, den historischen Bedingungen dieses fundamentalen Wechsels in der Wahrnehmung der Ziele des GATT nachzugehen und die Auswirkungen dieses Wechsels einzuschätzen.

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I. Introduction [↑]

GATT law represents an important part of the legal framework for the external trade relations of the Community. Thus, questions of GATT-law are regularly invoked before Community institutions. Especially the ECJ has had opportunity to develop a long-standing case law on the interpretation of GATT and has regularly commented on the "spirit, general scope and wording" of the GATT. In the opinion of the ECJ, GATT is driven by intergovernmental reciprocity and has to be maintained as a forum for interstate negotiations without intrusion by national authorities.(1) Perhaps the most important consequence of this perception of the GATT is the denial of direct applicability of GATT rules within the Community.(2)

However, the literature has recently developed a different perception of the function and spirit of GATT.(3) Following new trends of political economy, GATT-law is perceived as a quasi-constitutional constraint on national trade policy. Application of GATT-rules by national authorities to fight a potential bias in favor of protectionism is thus essential for effective implementation of the "spirit" of GATT. This article comments on the development of this change in perception and tries to assess its consequences.

II. The classical perception: bilateral quid pro quo in international trade [↑]

The roots of the GATT-system are usually traced back to the executive trade agreements of the 1930s.(4) In that system, states offered reductions in national tariffs on important products on a bilateral quid pro quo basis.(5) Where one state reduced its tariff on a specific product, the other knew his trade balance would improve through higher exports. Thus, she could give in on another product and offer the same improvement to her partner. So both states could enjoy the benefits of

increased international division of labor and corresponding productivity advantages without risking a significant trade balance deficit.(6)

However, to ensure the trade balance effect of tariff reductions, more complex circumstances of import/export transactions had to be considered.(7) A tariff reduction could be offset by an increasing tax-load, quantitative restrictions or discriminatory administrative procedures. Therefore, the tariff agreements included not only the negotiated tariff specifications but also a basic set of rules on non tariff barriers.(8)

Over the years, a standard-set of rules evolved that was included in most of the tariff agreements to secure their implementation. Especially three basic principles proved successful in maintaining the required trade balance equilibrium: The Most-Favored-Nation Clause, the Non-Discrimination Clause and a Prohibition of Quantitative Restrictions.

The MFN-Clause guarantees that an increase in export opportunities brought about through a tariff concession is not made void by an even more generous concession to a third state: Every concession to a third state would automatically be valid also for the partner of the agreement.(9) Thus the products of the protected state are always at least as competitive as those of any other state as far as the import regime is concerned. The Non-Discrimination-Clause assures that national legislation does not offset the tariff concession by the imposition of tax provisions. Finally, the prohibition of quantitative restriction ensures that the expected increase in exports is not hindered by quantitative restrictions.

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However, it was neither intended nor possible for these executive agreements to form a "super-constitution" that would substantially restrict national trade legislation.(10) Thus, the control of the equilibrium of the balance of trade effects did not entail a strictly legal law enforcements process. Instead, wide possibilities of short-notice suspension of the tariff-concessions provided the basic remedy for difficulties.(11) If a state realized that an agreement could not fulfill its expectations, an informal attempt of dispute resolution was made. It was not considered decisive if a state had simply miscalculated the trade balance effects of a tariff reduction or if the other state had offset the effects of the tariff reduction by increased taxes. The basic purpose was neither to clarify who was to blame for a disequilibrium nor whether there was a violation of the agreement or not, but to find any mutually satisfactory way to redefine the equilibrium. If no satisfactory solution was found, the agreement was canceled and the tariff-concessions where renounced. Characteristically, there was not even a distinction between "violation complaints" and "non-violation-complaints" in the dispute settlement rules.(12)

The "spirit" of this tradition is in fact based on intergovernmental reciprocity. The basic rules of MFN and non discrimination formed but a forum for bilateral arm twisting in trade negotiations. Thus, to assume that a private person could rely against his own government, for instance, on the prohibition of non discriminatory taxes seems completely out of place.

However, the GATT-system is not simply a child of the executive agreements of the 30s. It is also a result of the planning for a "super-organization" for international trade and the negotiations on the foundation of the ITO.

III. A new Paradigm: The Stillborn ITO [↑]

In November 1945(13) the US State Department(14) presented a paper for "Expansions of World

Trade and Employment," and in 1946 the USA proposed the creation of the "International Trade Organization" (ITO) in the newly founded UN.(15) In February 1946 the ECOSOC voted for a conference for the drafting of the ITO. Finally, in October the first conference took place in London and a „Suggested Charter for an ITO“ was presented.

This Charter represented a change of paradigm:(16) Instead of bilateral, short time technical agreements on a low political level, a permanent, highly legalized international organization with a complete institutional structure should govern international trade relations.(17) Correspondingly, the idea of a law-enforcement procedure through three instances(18) with reference to the International Court of Justice in Den Haag(19) was developed.(20)

From the very beginning this new paradigm was viewed not without skepticism. Access to the ICJ was soon restricted in the drafting process.(21) Non-violation complaints were maintained as a counterweight to the legalized enforcement procedure. Finally the whole organization of the ITO was stillborn.(22)

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However, there was consensus on the basic substantial features of a new trading regime: tariff reductions and the reduction of non-tariff barriers to trade.(23) Therefore, the relevant parts of the ITO charter came into force in what the US Congress called "the executive agreement commonly referred to as the GATT." In April 1947 the second preliminary conference for the ITO took place in Geneva and in October part IV of the ITO Charter was signed by 23 states as "GATT." (24) These provisions simply represented the consensual parts of the prospective ITO(25) without reference to the context of an international organization.(26) In 1948(27) the GATT came into force for 8 states through the Geneva Protocol on Provisional Application.(28)

IV. The GATT – neither flesh nor fish? [↑]

So, what "spirit" did this "General Agreement" represent? On the one hand, it was a piece of the text of the ITO charter – a charter created under the new paradigm of a highly legalized super institution.(29) On the other hand it was a provisionally applied, shortened version in which every reference toward the organizational, structural and institutional elements of the ITO-Charter was carefully avoided.(30)

Perhaps the decisive aspect of analyzing the "spirit" of GATT is exactly that it did not entail a clear message on its own general spirit – it was neither ITO, nor one of the 1930s executive agreements.(31) It lacked the formal authority of an international organization, but thereby it maintained the freedom to develop according to the need of practical experience.(32)

While representing uncertainty in the drafting period rather than a decision for flexibility, in retrospective one can see that this openness for the needs of practice has allowed a constant process of legalization and growth of the institutional aspects of GATT. In 1955 the GATT developed from a single treaty for a one time tariff reduction to a forum for permanent negotiation, when Art. XXVIII on the "modification of schedules" and Art. XXVIII bis on "tariff negotiations" were included.(33)

The next step of legalization came about through the unexpected success in tariff reduction: From 1949 to 1979(34) a nearly global participation in the GATT system was achieved.(35) Moreover, the amount of tariffs as an obstacle to international trade was reduced to near irrelevance.(36) As a consequence, the "hot topics" for the future were no longer questions of tariff-concessions(37) but questions of "supplementary rules:" The exact scope of the MFN-clause, non-discrimination issues,

antidumping, countervailing duties and other non-tariff barriers became primary topics of negotiation.(38) However, these topics required a much more "legalistic" approach than the tariff concessions, since they were much more difficult to handle in terms of trade balance reciprocity.

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The third aspect of this sneaking change in the "spirit" of GATT was the development of a legalistic dispute settlement procedure and a strong institutional aspect of the administration of GATT.(39) In 1952, the first panel decided its case. In 1960, the CONTRACTING PARTIES, who met only once a year delegated important competences to the General Council, who met about 10 times a year.(40) All these developments led to a strong legal and institutional background and more precise rules.(41) On November 29th, 1982, a ministerial declaration of the Contracting Parties proclaimed its consensus on a GATT-system that differed significantly from the original agreement of 1948.(42)

Finally, a completely new treaty was envisaged to codify this development. In 1985, a committee for the preparation of the 8th Negotiating Round was founded and on September 20th, 1986, the Uruguay Round was opened through the Ministerial Declaration in Punta del Este. After a preliminary conference in 1988 in Montreal,(43) the Uruguay Round was completed on December 15th, 1993, in Geneva and on April 15th, 1994, 111 states signed the results in Marrakech. When the WTO-treaty came into force January 1st 1995, many elements of the ITO-plan were finally realized. The fragmentary character of GATT, the problems of free riding and the protocol of provisional application were eliminated.(44)

V. The conceptual counterpart of legalization: constitutional political economy [↑]

Corresponding to this evolution of practical GATT-law and policy, a modern theoretical perception of the function and "general spirit" of GATT begins to evolve. The discussion about the "domestic policy function"(45) of GATT emphasizes its influence as a codification of "constitutional rules" and points to several characteristics that could change the general understanding of the relationship between private persons and GATT decisively.(46)

According to the "Constitutional Political Economy" – movement and its application to the GATT, the primary function of the GATT is not the resolution of interstate disputes, but the regulation of intrastate conflicts of interests.(47) In the perception of this „domestic policy“(48) or „constitutional function“ of GATT,(49) tariffs are essentially a form of redistribution not between governments(50) but between producers and consumers.(51)

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Many national constitutions contain no substantive rules on international trade. Thus, protectionist interests of import competing industries and liberal interests of consumers have to compete on the same level in the ordinary political process.(52) This process, however, is structurally biased in favor of protectionism because of easier access to professional lobbying(53) and lower costs of gaining(54) and organizing information.(55) Thus, political economy predicts lower growth rates and welfare losses through unreasonable protection in the absence of constitutional restraints. Lawyers see the circumvention of constitutional rules on economic human rights and domestic distribution of income.(56) Under this paradigm, external trade law is one of the most dangerous and least controlled

powers of government.(57) Therefore, there is a need for general policy rules to enhance growth and welfare as well a need for constitutional rules to secure the rule of law.(58)

Since the political process is systematically biased, these rules can only come from a level higher than this process, i.e. from a constitutional level.(59) However, even national constitutional law is not sufficient: The only interest group that can compete evenly with protectionist producers is export-orientated industry. However, this group is not interested in national but in foreign import barriers. Therefore, it is necessary to find a common legal rule for national and foreign trade barriers. Only then will import competing industry (favoring protectionism) and export interested industry (favoring liberalism) meet on a level playing field.(60) Thus, *international* trade law is necessary to find a domestic equilibrium between liberalism-orientated and protectionism-orientated interest groups.(61) Free Trade Agreements thereby can work as a "second line of national constitutional entrenchment".(62)

VI. A different view on classical GATT – principles [↑]

This different perception of the "general spirit" of GATT also induces a different view on its general regulatory principles.(63)

The prohibition of quantitative restrictions, for instance,(64) introduces a special test of proportionality in the area of international trade: Higher tariffs increase costs of imports; quantitative restrictions prohibit them. Thus, quantitative restrictions are the more oppressive intervention in the general freedom of contract. So, the (supposedly universal) constitutional principle of proportionality, specialized for the area of external trade by the prohibition of quantitative restriction in the GATT, requires the use of (today economically irrelevant) tariffs as the main policy tool.(65)

Similarly, the MFN-Clause(66) is seen in a new light:(67) Instead of securing intergovernmental reciprocity, it allows individual traders to choose freely and internationally from which producer they want to buy.(68) Governmental price-intervention on the basis of the origin of products is rendered illegal as it intervenes with the right to contract. Thereby the MFN-Clause offers a specialized version of the "low level scrutiny" of the constitutionality of governmental interference with economic rights.

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The same is true for the principle of non-discrimination in Art. III: Governmental intervention on the basis of the distinction between "domestic or foreign" that influences the economics of the choice between potential partners for a contract is reduced to internationally regulated tariffs. Other forms of intervention, for instance through taxes or administrative procedures, are prohibited. If a product has reached the domestic market, the individual can rely on a non-discriminatory treatment and can therefore freely exercise his right to choose his partners for business on the basis of efficiency.

Table

In this "modern" view of the "general spirit" of GATT, the opportunity for individual traders to invoke a GATT-rule against their own government and thus to rely on its direct effect, seems to be the most natural thing to do.

VII. Conclusion: Consequences of the “modern” perception of the spirit of GATT [↑]

Since the coming into force of the WTO-treaty, the ECJ has successfully avoided to address the question whether WTO-law will be construed in the same strictly intergovernmental way as the GATT'47 or not. Perhaps the most important situation in which this question can arise will be a case involving the possible direct effect of WTO-law in the Community. At that time, the European judges will have to make clear whether or not they have been convinced by the modern perception of the spirit of GATT.

As ancient wizards looking at tea-leaves and oracles, European lawyers carefully try to read the signs.⁽⁶⁹⁾ To be sure, there are signs readily at hand for every opinion: The banana decision hit the crusaders for individual rights in international trade like a slap in the face and Affish⁽⁷⁰⁾ and Port⁽⁷¹⁾ seem to extend this ratio decidendi. However, since that time the ECJ has spoken of a "complex question" in the Lehrfreund decision⁽⁷²⁾ and in Hermes/FHT Marketing⁽⁷³⁾ the advocate general seemed to try to pull the judges in the direction of direct effect. As everybody is waiting for a new leading decision, it seems to become obvious that a simple reference to the International Fruit Company line of decisions will not be sufficient to answer the current questions. In the meantime, there is nothing to be done but to wait and speculate.

References [↑]

List of quoted legal sources:

GATT: Art. I, II, III, XI, XXIII; Treaty of Amsterdam: Art. 133 (ex Art. 113), US: Sect. 301, EC: Trade Barrier Regulation

For quoted literature see in the footnotes.

Endnotes [↑]

⁽¹⁾ Bebr, Gerhard, Agreements Concluded by the Community and their possible direct effect: from International Fruit Company to Kupferberg, 20 CMLR 35 – 73 (1983); Rideau, C.D.E. 1974, S. 461, 481; Meng, Werner, Gedanken zur Frage unmittelbarer Anwendung von WTO Recht in der EG, 1061, 1084 in FS Bernhardt (1992).

⁽²⁾ Case 24/74 (International Fruit Company), Judgment of 12.12.1972, ECR. 1972, 1219, 1225.

⁽³⁾ See infra, fn. 47

⁽⁴⁾ The best-known of these agreements is the one between Mexico and the US from 23.12.1942, US Dept. Of State, Executive Agreement Series 311. In 1934 the US enacted the "Reciprocal Trade Agreements Act" thereby empowering the president to agree to tariff reductions up to 50% without explicit authorization by the congress. See Schott, Jeffrey J., US Policies towards the GATT: Past, Present, Prospective, 23, 24 in: Rode, Reinhard (ed.), GATT and conflict management: a transatlantic strategy for a stronger regime (1990).

⁽⁵⁾ Hudec, Robert E., The GATT Legal System: A Diplomat's Jurisprudence, 4 JWTL 615, 616 (1970-II).

⁽⁶⁾ From an economic perspective, however, the mercantilist use of trade balance to measure success

of trade policy is highly problematic: the trade balance is the result of a complex macroeconomic mix, not just the trade policy. See Curzon, Gerard/Curzon Price, Victoria, *The GATT Regime: Issues and Prospects* 7, 16f in: Rode, Reinhard (eds.), *GATT and conflict management: a transatlantic strategy for a stronger regime* (1990).

(7) Kitamura, Hiroshi, *Japan in the GATT*, 47, 49f in: Rode, Reinhard (ed.), *GATT and conflict management: a transatlantic strategy for a stronger regime* (1990) shows how this view depends on mercantilistic premises.

(8) See League of Nations, Reports approved by the Conference on 27 July 1933, and Resolution adopted by the Bureau (Official No. C.435.M.220:199:II) page 30.

(9) Brößkamp, Markus, *Meistbegünstigung und Gegenseitigkeit im GATT*, 28 (Köln 1990).

(10) As executive agreements these agreements were concluded without ratification by the national parliaments. Therefore, national legislation did not regard itself completely bound by these agreements.

(11) Usually a six months notification period was provided for. See, for example, the USA-Mexico treaty, *supra* Fn. 4 Art. XVIII para. 2.

(12) In League of Nations, Memorandum Relating to the Pacific Settlement of International Disputes concerning Economic Questions in general and Commercial and Customs Questions in Particular (Official No. E.666.1931.II.B.1), an analysis showed that none of 37 agreements provided for a distinction between violation complaints and non-violation complaints

(13) Hudec, Robert E. *The GATT Legal System and World Diplomacy* 9 (2nd ed. 1990) traces the roots of the ITO plan back to the "Lend-Lease-Agreements" between the USA and the UK during the second world war.

(14) For the USA the GATT and the there enshrined principle of multilateralism has been the primary instrument of trade policy until the 1980s. Only after the ministerial conference 1982, which was perceived very negatively by US officials, the US concluded bilateral trade agreements with Israel and Mexico and nowadays she has reinvented regional trade agreements with NAFTA. In addition, bilateral "arm twisting" in Sect. 301 procedures have gained increasing importance in recent years. See. Curzon, Gerard/Curzon Price, Victoria, *The GATT Regime: Issues and Prospects* in: Rode, Reinhard (ed.), *GATT and conflict management: a transatlantic strategy for a stronger regime* (1990).

(15) At that point a reference towards monetary and developmental aspects of the envisaged new economic world order of the Bretton Woods System seems to be in place: The ITO was meant to form a part of the "celebrated triad" of IMF, IBRD and ITO, see Cooper, Richard N., *The Nexes Among Foreign Trade, Investment, and Balance of Payment Adjustment*, in 2 *United States International Economic Policy in an Interdependent World* 515, 515 (1971) and Nichols, Philip M., *GATT Doctrine*, 36 *Virginia Journal of International Law* 379, 388 (1996).

(16) Hudec, Robert E., *The GATT Legal System: A Diplomat's Jurisprudence*, 4 *JWTL* 615, 619 (1970-II).

(17) The ITO was meant to be part of the UN-system and to have recourse to a permanent organization of a secretariat and expert employees.

(18) The "Executive Board" a 18 person group of experts, was foreseen to be the first instance, the second instance was "the conference", the plenary organ of ITO, and finally the IJC was meant to be

the third instance.

(19) Hudec, Robert E., *The GATT Legal System: A Diplomat's Jurisprudence*, 4 JWTL 615, 622f (1970-II) even argues that the ICJ was too legalistic to be of any use in international trade disputes, were the decisive issue would be dispute settlement and not law enforcement.

(20) See Suggested Charter for an International Trade Organization of the United Nations, Art. 76.

(21) First, the drafters intended to require political consent of the "Conference" of the ITO. (Art. 76 of the ITO Charter as proposed by the USA). Finally, access to the ICJ was not restricted (so that some could speak of a "rights to go to the ICJ"), but the ICJ could not decide the issue at hand but only give an "advisory opinion" to the ITO as such. The Conference then had to decide, whether and how to implement the legal opinion of the ICJ. Thereby, policy could still override law. See Art. 96 of the ITO Charter.

(22) As the US-congress refused to ratify the ITO Charter during the presidency of president Truman, an "ITO-light" was developed and signed as the GATT. Even before that, the ITO was changed significantly due to trade balance difficulties, abandoned the far reaching plans of the immediate post war area and became "much less biting and binding" than the original plan. At the beginning of the Cold War, the Chinese Revolution and the War in Korea projects like the Marshall Plan seemed more urgent than the conclusion of the ITO. In addition, the sub optimal economic development in the US reduced the tolerance of congress to grant third states trade advantages. See Schott, Jeffrey J., *US Policies towards the GATT: Past, Present, Prospective*, 23, 23ff in: Rode, Reinhard (ed.), *GATT and conflict management: a transatlantic strategy for a stronger regime* (1990).

(23) In the first plan, the GATT-content was negotiated in advance in order to prevent speculation and trade disturbances because of insider knowledge of future tariff reductions. Whereas it became clear that the ITO would not be ratified, the GATT could be finished just within the three year period granted by congress to the president to conclude "preliminary" trade agreements. Jackson, John H., *Implementing the Tokyo Round: Legal Aspects Changing International Economic Rules*, 81 *Michigan Law Review*. 267, 270 (1982-83).

(24) Beginning with 1.1.1948 members should apply parts I (Art I und II) and III des GATT completely, but part II only "to the fullest extent not inconsistent with existing legislation" (the so called grand father clause). Only Hawaii (!) ratified the GATT without reference to the Protocol of Provisorial Application.

(25) "A faithful copy of the Commercial Policy Chapter as it then stood." Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (1946) (=London Report) reprinted in US Dept. Of State Publication 2728 Commercial Policy Series, Annex10 Section H p. 50, quoted in Hudec, Robert E., *The GATT Legal System: A Diplomat's Jurisprudence*, 4 JWTL 615, 632 (1970-II). Most drafters expected that the ITO would be ratified sooner or later and that the GATT then would simply get irrelevant because its content would be included also in the ITO.

(26) Otherwise the US had not been able to conclude the GATT as "Executive Agreement", i.e. without consent of the congress. Even the conclusion of the GATT as an executive agreement was not easily taken by the congress, which for that reason denoted the GATT for more than 20 years as "the executive agreement commonly referred to as GATT" see supra fn. 22.

(27) The decisive acts were performed at the United Nations Conference on Trade and Employment on 21.11.1947 and 24.3.1948 (Havana Conference).

(28) Meng, Werner, Gedanken zur Frage unmittelbarer Anwendung von WTO Recht in der EG, 2031, 1083 in FS Bernhardt (1992).

(29) Actually a piece of the Geneva version of the ITO-draft-charter. Even in the GATT-context the attempt to include the ICJ in the system was made once again, but could not find the necessary consensus. See E/PC/T/C.6/65 und 87/Rev 2 p. 5 (12. February 1947), quoted in Hudec, Robert E., The GATT Legal System: A Diplomat's Jurisprudence, 4 JWTL 615, 632 (1970-II).

(30) See Hudec, Robert E., The GATT Legal System: A Diplomat's Jurisprudence, 4 JWTL 615, 632 (1970-II).

(31) Hudec, Robert E., The GATT Legal System: A Diplomat's Jurisprudence, 4 JWTL 615, 634 (1970-II).

(32) Long, Oliver, Law and its Limitations in the GATT multilateral trade system 1f (1985) points out that there has been a vacuum in international economic relations and that there has not been an occasion to implement a grand plan such as the ITO after the big changes in the immediate post war area. Especially the East-West conflict had been very obstructive towards a complex regulatory scheme for the international trading system. Since neither UNCTAD nor NIWO had a chance to reach the necessary consensus, the "rest" of the ITO, the GATT was the only remaining forum for the development of a working system.

(33) Petersmann, Rights and Duties of States and Rights and Duties of their Citizens, Towards the Constitutionalization of the Bretton Woods System Fifty Years after its Foundation, 1087, 1107f in FS Bernhardt (1992). Cf. Protocol amending the Preamble and Parts II and III of the GATT (10.3.1955) 278 UNTS 168.

(34) The trade rounds took place 1949 in Annency (2nd GATT round, tariff reduction 20%, 10 new members), 1954 in Torquay (3rd GATT, seven new states), 1956 in Geneva (4th GATT round, Japan becomes member state), 1962 in Geneva (5th GATT round "Dillon-Round", 20%-tariff reduction), 1964 – 1967 in Geneva (6th GATT round, "Kennedy-Round", 30-40% tariff reduction and first non tariff barrier regulation negotiations), 1973 – 1979 in Geneva (7th GATT-Round "Tokyo-Round", 35% tariff-reduction).

(35) Starting with 23 member states, in 1985 GATT enjoyed with 122 members and many associated states in different legal ways quasi global character regulating more than 80% of world trade. See Long, Oliver, Law and its Limitations in the GATT multilateral trade system (1985).

(36) See, for instance Curzon, Gerard/Curzon Price, Victoria, The GATT Regime: Issues and Prospects, 7, 8f und Zepter, Bernhardt, Prospects for the Uruguay Round: The Declaration of Punta del Este, 103, 114, both in: Rode, Reinhard (ed.) GATT and conflict management: a transatlantic strategy for a stronger regime (1990). During the period from 1948 to 1979 world trade increased from 30 billion to 2000 billion. See Benedek, Die Rechtsordnung des GATT aus völkerrechtlicher Sicht 1 (1990).

(37) Cf., for instance, Schott, Jeffrey J., US Policies towards the GATT: Past, Present, Prospective, 23, 28 in: Rode, Reinhard (ed.), GATT and conflict management: a transatlantic strategy for a stronger regime (1990).

(38) In 1979, a consensus on 9 non tariff barrier agreements was found, inter alia on textiles, civil aviation, dairy products, beef, dumping, subsidies and procurement.

(39) The legal basis for this development was to be found in Art. XXV para. 1 that provided the

possibility of "joint action" of the CONTRACTING PARTIES. Long, Oliver, Law and its Limitations in the GATT multilateral trade system 6 (1985).

(40) Thereby the institutional presence of GATT was significantly increased: Instead of a conference meeting once a year, now an institution that was nearly permanently in session could regulate important affairs.

(41) I have to admit that the presentation of the historic development is very shortened and simplified. There have been, of course difficulties and moments when people did not believe in the success of GATT. See Curzon, Gerard/Curzon Price, Victoria, The GATT Regime: Issues and Prospects, 7, 8f in: Rode, Reinhard (ed.) GATT and conflict management: a transatlantic strategy for a stronger regime (1990), where it is argued that in times of increasing use of Sect. 301, the "Fortress Europe" and an increasing US trade deficit a power-orientated approach to problems of international trade dominated the approaches to enhance the rule of law in international trade.

(42) Hudec, Robert E., The GATT Legal System: A Diplomat's Jurisprudence, 4 JWTL 615, 616 (1970).

(43) See, for instance, Stewart, Terence P., The GATT Uruguay Round. A Negotiating History (1986-1992).

(44) Petersmann, Ernst Ulrich, Rights and Duties of States and Rights and Duties of Citizens, Towards the Constitutionalization of the Bretton Woods System Fifty Years after its Foundation, 1086, 1110f (1992).

(45) As far as it is demonstrated by the literature, the idea of applying "constitutional economics," as F.A. Hayek and James M. Buchanan [Z.B. Buchanan, James M., Constitutional Economics (1991)] understood it, to GATT was first developed by Jan Tumlir (then director of the GATT Secretariat Economic Research and Analysis Unit). For a detailed presentation of the theoretical background of the argument see the numerous publications by Ernst-Ulrich Petersmann.

(46) See the following text.

(47) On the political economy of international trade see already Johnson, H., An Economic Theory of Protectionism, Tariff Bargaining and the Formation of Customs Unions, 73 Journal of Political Economy, 253-283 (1965).

(48) Parisi, Francesco, The Constitutional and Political Economy of Trade Protection, 5 European Journal of Law and Economics 67-79 (1998).

(49) Petersmann, E.U. Constitutional Functions of International Economic Law (1990); Hauser, H. Domestic Policy Foundation and Domestic Policy Function of International Trade Rules, Außenwirtschaft 41 (1986); Hudec, R.E., GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade, 80 The Yale Law Journal, 1299ff (1971).

(50) See Frey, B.S. Internationale Politische Ökonomie, 12ff (1985); Hauser, H., Foreign Trade Policy and the Function of Rules for Trade Policy Making, in: Dicke, D.C./Petersmann, E.U., Foreign Trade in the Present and a new International Economic Order (1988).

(51) From a legal perspective see for instance Petersmann, E.U., International and European Foreign Trade Law: GATT Dispute Settlement Proceedings against the EEC, 22 C.M.L.R. 441, 442f (1985); from an economic perspective, see for example Krueger, the political economy of the rent seeking society, A.E.R. 291 (1974).

(52) See, however, Art. 29 and 31 of the Swiss Constitution, providing for guarantees for low tariffs and a principle of freedom of external trade. Hilpold, Peter, Die EU im GATT/WTO System, Aspekte einer Beziehung "sui generis" 237 (1999).

(53) Hauser, H., Foreign Trade Policy and the Function of Rules for Trade Policy Making, in: Dicke, D.C./Petersmann, E.U., Foreign Trade in the Present and a New International Economic Order (1988).

(54) For a single consumer, information on effects of specific trade laws is relatively irrelevant and hard to gain, because he consumes many different products. For a single producer this information is already part of his business and very important, since it concerns his major business fields. Thus, the costs of information are much lower.

(55) Typically there is a much smaller number of producers of a certain good than consumers. Small groups are easier and cheaper to organize.

(56) See, for instance, the first banana decision, where Germany argued that the economic rights of its entrepreneurs were violated by the requirement of import-licenses.

(57) Petersmann, Ernst Ulrich, Rights and Duties of States and Rights and Duties of Citizens, Towards the Constitutionalization of the Bretton Woods System Fifty Years after its Foundation, 1086, 1097f (1995).

(58) Petersmann, E.U., Rights and Duties of States and Rights and Duties of their Citizens. Towards the Constitutionalization of the Bretton Woods System Fifty Years after its Foundation, 1087, 1088 in FS Bernhardt (1995) even argues that the protection of economic and social rights of the individual has surpassed the relevance of "classical" liberal rights of the 19th century since the second world war.

(59) For a systematic analysis of the reasons to look for a higher level of regulation to gain legitimacy compare also Franck, T.M., Legitimacy in the International System, 82 AJIL 705, 741, 750 (1988).

(60) Petersmann, Ernst Ulrich, Rights and Duties of States and Rights and Duties of Citizens, Towards the Constitutionalization of the Bretton Woods System Fifty Years after its Foundation, 1086, 1103 und 1107 (1995).

(61) It seems that relatively little is known about the influence of "intrafirm transfers", on the typical interests in the field of international trade, despite the fact that they account for about 50% of international trade. Usually it is simply thought that the Multis favor free trade. See Shell, G.R. Trade Legalism and International Relations Theory: An Analysis of the WTO, 44(5) Duke Law Journal 829-927, 854ff (1995).

(62) Tumlir, J., International Economic Order and Democratic Constitutionalism, 34 ORDO, 71, 80 (1983).

(63) Following Benedek, Die Rechtsordnung des GATT aus völkerrechtlicher Sicht, 49 (1990) general principles in this context shall be defined simply as legal concepts of general relevance without reference to the distinction of structural principles, containing the axiomatic principles of a legal system and functionary principles, containing purposes and content of a legal system. See, for instance, Larenz, Methodenlehre der Rechtswissenschaften 346 (1983); Esser, J., Grundsatz und Norm 39 (1974).

(64) Art. XI GATT.

(65) The tariff lists are negotiated in the GATT rounds and in the "Schedules" become integral parts of the General Agreement itself as Annexes (Art. II para. 7). Long, *ibid.* 23 characterizes this as a "quasi legislative process".

(66) Art. I. See generally John H. Jackson, *The World Trading System* 133ff (The MIT Press, Cambridge etc. 1989), John H. Jackson, *World Trade and the Law of GATT*, 249 (1969).

(67) Ernst-Ulrich Petersmann, *Rights and Duties of States and Rights and Duties of their Citizens. Towards the „Constitutionalization“ of the Bretton Woods System Fifty Years after its Foundation*, in: *Festschrift für Rudolf Bernhardt*, Berlin, Heidelberg 1087-1128, 1106 (1992).

(68) Cf. Special Rapporteur Ustor, *Working Document on the Most-Favored-Nation Treatment Clause*, ILC Yearbook 1968 Vol. II, p. 169, arguing that the actual motive and purpose of the Most Favored Nation Clause ist not equal treatment of states but of individuals.

(69) I dare to use this disrespectful image since I felt this was exactly what I did trying to work on the topic for a doctoral thesis for two years. My excuses to the other wizards.

(70) Case 183/95 (Affish) Judgment of 17.7.1997, ECR 1997, I-4315.

(71) Case C-364/95 und 365/95, (T.Port GmbH Co) Judgment of 10.3.1998.

(72) Decision of the President of the Court of First Instance 12.2.1996, Case T-228/95 R. (Lehrfreund Limited v. Council and Commission), ECR 1996 II-0111.

(73) See Advocate General Tesauro, 13.11.1997, Case 53/96 *Hermes International Kommanditgesellschaft auf Aktien v. FHT Marketing Choice BV, Arrondissementsrechtbank Amsterdam*, ECR 1998 I 3603.

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Table

Comparison between the classical and the modern perceptions of GATT

Area	Classical Perception	Modern Perception
"general spirit"	Bilateral reciprocity	Domestic policy function
MFN (Art. I)	No tricks with third states	International freedom to contract
Non- Discrimination (Art. III)	No tricks with nationality	International "equal protection"
Quantitative restrictions (Art. XI)	No tricks at the border	International "due process"
Dispute Settlement	Mutually satisfactory solution irrespective of whether or not a rule was broken	Rule – based law enforcement
Regime of exceptions	Trade law is deferent to all kinds of "high politics" motives	Legalized, rule based exception regime

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