

# CONTENTS

<i>Table of WTO and GATT Agreements, Treaties, and other International Instruments</i>	xxvii
<i>Tables of National Laws and Regulations</i>	lvii
<i>Tables of WTO and GATT Decisions</i>	lxv
<i>Tables of Court and Administrative Decisions</i>	lxxxix
<i>Overview</i>	ci
<b>1. The World Trade Organization</b>	<b>1</b>
1. Bretton Woods and the failure of the International Trade Organization	1
2. The GATT becomes an international organization	2
3. A summary of GATT obligations	3
4. The GATT tariff negotiating rounds	5
5. The creation of the WTO	6
6. The WTO: functions and structure	9
6.1 Membership, accession, and withdrawal	11
6.2 Decision-making	12
6.2.1 General-decision making	12
6.2.2 Interpretations	12
6.2.3 Waivers	13
6.2.4 Amendments	13
6.3 The WTO as an international organization	14
7. Suggestions for improving the WTO	14
<b>2. Dispute Settlement</b>	<b>17</b>
1. Introduction	18

2.	Dispute settlement in the GATT	19
3.	WTO dispute settlement	21
3.1	General considerations	22
3.2	Institutions	22
3.3	Scope of application	23
3.4	The legal effect of panel and Appellate Body reports	25
3.5	Dispute resolution procedures	25
3.5.1	Objectives	25
3.5.2	Initiation: request for consultations	26
3.5.3	Standing to bring claims	26
3.5.4	Good offices, conciliation, and mediation	27
3.5.5	Arbitration	28
3.6	The panel process	28
3.7	The appeal process	29
3.8	Implementation	30
3.8.1	Reasonable period for implementation	30
3.8.2	Compliance and the “sequencing” problem	30
3.9	Compensation for failure to comply and retaliation	32
3.10	Special dispute resolution procedures	33
3.10.1	Non-violation complaints	34
3.10.2	Situation complaints	35
3.11	Adverse inference	35
3.12	<i>Amicus curiae</i>	36
3.13	Burden of proof	38
3.14	Judicial economy	39
3.15	Standard of review	40
3.16	Critique of the DSU	43
4.	Trade retaliation under national laws	44
4.1	The European Union	45
4.2	Japan	46
4.3	The United States	46
4.4	Critique of trade retaliation under national laws	50
<b>3.</b>	<b>Sources of Law</b>	<b>53</b>
1.	Introduction	53
2.	Sources of law	55
2.1	Covered agreements	55
2.2	Reports of prior panels and the Appellate Body	56
2.2.1	Adopted and unadopted panel reports	56

## Contents

2.3	Custom	64
2.4	Teachings of the most highly qualified publicists	65
2.5	General principles of law	66
2.6	Other International Instruments	67
2.6.1	Agreements referred to in the WTO agreements	67
2.6.2	Agreements between the parties	69
3.	Conflicts of norms	74
4.	Conclusions	75
<b>4.</b>	<b>Remedies</b>	<b>77</b>
1.	The pre-WTO phase	77
1.1	The usual GATT remedy	78
1.2	An alternative remedy: reimbursement and restitution	78
2.	Remedies under the Dispute Settlement Understanding	79
2.1	Violation complaints	80
2.1.1	Recommendations and suggestions	80
2.1.2	Prospective and retrospective remedies	82
2.2	Non-violation and situation complaints	84
2.3	Compensation for failure to comply and retaliation	86
2.3.1	Overview	86
2.3.2	Measuring countermeasures	87
2.3.3	Measuring countermeasures: WTO practice	88
2.3.3.1	The function of countermeasures	90
2.3.3.2	The burden of proof	90
2.3.3.3	The standard of review	91
2.4	Countermeasures: how effective?	92
3.	The case for re-negotiating remedies	94
<b>5.</b>	<b>WTO Law and Domestic Law</b>	<b>97</b>
1.	Introduction	97
2.	The United States	99
2.1	Overview of U.S. law	99
2.2	The relationship between WTO law and U.S. law	100
3.	The European Community	103
3.1	External relations and the EU/EC	103
3.2	The relationship between WTO law and the laws of the EC and its Member States	

4.	Japan	107
4.1	Overview of Japanese law	107
<b>6.</b>	<b>Tariffs, Quotas, and Other Barriers to Market Access</b>	<b>111</b>
1.	Introduction	112
2.	Tariffs and customs rules	113
2.1	The nature of a tariff	113
2.2	Welfare effects of tariffs	113
2.3	Tariff modifications	115
2.4	Reclassification	116
2.5	Valuation	117
2.6	Rules of origin	119
2.7	Customs laws and procedures	121
2.8	Customs fees and formalities	122
2.9	Preshipment inspection (PSI)	122
3.	Quotas	123
3.1	The nature of a quota	123
3.2	Welfare effects of quotas	124
3.3	Prohibition on quotas and other measures that restrain trade	124
3.4	Exceptions to the prohibition on quotas and other measures	126
3.5	Licensing	128
4.	State-trading enterprises	129
5.	Technical barriers to trade	132
6.	Sanitary and phytosanitary measures	133
7.	Sectoral market access agreements	135
7.1	Agriculture	135
7.1.1	Basic obligations	135
7.1.2	Tariffication	137
7.1.3	Subsidies	138
7.1.4	The Doha Agenda	140
7.2	Textiles and clothing	141
7.3	Information technology	141
7.4	Electronic commerce	142

<b>7. The Most-Favoured-Nation Principle</b>	143
1. What is the most-favoured-nation principle?	143
2. Policy basis	144
3. The MFN principle in customary international law	146
4. MFN treatment in the WTO	146
4.1 The MFN obligation under the GATT	147
4.2 Types of “advantage” covered by the MFN obligation	149
4.3 Like products	150
4.4 Conditional “advantage”	151
4.5 Discrimination between firms	153
5. Exceptions to the MFN obligations	154
<b>8. The National Treatment Principle</b>	155
1. What is the national treatment principle?	156
2. National treatment: some key issues	158
2.1 “Like” products	158
2.1.1 Article III:2, first sentence	159
2.1.2 Article III:2, second sentence	159
2.1.3 Article III:4	160
2.1.4 The aim and effects test	161
2.2 The product-process distinction	162
2.3 Technical regulations and sanitary and phytosanitary measures	163
2.4 Application of Article III to state-trading monopolies	164
2.5 Application of Article III national treatment obligations to sub-federal units of WTO Members	165
2.6 The relationship between Article III and Article XI of the GATT	166
3. Taxes	167
3.1 Scope	168
3.2 Border tax adjustment	168
3.3 The non-discrimination principle	169
4. Government regulations	171
5. <i>De Facto</i> discrimination	173

6.	Article XX exceptions	176
7.	Government procurement	177
<b>9.</b>	<b>Safeguards</b>	<b>181</b>
1.	Introduction	182
2.	The legal and policy framework for safeguards in the GATT/WTO regime	183
3.	GATT Article XIX and the Agreement on Safeguards	184
3.1	GATT Article XIX	184
3.2	The Safeguards Agreement	184
3.3	The relationship between GATT Article XIX and the Safeguards Agreement	185
3.4	Investigation	186
3.5	Provisional application	187
3.6	Determination of increased imports	187
3.7	Unforeseen developments	187
3.8	Determination of injury	189
3.8.1	Serious injury or threat of serious injury	189
3.8.1.1	Serious injury	190
3.8.1.2	Threat of serious injury	190
3.8.1.3	Factors to be considered when determining injury or threat thereof	191
3.8.1.4	Domestic industry	192
3.8.2	Causation	192
3.9	Limits on the application of safeguard measures	194
3.9.1	Parallelism	194
3.9.2	Extent of safeguards	197
3.9.3	Selectivity	198
3.9.4	Developing countries	198
3.9.5	GATT Article XIII	199
3.9.6	Duration and review	199
3.10	Notification and consultation	200
3.11	Compensation	200
3.12	The standard of review for safeguard disputes	202
4.	Safeguard measures for balance-of-payment reasons	202
4.1	The GATT	202
4.2	The WTO	206

5.	Safeguard measures in textile and clothing trade	208
6.	Prohibition on voluntary export restraints	209
6.1	Prohibition in the Safeguards Agreement	209
6.2	Tension between voluntary export restraints and competition policy	211
6.2.1	The automobile VER case	211
6.2.2	The steel VER case	214
6.2.3	Analysis of the conflict between trade policy and competition policy	215
<b>10.</b>	<b>Export Controls and National Security</b>	<b>217</b>
1.	Introduction	217
2.	Export restraints	218
3.	Export taxes	219
4.	Security exceptions	220
5.	Extraterritorial application of export controls	224
6.	Conclusions	226
<b>11.</b>	<b>Trade in Services</b>	<b>227</b>
1.	Introduction	228
2.	Overview of the General Agreement on Trade in Services	229
3.	The relationship between GATT and GATS	232
4.	The WTO model for liberalization of trade in services	234
4.1	When to negotiate in the context of GATS	234
4.2	The concept of “services”	235
4.3	Modes of supply	236
4.4	Measures “affecting trade in services”	237
4.5	When are GATS commitments binding?	239
4.6	General obligations and specific commitments	239
4.7	Institutional issues	239
5.	General obligations under the GATS	240
5.1	The GATS “positive list” approach	240
5.2	The MFN clause	240
5.3	Transparency	242
5.4	Domestic regulation and mutual recognition	243

---

5.5	Anticompetitive practices	245
5.6	Subsidies	245
5.7	Safeguards	245
5.8	Developing countries	246
5.9	Exceptions	246
6.	Specific commitments	246
6.1	The limits of general obligations	246
6.2	Market access (Article XVI)	247
6.3	The national treatment obligation (Article XVII)	247
6.4	The relationship between Article XVI and Article XVII	250
6.5	Additional commitments	251
6.6	Modification of schedules	251
7.	Financial services, telecommunications, and maritime transport	252
7.1	What is so special about these agreements?	252
7.2	The Agreement on Financial Services	252
7.3	The Agreement on Telecommunications	254
7.4	The Agreement on Maritime Transport	257
8.	Conclusions	258
<b>12.</b>	<b>Subsidies and Countervailing Duties</b>	<b>259</b>
1.	Introduction	260
2.	The legal framework	263
2.1	Articles XVI and VI of GATT 1994	263
2.2	The SCM Agreement	264
2.3	The SCM Agreement and agricultural subsidies	265
2.4	Institutions and notifications	265
2.5	Developing countries	266
3.	The regulation of subsidies	266
3.1	Definition of subsidy	266
3.1.1	The financial contribution by a government must confer a benefit to the recipient	269
3.1.2	The subsidy must be specific	271
3.1.3	Subsidies are defined by reference to domestic law	271
3.2	The classification of subsidies	272
3.2.1	The “traffic light” approach	272



## Contents

---

3.2.2	Prohibited subsidies	272
3.2.2.1	Who determines whether a subsidy is a prohibited one?	273
3.2.2.2	Remedies against prohibited subsidies	274
3.2.2.3	WTO jurisprudence on prohibited subsidies	274
3.2.2.3.1	Punitive damages in the WTO?	276
3.2.2.3.2	Retroactivity	277
3.2.3	Actionable subsidies	278
3.2.4	Non-actionable subsidies	282
3.2.4.1	Research and development subsidies	282
3.2.4.2	Regional subsidies	283
3.2.4.3	Environmental subsidies	284
3.2.4.4	Who determines whether a subsidy is a non-actionable one?	285
3.2.4.5	Can non-actionable subsidies become actionable?	286
4.	The regulation of countervailing duties	286
4.1	Overview of procedural and substantive obligations	286
4.2	Investigation	287
4.2.1	Initiating an investigation	287
4.2.2	Evidentiary issues	288
4.2.3	The duties of the investigating authority	289
4.3	Provisional application	290
4.4	Determination of subsidy	291
4.5	Determination of injury	291
4.5.1	Domestic industry	293
4.5.2	Causation	293
4.6	The imposition of definitive countervailing duties	294
4.7	Duration and review	295
4.8	Judicial review	295
4.9	Undertakings (suspension of countervailing duty investigations)	296
4.10	Retroactivity	297
4.11	The standard of review for subsidies and countervailing duties disputes	297
5.	Conclusions	298

---

<b>13. Antidumping</b>	<b>301</b>
1. What is dumping?	302
1.1 Dumping as sales below cost	303
1.2 Dumping as international price discrimination	304
1.3 Duration	305
1.4 Cost analysis	305
1.5 Welfare effects	306
1.6 Measures to counteract dumping	306
2. The regulation of antidumping duties	307
2.1 The legal framework of antidumping in the GATT/WTO regime	307
2.1.1 GATT Article VI	308
2.1.2 The Antidumping Agreement	308
2.1.3 Institutions and notifications	309
2.1.4 Developing countries	309
2.2 Investigation	309
2.2.1 Initiating an investigation	309
2.2.2 Evidentiary issues	310
2.2.3 The duties of the investigating authority	312
2.3 Determination of dumping	312
2.3.1 Like product	313
2.3.2 Comparison of third-country prices	315
2.3.3 Constructed value	315
2.3.4 Arm's-length transactions and transactions between affiliated parties	317
2.3.5 Sales below cost	318
2.3.6 Fair price comparisons	319
2.3.7 Averaging	320
2.3.8 Zeroing	321
2.4 Determination of injury	323
2.4.1 Material injury or threat of material injury	323
2.4.2 Factors to be considered when determining injury	324
2.4.3 Factors to be considered when determining threat	324
2.4.4 Cumulation of injuries	325
2.4.5 Causation	325
2.5 Domestic industry	327
2.6 The imposition of antidumping measures	328

2.6.1	Provisional measures	328
2.6.2	Definitive measures	328
2.6.3	Retroactivity	329
2.6.4	Duration and review	329
2.7	Price undertakings (suspension of antidumping duty investigations)	329
2.8	Anti-circumvention	330
2.9	Dispute settlement	331
3.	Criminal penalties and private remedies	333
3.1	The U.S. 1916 Antidumping Act	333
3.2	Future implications of the panel and the Appellate Report on the 1916 Act case	335
4.	Conclusions	336
<b>14.</b>	<b>Regional Trade Agreements</b>	<b>341</b>
1.	Introduction	342
2.	Must preferential trade agreements (PTAs) cover both goods and services in the WTO era?	345
3.	When is a PTA compatible with WTO rules?	347
3.1	The GATT test	347
3.2	The obligation to notify	348
3.2.1	From GATT working parties to the Committee on Regional Trade Agreements (CRTA): just a cosmetic change?	348
3.2.2	The timing of the notification	349
3.2.3	The powers of the CRTA	350
3.2.4	The CRTA in the context of the GATS	351
3.3	The external trade requirement	351
3.3.1	Free-trade areas	351
3.3.2	Customs unions	352
3.3.3	PTAs in the GATS context	356
3.4	The internal trade requirement	356
3.4.1	Substantially all the trade	356
3.4.1.1	The ordinary meaning of the terms	357
3.4.1.2	The context	357
3.4.1.3	The object and purpose of the agreement	358
3.4.1.4	Subsequent decisions	358

3.4.1.5	Subsequent practice	359
3.4.1.6	Preparatory work	360
3.4.1.7	Conclusion	360
3.4.2	“Other restrictive regulations of commerce”	360
3.4.2.1	The context	361
3.4.2.2	Subsequent practice	361
3.4.2.3	Preparatory work	363
3.4.2.4	Conclusion	363
4.	The GATS regime	364
5.	The WTO: less tolerance for PTAs?	365
5.1	Dispute settlement	365
5.2	How will PTAs fare in the WTO?	369
<b>15.</b>	<b>Developing Countries</b>	<b>373</b>
1.	The developing world	373
2.	A bit of history	375
3.	GATT Article XX(h)	380
4.	GATT Article XVIII	380
5.	Part IV of the GATT	382
6.	The generalized system of preferences	383
7.	The Global System of Trade Preferences	385
8.	Special and differential treatment provisions for developing countries in the Uruguay Round	385
9.	Trade and economic development	388
10.	Trade and the right to development	389
11.	Enhancing market access	390
12.	New initiatives	391
<b>16.</b>	<b>Intellectual Property</b>	<b>395</b>
1.	Introduction	396
2.	Types of intellectual property rights addressed in the TRIPS Agreement	399
3.	Overview of the TRIPS Agreement	404

## *Contents*

---

4.	Institutional arrangements	406
5.	Provisions relating to developing countries	407
6.	Public policy criticisms	408
6.1	Benefits and costs of higher IP standards for developing countries	409
6.2	Protection of traditional knowledge and culture	411
6.3	Biological diversity	412
6.3.1	Access to genetic resources	413
6.3.2	Patentability	416
6.3.3	Transfer of technology	417
6.4	Health	418
6.4.1	Compulsory licensing	419
6.4.2	Parallel imports	420
6.4.3	Beyond the TRIPS Agreement	422
6.5	Food	423
7.	The general principles of the TRIPS Agreement	424
7.1	The relationship between the TRIPS Agreement and other intellectual property treaties	424
7.2	Acquisition and maintenance of intellectual property rights	424
7.3	National treatment and most-favoured-nation treatment	425
8.	Minimum substantive standards	425
8.1	Copyright and related rights	425
8.2	Patents	426
8.2.1	Patent excludability	426
8.2.2	Limited exceptions	427
8.2.3	Compulsory licensing	428
8.2.3.1	Differing views on compulsory licensing	428
8.2.3.2	Provisions in the TRIPS Agreement	428
8.3	Trademarks and service marks	429
8.4	Geographical indications	430
8.5	Undisclosed information or trade secrets	430
8.6	Industrial designs	431
8.7	Layout designs of integrated circuits	431
9.	Enforcement of intellectual property rights under the TRIPS Agreement	431
9.1	General principles	431
9.2	Civil and administrative procedures and remedies	432

9.3	Criminal procedures	432
9.4	Border measures	432
9.5	Provisional measures	433
9.6	Dispute settlement	433
10.	Exhaustion of intellectual property rights	434
11.	Restrictive business practices	435
11.1	Types of restrictive business practices involved in technology licensing agreements	435
11.2	Article 40 of the TRIPS Agreement	436
12.	Conclusions	437
<b>17.</b>	<b>Environmental Protection and Trade</b>	<b>439</b>
1.	Introduction	440
2.	Environmental trade demands: a critical analysis	444
3.	The environmental impact of trade	444
4.	The <i>Tuna Dolphin</i> cases: a false start	448
5.	The WTO approach under GATT 1994	451
5.1	GATT Article XX(g)	451
5.2	GATT Article XX(b)	453
5.3	The chapeau of Article XX	454
6.	Multilateral and bilateral environmental agreements	456
7.	Unilateral measures	459
8.	Protection of natural resources	459
9.	Environmental standards and process and production methods	461
9.1	Standards and technical regulations	461
9.2	Process and production methods	461
9.2.1	Environmental agreements	465
9.2.2	Environmental management systems	466
9.2.3	Investment	468
10.	Recycling and packaging	469
11.	Eco-labels	471
12.	The export of hazardous substances and wastes	473
12.1	Domestically prohibited goods	473

## *Contents*

---

12.2	Waste	475
13.	Environmental taxes	476
13.1	Taxes on products	480
13.2	Taxes on resource use	481
13.3	Taxes on inputs	481
14.	Conclusions	483
<b>18.</b>	<b>Technical Barriers, Standards, Trade and Health</b>	<b>485</b>
1.	Introduction	486
2.	The GATT, the SPS Agreement, and the TBT Agreement	486
3.	Health and safety standards under the three agreements	490
3.1	The GATT	490
3.1.1	“Necessary”: a sliding scale	492
3.2	The Sanitary and Phytosanitary Agreement (SPS Agreement)	494
3.2.1	Assessing risks on the basis of scientific principles and evidence	495
3.2.2	Factors to consider when assessing risks	499
3.2.3	The precautionary principle	500
3.2.4	Economic factors to consider when assessing risks to animal or plant life or health	500
3.2.5	Taking into account the objective of minimizing negative trade effects	501
3.2.6	The objective of achieving consistency in the protection against risk	501
3.2.7	SPS measures may not be more trade restrictive than necessary	504
3.2.8	Provisional measures	506
3.2.9	Burden of proof	507
3.2.10	The role of expert witnesses	508
3.2.11	Summary of obligations under the SPS Agreement	509
3.3	The Technical Barriers to Trade Agreement (TBT Agreement)	510
4.	The Cartagena Biosafety Protocol	513
5.	Health and safety: a reprise and synthesis	519

<b>19. Trade and Investment</b>	521
1. Introduction to the trade and investment debate	522
2. The legal framework of trade-related investment measures in the GATT/WTO regime	524
2.1 Introduction to the TRIMs Agreement	524
2.2 TRIMs against the background of the GATT	525
2.3 The legal relationship between the GATT and the TRIMs Agreement	526
2.4 The legal relationship between the TRIMs Agreement and other WTO Annex 1A agreements	529
2.5 Investment issues in the GATS	530
2.6 Investment issues in the TRIPS Agreement	531
3. The regulation of trade and investment	531
3.1 Analysing whether TRIMs are inconsistent with GATT Article III:4 under the TRIMs Agreement	531
3.2 Analysing whether TRIMs are inconsistent with GATT Article XI:1 under the TRIMs Agreement	532
3.3 Notification of existing WTO-inconsistent TRIMs	533
3.4 Transparency	533
3.5 The obligation to eliminate TRIMs within a transition period	534
3.6 The “standstill” obligation	535
3.7 The review of the TRIMs Agreement	535
3.8 Institutional issues	535
4. The MAI: a short-lived story	536
<b>20. Competition Policy and Trade</b>	539
1. WTO and competition policy	540
1.1 Introduction	540
1.2 Anti-competitive conduct that adversely affects international trade	541
1.2.1 International cartels, export cartels, and import cartels	541
1.2.2 Boycotts, tie-in contracts, and vertical restraints	543
1.2.3 Mergers and acquisitions	544
2. Provisions on competition policy in the WTO agreements	545
2.1 Agreement on technical barriers to trade (TBT Agreement)	546
2.2 Trade in services	547



2.3	Intellectual property and trade-related investment measures	549
2.4	Safeguards and antidumping	550
3.	Extraterritorial application of domestic competition laws	550
3.1	In general	550
3.2	The United States	552
3.3	The European Community	554
3.4	Germany	555
3.5	Japan	556
4.	Conflict of jurisdictions	558
4.1	In general	558
4.2	The ICI case	558
4.3	The Swiss Watch case	560
4.4	The Laker case	561
4.5	The GE/Honeywell case	563
4.6	Summary	564
5.	Trade policy and competition policy	565
5.1	Trade policy and competition	565
5.2	The Semiconductor case	565
5.3	Competition policy implications of the Semiconductor Agreement	567
6.	International cooperation in competition policy	568
6.1	Globalizing economy and the need for convergence of competition law and policy	568
6.2	International cooperation in competition policy	569
6.2.1	Types of cooperation in competition policy	569
6.2.2	Positive comity	571
6.2.3	Cooperation in investigation	572
6.2.4	Convergence of competition policy and law	573
6.2.5	The ICPAC Report	575
7.	The competition policy debates in the WTO	577
7.1	Activities of the working group on trade and competition policy in the WTO	577
7.2	Review of the working group's reports	579
7.2.1	Consensus	580
7.2.2	Divergent views	580
7.3	The Ministerial Declaration on Competition Policy adopted at the Doha Ministerial Conference in November 2001	582

## *Contents*

---

8.	Conclusions	584
8.1	Option 1: A declaration that competition policy is an integral part of the WTO regime	584
8.2	Option 2: A plurilateral agreement	584
8.3	Option 3: A non-binding multilateral framework for cooperation in competition policy	586
8.4	Option 4: A partly-binding multilateral framework	587
<b>21.</b>	<b>Future Challenges</b>	<b>589</b>
1.	Three crises	589
1.1	Internal decision-making	590
1.2	Civil society	592
1.3	Developing countries	594
2.	The multilateral trading system at a crossroads	595
3.	Societal issues	599
3.1	The environment	599
3.2	Health	601
3.3	Workers' rights	602
3.4	Human rights	604
3.5	The poor	605
3.6	Intellectual property	607
3.7	Transparency	608
3.8	Governance	608
4.	The Doha negotiating agenda	609
	<i>Index</i>	613