Chapter 3

QUANTITATIVE RESTRICTIONS

1. OVERVIEW OF RULES

Article XI of the GATT generally prohibits quantitative restrictions on the importation or the exportation of any product by stating that "No prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted or maintained by any Contracting Party . . . ." One reason for this prohibition is that quantitative restrictions are considered to have a greater protective effect than tariff measures and are more likely to distort the free flow of trade. When a trading partner uses tariffs to restrict imports, it remains possible to increase exports as long as foreign products become price-competitive enough to overcome the barriers created by the tariff. When a trading partner uses quantitative restrictions (*i.e.*, quotas), however, it is impossible to export in excess of the quota no matter how price competitive the product may be. Thus, quantitative restrictions are considered to have a distortional effect on trade and their prohibition is one of the fundamental principles of the GATT.

However, the GATT provides exceptions to this fundamental principle. These exceptions permit the imposition of quantitative measures under limited conditions, and only if they are taken on policy grounds justifiable under the GATT, such as critical shortages of foodstuffs (Article XI:2) or balance of payment problems (Article XVIII:B). As long as these exceptions are invoked formally in accordance with GATT provisions, they cannot be criticized as unfair trade measures.

2. LEGAL FRAMEWORK

GATT Provisions Regarding Quantitative Restrictions

Quantitative import and export restrictions against WTO Members are prohibited by Article XI:1 of the GATT. GATT provisions, however, provide some exceptions for quantitative restrictions applied on a limited or temporary basis. This section details quantitative restrictions permitted under the exceptions.

Exceptions Provided in GATT Article XI

- "Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting" WTO Member (Paragraph 2 (a));
- "Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade" (Paragraph 2 (b)); and
- "Import restrictions on any agricultural or fisheries product . . . necessary to the enforcement of governmental measures which operate . . . to restrict" production of the domestic product or for certain other purposes (Paragraph 2 (c)).

Exceptions Provided in Other Articles

<u>Non-Economic Reasons</u>

- General exceptions for measures such as those necessary to protect public morals or protect human, animal, or plant life or health (Article XX);
- Exceptions for security reasons (Article XXI).

<u>Economic Reasons</u>

- Restrictions to safeguard the balance of payments (Article XII regarding all WTO Members; Article XVIII:B regarding developing WTO Members in the early stages of economic development);
- Quantitative restrictions necessary to the development of a particular industry by a WTO Member in the early stages of economic development or in certain other situations (Article XVIII:C, D);
- Quantitative restrictions necessary to prevent sudden increases in imports from causing serious injury to domestic producers or to relieve producers who have suffered such injury (Article XIX);[1]
- Quantitative restrictions imposed with the authorization of the Dispute Settlement Body as retaliatory measures in the event that the recommendations and rulings of a panel are not implemented within a reasonable period of time (Article XXIII:2);
- Quantitative restrictions imposed pursuant to a specific waiver of obligations granted in exceptional circumstances by the Ministerial Conference (or the General Council in between Ministerial Conferences).[2]

[1] Quantitative restrictions imposed under the above-mentioned three exceptions should, in principle, be applied in a non-discriminatory manner (Article XIII).

Import Restrictions for Balance-of-Payments Purposes

Under GATT Articles XII or XVIII:B, a WTO Member may restrict imports in order to safeguard its balance-of-payments (BOP) if the International Monetary Fund (IMF) finds that the country is experiencing BOP difficulties (Article XV:2). When a country is designated as an "IMF Article VIII country", it is not generally permitted to institute foreign exchange restrictions. Members have rarely been found to be experiencing BOP difficulties.

Figure 3-1 shows recent developments in WTO Committee on Balance-of-Payments Restrictions consultations. While Article XII can be invoked by all Members, Article XVIII:B can be invoked solely by Members who are in the early stages of economic development and whose economy can only support low standards of living.

Figure 3-1

Consultations in the WTO Committee on Balance-of-Payments Restrictions Under Article XII of the GATT

Country	Year of Resort	Most Recent Consultation	Measures	Circumstance
Slovak Republic	1999	Sept. 2000	Import surcharge (3 percent as of September 2000)	A seven percent surcharge was introduced in June 1999. During the consultations held in September, the Committee found the Slovak Republic in conformity with its obligations under GATT Article XII. The import surcharge was gradually reduced and eliminated in 2001.
Romania	1998	Sept. 2000	Import surcharge on most items (4 percent as of March 1999)	The measure was introduced in October 1998. During the consultations held in February 1999, the Committee found Romania in conformity with its obligations under GATT Article XII. The import surcharge was gradually reduced and eliminated by the end of 2000.

[2] *See* Chapter 1 for a discussion of the conditions for waivers under the WTO Agreement.

<u>Figure 3-2</u>

Consultations in WTO Committee on Balance-of-Payments Restrictions Under Article XVIII: B of the GATT

Country	Year of Resort	Most recent Consultation	Measures	Circumstance
Bangladesh	1962	May 2000	Import restrictions on agricultural products	The Committee approved the plan of the Government of Bangladesh to eliminate BOP restrictions on 11 out of 17 items in December 2000. According to the plan, the restrictions on the 11 items will be fully eliminated by January 2005. With respect to the remaining 6 items, the Committee approved retaining restrictions on: (1) sugar until July 2005, together with the submitted elimination plan (Committee on Balance of Payments, February 2002); and (2) chicken, eggs, paper boxes, Tendu leaves and salt under Article XVIII:B until 2009 (Council for Trade in Goods, October 2002). At the BOT Committee in October 2005, Bangladesh reported that they had eliminated restrictions on paper boxes in July 2005.
Pakistan	1960	Nov. 2000	Import restrictions on textiles, etc.	The government of Pakistan submitted the plan in November 1998, taking 3 stages to eliminate restrictions in 3 years. While Pakistan had committed to eliminate remaining restrictions on the items other than those described in the 1998 plan by the end of June 2002, all import restrictions were abolished ahead of schedule in December 2001. After the elimination of Pakistan's restrictions, Bangladesh remains the only Member that currently exercises BOP measures.

Under Articles XII and XVIII:B of the GATT, a Member may restrict imports in order to safeguard its balance of payments. However, a lack of well-defined criteria with which to judge whether the country has met the conditions of these articles has led to occasional abuse. To correct this, the WTO Agreement has attempted to clarify the conditions for invoking the BOP provisions. These conditions are detailed in the Understanding on the Balance-of-Payments Provisions of the GATT 1994 (the Understanding) and summarized below in the Outline of BOP Understanding. Among other requirements, countries invoking BOP safeguards must now specify products involved and provide a timetable for their elimination. Nevertheless, even with the new Agreement, there appeared to be examples of misuse or abuse of the BOP provisions (e.g., the extremely broad range of quantitative restrictions by India).

The WTO Committee on Balance-of-Payments Restrictions has recommended that Members invoking BOP provisions ultimately phase out the measures. As a result, only Bangladesh is still invoking BOP provisions at present

Outline of BOP Understanding

Conditions and Procedures

- Restrictive import measures taken for BOP purposes "may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation" (Paragraph 4 of the Understanding).
- Members must announce time-schedules for removing restrictive import measures taken for BOP purposes (Paragraphs 1 and 9).
- Wherever possible, price-based restrictions are to be preferred to quantitative restrictions, except in times of crisis (Paragraph 3).
- Cumulative restrictions on the same product are prohibited (Paragraph 3).

Committee on Balance-of-Payments Restrictions

- A Member invoking restrictive import measures for BOP purposes "shall enter into consultations with the Committee within four months of adopting such measures" and consult in accordance with Article XII or XVIII as appropriate (Paragraph 6).
- "The Committee shall report on its consultations to the General Council" (Paragraph 13).

The Agreement on Agriculture

The Agreement on Agriculture created substantial, binding commitments in three areas: market access (tariffication), domestic support (reduction in subsidies) and export competition. These commitments were to be implemented over a six-year period beginning in 1995. This was accomplished despite the following difficulties: (1) the U.S. use of price-support policies to boost grain production and exports to portray itself as “the world’s breadbasket”; (2) the European Union’s Common Agricultural Policy (CAP) that used price supports, variable import levies, and export subsidies, and consequently transformed the European Union from one of the world’s largest importers of agricultural products to one of the largest exporters; and (3) increased competition for grain exports as the shortages that existed through the mid-1970s turned into surpluses because of changes in the international supply-and-demand balance.

Fig. 3-3, below, outlines the market access provisions of the Agreement on Agriculture to which each WTO Member must conform its import quota measures. The integrated dispute settlement procedures of the WTO apply to consultations and dispute settlements arising under the Agreement on Agriculture.

Figure 3-3

Outline of the Agreement on Agriculture

Tariffication of Non-Tariff Barriers	All non-tariff barriers are to be converted to tariffs using tariff equivalents (tariffication), (Article 4.2) and concessions are to be made. After conversion, tariffs, in principle, should be equal to the difference between import prices and domestic wholesale prices.
Reduction in Ordinary Tariffs	Over a period of six years, ordinary tariffs, including tariff equivalents, are to be reduced by at least 36 percent overall and at least 15 percent for each tariff line.
Tariff equivalent quantities	Tariff equivalent quantities that can serve as an index in tariffication (domestic and foreign price difference) shall be, in principle, the difference between a domestic wholesale price and an import price, with a base-year period of 1986 to 1988.
“Current access opportunity” Standards for Establishing Minimum Access Opportunities	Current access opportunities will be maintained for tariffed products. If imports are negligible, however, a minimum access opportunity of 3 percent of domestic consumption will be provided in the first year, expanding to 5 percent by the end of the implementation period (Article 4.2 and Annex 5).

Special Safeguards	Under Article 5, additional tariffs may be imposed as special safeguard measures for tariffed items and may be increased either by: (i) one-third for the relevant year only; or (ii) 30 percent, if a drop of 10-40 percent occurs for the portion of the drop over 10 percent and applied to the relevant shipment load only. Additional tariffs may also be imposed where price drops exceed 40 percent. Specifically, under Article 5: 1. Tariffs may be increased by one-third if import volumes exceed the following trigger levels: (percentage of market access opportunities in domestic consumption quantities) a) Where market access opportunities are 10 percent or less, the base trigger level shall be equal to 125 percent; b) Where market access opportunities are greater than 10 percent but less than or equal to 30 percent or less, the base trigger level shall be equal to 110 percent; c) Where market access opportunities are greater than 30 percent, the base trigger level shall be equal to 105 percent. (Article 5.4) 2. Tariffs may be increased if import prices drop more than 10 percent from the average prices for 1986-1988 (Article 5.5).
Rules on Export Prohibitions and Restrictions	Any Member instituting a new export prohibition or restriction on foodstuffs shall give due consideration to the effects thereof on the importing Member's food security, notify the Committee on Agriculture, and consult with any other Member having a substantial interest.[3](Article 12(1))

[3] Special exceptions (implementation waived for six years) to the tariffication rule are applied to agricultural products that meet several conditions, including the three criteria below. The exceptions are conditional upon set increases in minimum access opportunities (improving those of 3 percent and 5 percent, to those of 4 percent and 8 percent, respectively). The three criteria for special exceptions are:

(1) Imports during the base period (1986-1988) were less than 3 percent of domestic consumption;
(2) Export subsidies are not provided;
(3) Effective production limits are in place.

When exceptions are ended during implementation, the annual rate of increase for minimum access is reduced beginning the next year (from 0.8% to 0.4%).

3. ECONOMIC ASPECTS AND SIGNIFICANCE

The imposition of quantitative restrictions on imports (including export restrictions by the trading partner and other similar measures also act as quantitative restrictions on imports), through direct restriction on the amount of the foreign product imported enables domestic products to avoid direct competition. Quantitative restrictions also enable the applicable domestic industry, at least for the time being, to secure market share, expand their profits and stabilize employment. When quantitative restrictions are employed by a “large country” with enough trade volume to influence international prices, the decline in import volumes may improve the terms of trade and can increase the economic welfare of the importing country as a whole. Quantitative restrictions on imports and the resulting declines in export volumes may convince foreign companies to make direct investments in the importing country and to transfer production there. Such investments have the effect of promoting employment and technology transfers.

At the same time, quantitative restrictions impair access of foreign products enjoyed by consumers and consuming industries in the importing country. By increasing prices and reducing the range of choice, the economic benefit for these groups is vastly diminished. Although quantitative restrictions may improve the terms of trade for importing countries, they exacerbate the terms of trade for exporting countries and reduce their economic welfare. The disparity between international and domestic prices caused by quantitative restrictions becomes a “rent” that profits those who own export and import licenses. In the case of export restrictions, the rent shifts overseas; consequently, economic welfare in the importing country is reduced more than under an import restriction scenario. Import restrictions require that the quantities, varieties and importers (or in the case of export restrictions, exporters) be determined in advance. These determinations can be arbitrary and opaque, causing unfairness among industries and unfairness in the acquisition of export/import licenses. In addition, import restrictions fail to reflect changes in international prices and exchange rates. Thus, the GATT/WTO prohibits all quantitative restrictions, with only a handful of exceptions.

Badly implemented quantitative restrictions have a detrimental impact on industry — they discourage companies to streamline productivity that they would otherwise have been required to undertake if exposed to intense competition. Unless quantitative restrictions are clearly characterized as temporary measures contingent upon adjustments made to the industrial structure and upon sufficient productivity gains achieved during the period of implementation, they have a high potential over the medium and long term to impair development of the industry and harm the economic interests of the restricting country, regardless of what their short-term benefits may be.

4. RELATIONSHIP BETWEEN THE WTO AGREEMENT AND TRADE RESTRICTIVE MEASURES PURSUANT TO MULTILATERAL ENVIRONMENTAL AGREEMENTS

The WTO Committee on Trade and Environment (CTE) discussed the relationship between the WTO Agreement and trade measures pursuant to Multilateral Environmental Agreements (MEAs) in relation to quantitative restrictions.

The GATT generally bans quantitative restrictions, but allows those which fall under the general exceptions described in Articles XX(b) (necessary to protect human, animal, or plant life or health) and XX(g) (relating to the conservation of exhaustible natural resources). Measures applied under these exceptions also must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or disguised restriction.

MEAs such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora authorize trade measures that are aimed at protecting the environment outside either member countries' jurisdiction or the global environment, or that serve to encourage changes in the environmental policy of non-signatories of MEAs. The finding of the past GATT panel reports would seem to indicate that such measures conflict with the WTO Agreement. The CTE Committee has therefore been examining how to clearly ensure the WTO compatibility of trade measures taken pursuant to MEAs.

One opinion voiced is that Article XX of the GATT (general exceptions) should be amended to expressly permit exceptional treatment for measures taken for environmental protection. Opponents argue, however, that allowing waivers on a case-by-case basis is adequate to address the issue. There has also been a proposal to formulate guidelines for the types of trade measures under MEAs that would be considered consistent with the WTO Agreement.

In its report to the Singapore Ministerial Conference in December 1996, the CTE noted that there may be cases in which trade measures pursuant to specifically agreed-upon provisions would be necessary to achieve the objectives of MEAs. The CTE, however, offered no conclusions on how to ensure conformity with the WTO Agreement. Discussions on this topic are still ongoing. It is the majority's opinion, however, that unilateral measures for reasons of protecting the environment outside the jurisdiction of one's own country should be strictly avoided when such measures are not based on MEAs.[4]

The November 2001 Doha Ministerial Declaration agreed on negotiations involving the WTO and MEAs, but limited them in scope to the relationship between MEAs of relevant parties. Discussions at CTE have been ongoing since March 2002, but little progress has been made.

5. MAJOR CASES

US – Import Restrictions on Yellowfin Tuna

To reduce the incidental taking of dolphins by yellowfin tuna fisheries, the United States implemented the Marine Mammal Protection Act of 1972 to ban imports of yellowfin tuna and their processed products from Mexico and other countries whose fishing methods result in the incidental taking of dolphins in the Eastern Tropical Pacific. To prevent circumvention, the United States demands that similar import restrictions be adopted by third countries importing yellowfin tuna or their processed products from countries subject to the above import restrictions and, in turn, prohibits imports of yellowfin tuna and their products from countries which do not comply with this demand. Japan, the European Union and other countries have been targeted by the US measures.

The United States contends that the above measures are designed to protect dolphins and are therefore measures "necessary to protect human, animal, or plant life or health" (Article XX (b)) and measures "relating to the conservation of exhaustible natural resources" (Article XX (g)). Thus, the United States maintains that these measures are permissible under the GATT as exceptions to the general prohibition on quantitative restrictions.

However, a GATT panel established pursuant to a request by Mexico in February 1991 found in September 1991 that the US measures violate the GATT. (Because Mexico sought resolution through bilateral negotiations with the United States, the report was not adopted by the GATT Council.) The panel report concluded that the US measures violate Article XI as quantitative restrictions and that such restrictions are not justified by Article XX because: (1) the measures may not be a necessary and appropriate means of protecting dolphins, and (2) allowing countries to apply conservation measures that protect objects outside their territory and thus to determine unilaterally the necessity of the regulation and its degree would jeopardize the rights of other countries.

In September 1992, a GATT panel was established to examine the issue again at the request of the European Communities and the Netherlands (representing the Dutch

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4 *See also* the discussion in Chapter 10 on the relationship between Eco-labelling schemes and the TBT Agreement, another major subject discussed in the CTE.

Antilles). In May 1994, the panel found that the US measures violate US GATT obligations. The report noted that the US import prohibitions are designed to force policy changes in other countries and can only be effective if such changes are made. Because the US prohibitions are not measures necessary to protect the life and health of animals and are not primarily aimed at the conservation of exhaustible natural resources, the panel concluded that the US measures violated Article XI:1 and were not covered by the exceptions in Articles XX:(b) or (g).

The report was submitted to the GATT Council for adoption in July 1994, but was blocked by the United States. In reaction to this deadlock, the United States and the governments of the countries involved, mostly Latin American countries, negotiated the Panama Declaration, which adopts restrictive measures pursuant to the annual plan prepared in 1992 to regulate the incidental taking of dolphins. As a result of the Panama Declaration, the United States enacted the International Dolphin Conservation Program Act (Public Law No. 105-42) in August 1997, which removes the embargo on imports of yellowfin tuna from those countries that participate in a dolphin conservation program formulated under the US law. The Panama Declaration and, ultimately, the US law, were contingent upon an international implementing agreement. The international agreement that has the legal binding force to implement the Panama Declaration—the International Dolphin Preservation Agreement—was adopted in February 1998.

On January 3, 2000, the US Government established an interim final rule implementing the International Dolphin Conservation Program Act and promised (1) to lift the current ban and conditionally accept imports of yellowfin tuna from IDCP members, (2) to allow round haul netters to fish for yellowfin tuna in the Eastern Tropical Pacific Ocean, and (3) to ensure origin and related verification of yellowfin tuna imported from the Eastern Tropical Pacific Ocean. Ecuador, El Salvador, Mexico, Panama, Spain and Venezuela submitted import license applications. The US Government granted applications to Mexico on April 12, 2000, to Ecuador on May 31, 2000, to El Salvador on December 31, 2003, and to Spain on June 9, 2005. The interim final rule implementing the International Dolphin Conservation Program Act became a final rule on September 13, 2004 (with no substantial changes).

The US Government accepts license applications for the import of yellowfin tuna every five years. The import license is granted to an applicant after the National Oceanic and Atmospheric Administration (NOAA) reviews the application and materials submitted by the Department of State and the Inter-American Tropical Tuna Commission (IATTC) on the applicant's compliance with approved fishing methods. The license is valid for one year starting from April 1 to March 31 and subject to annual renewal over a period of five years. Annual renewal requires an updated examination of all previously submitted materials.

US – Import Restrictions on Shrimp and Shrimp Products

Under Section 609 of Public Law 101-162 of 1989, the United States began requiring on May 1, 1991, shrimp fishers to provide a certificate showing that their governments maintain a regulatory program comparable to that of the United States for protecting sea turtles from shrimp nets. Absent such a certificate, imports of shrimp are banned from countries that allow harvest methods of shrimp that may be harmful to sea turtles.

The United States initially applied its law to 14 countries from the Caribbean and Gulf of Mexico region, requesting that they use the same kind of turtle excluder devices as US shrimp trawlers. In 1993, a US environmental non-governmental organization, “Earth Island Institute”, brought a lawsuit challenging the selective application of the law. Pursuant to a December 1995 United States Court of International Trade (USCIT) decision, the United States began applying the law to countries all over the world, including Japan, beginning May 1, 1996. A subsequent USCIT ruling allowed shrimp to be imported without a certificate if it is raised on fish farms (for more than 30 days), is harvested by methods that do not involve the use of engines, or is cold-water shrimp (from regions where sea turtles do not live). Otherwise, imports without a certificate were banned, regardless of whether excluder devices were used.

India, Malaysia, Pakistan and Thailand (later joined by the Philippines) requested consultations with the United States pursuant to GATT Article XXII claiming that the US measures violate Article XI and are not justified under any exception, including Article XX. Subsequently, at a DSB meeting held in February 1997, a WTO panel was established in response to requests from Thailand, Malaysia, and Pakistan. Japan participated as a third party.

The panel issued a report in May 1998 and found that the US measures regarding shrimp imports violated GATT Article XI. The panel also found that measures that attempted to influence the policies of other countries by threatening to undermine the multilateral trading system were not justified, even under GATT Article XX.

The United States appealed the decision in July 1998. Although the Appellate Body did reverse some of the panel’s findings in October, it nonetheless found that the US measures were not justified under Article XX. In November 1998, the DSB adopted the report by the Appellate Body, which recommended that the DSB request the United States to bring its measures into conformity with its obligations under the WTO Agreement. During the DSB meeting, some objections were raised regarding the Appellate Body’s interpretation of Article XX because, among other things, it left room for justifying the extraterritorial application of domestic measures. Despite the objections, the report was adopted during the meeting.

In response to Malaysia’s claim that the United States had not adequately implemented the panel and Appellate Body recommendations, a panel was established in October 2000 pursuant to Article 21.5 of the Dispute Settlement Understanding. In June 2001, the panel ruled that the United States was in compliance with GATT Article XX requirements given its continued and sincere efforts to negotiate the Inter-American

Convention and other actions. In October 2001, the Appellate Body upheld the panel's findings, confirming the US implementation of the panel recommendation.