International Trade and Health

LAWG 691-09
Fall 2014
Georgetown University Law Center
Room 337
Tuesdays 11.10am – 1.10pm

Course Materials
Adjunct Prof. Benn McGrady

Course Description
The objective of this 2 credit course is to introduce students to the relationship between international laws governing trade and efforts to protect and promote human health. The course will focus on how the law of the World Trade Organization (WTO) restrains the ability of WTO Members to implement public health measures at the domestic level. Students will learn, and be asked to think critically about, how the international trade regime affects national regulation in the interests of human health.

Overview
The course will address the following subject matter:
1. Introduction to 'Trade and Health': Issues and Underlying Theories
2. The Prohibitions and Exceptions of the GATT 1994
3. Risk Regulation and the SPS Agreement
4. Technical Regulation and Standards under the TBT Agreement
5. Trade in Health Services and the GATS
7. Agricultural and other Subsidies

Time and Venue
The class will meet on Tuesdays 11.10 – 1.10 pm in room 337.

Assessment
Grades will be determined based on a take-home exam (85%) and class participation (15%). Students are expected to complete the readings prior to each class and to be prepared to discuss them.

Contact Details
I am based at the O’Neill Institute for National and Global Health Law in room 353 of the Williams Library and am willing to schedule appointments to meet students there as required. My email address is [redacted] and my office number is [redacted]. Feel free to contact me with any questions or concerns.

The Readings
The readings are set out below. It should be noted that the readings are heavier in the first half of the semester than in the second. This is intended to ease the workload in the lead-up to exams. It should also be noted that the readings may change (although due notice will be given). In the first class, we will identify the issues that students are
most interested in learning about and the course will be tailored to address those issues.
1. **Introduction to 'Trade and Health': Issues and Underlying Theories**

In this session we will examine theories underlying international trade, including the theory of comparative advantage and theories of economic liberalism. After considering debate about economic policy we will explore normative theories of regulation relevant to public health. These theories relate to the correction of market failures, paternalism, sustainability and the protection of human rights.

Against this broader theoretical backdrop, we will discuss the basic structure and features of the World Trade Organization (WTO). We will begin to consider which values the WTO Agreement embeds in international law and how this affects policy space at the national level.

**Readings**

From the outset, students new to trade law may benefit from the following glossary of terms

- [http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief22_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief22_e.htm)

An overview of trade theory is provided in:


For students unfamiliar with trade theory and economics the above reading will be challenging. There are two important points to take from this reading. First, economic theories suggesting that trade will generate net economic gains are subject to a great number of assumptions. These assumptions mean that the theory will hold true only under specific conditions.

Second, economic theories underlying trade suggest that trade liberalization will produce winners and losers within each country depending on the competitiveness of different industries in global markets. This poses internal challenges with respect to equity and redistributive justice.

The economic justifications for trade are true irrespective of the existence of trade agreements, which compel governments to open their markets. So why do we need trade agreements at all? One answer lies in the fact that trade policy creates winners and losers. Some firms are export oriented with a preference for better access to foreign markets. Other firms are import-sensitive with a preference for protection. This political economy is heavily associated with lobbying by special interest groups that leads to sub-optimal economic outcomes in the absence of some mechanism to tie the hands of government. Some of the justifications for trade agreements are set out in:


The fact that trade agreements tie the hands of governments raises questions about the legitimacy of such agreements, national sovereignty and a deficit in democratic decision-making. We will explore these themes in class.
The economic arguments for free markets raise the additional question of why governments should intervene at all. Normative theories justifying health regulation are summarized in:


As this reading implies, regulation to protect human health occurs in the context of philosophical and political battles over the desirable extent of economic and individual liberty.

In recent times the impact of the trade regime on human health has generated attention within the public health community. The following documents reflect ongoing work within intergovernmental organizations, such as the World Health Organization (WHO). These documents introduce policy coherence as an issue of concern.

- Fifty-Ninth World Health Assembly, Resolution on International Trade and Health - 59/15

Suggested Further Readings
Although not compulsory reading, the following documents also provide a useful introduction to the linkage of trade and health.

- What is the WTO? Available at http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm
2. **The General Agreement on Tariffs and Trade 1994**

In this session, we will discuss the core rules established in the GATT 1994 and how those rules restrict domestic regulatory autonomy. The discussion will focus on:

- Article II (Schedules of Concessions), which places upper limits on the imposition of customs duties (tariffs) by WTO Members;
- Article III (National Treatment on Internal Taxation and Regulation), which prohibits discrimination against imported products;
- Article I (General Most-Favoured Nation Treatment), which prohibits discrimination against products from one WTO Member in favour of another WTO Member or third country;
- Article XI (General Elimination of Quantitative Restrictions), which constrains quantitative measures such as quotas; and
- Article XX (General Exceptions), which establishes exceptions to the obligations set out above.

**Readings**

- The General Agreement on Tariffs and Trade (GATT 1994) - skim the entire agreement and pay particular attention to the provisions listed above.
- Handout explaining national treatment under Article III
- Handout explaining the Article XX(b) health exception

**Article III**

Article III:2 governs tax measures, whereas Article III:4 governs regulatory measures. Each provision reflects the principle of non-discrimination. To put it simply, WTO Members are prohibited from using tax or regulatory measures that discriminate against imported goods. Discrimination may arise either through the form or effect of a measure.

For example, in *EC – Asbestos*, Canada argued that a French ban on asbestos and asbestos products treated Canadian asbestos and asbestos products less favourably than French substitutes. Similarly, in *US – Clove Cigarettes*, Indonesia argued that a ban on clove, but not menthol-flavoured cigarettes discriminated against imported clove cigarettes of Indonesian origin as compared to menthol cigarettes of US origin.

In the analysis under Article III, the question of whether a legitimate regulatory purpose underlies a measure is one of the key issues for discussion. In the early dispute of *Japan – Alcoholic Beverages II*, the Appellate Body rejected the argument that the consistency of a measure with Article III should be determined by reference to the aim and effects of a measure. This decision marginalized the importance of a WTO Member’s regulatory purpose in analysis of discrimination.

Nonetheless, regulatory issues (such as how the risks posed by different product categories differ) may still be taken into consideration. The following readings highlight how regulatory issues may be taken into account in assessing whether product categories are like and whether less favourable treatment has arisen under Article III:4 (the two key questions in analysis under Article III).

In *EC – Asbestos* the Appellate Body discussed the role played by the different health impacts of the products in determining likeness.

Leaving likeness to one side, some subsequent case law placed significant emphasis on the regulatory legitimacy of a measure in determining whether that measure results in “less favourable treatment” of imported goods.


However, the Appellate Body has recently clarified that the focus of analysis under Article III is whether a measure modifies the conditions of competition to the detriment of imported products.


Although the above readings focus on regulatory measures under Article III:4, in class we will also discuss the treatment of taxation measures under Article III:2.

**Article XI**

In *Brazil – Retreaded Tyres*, a Brazilian ban on the importation of waste- and retreaded-tyres was found to violate Article XI:1. Brazil sought to justify the measure on the basis that importing waste and retreaded tyres increases tyre waste in Brazil, which provides a breeding ground for mosquitoes that transmit Dengue.


The breadth of Article XI:1 of the GATT suggests that it could prohibit virtually any measure to protect human health where that measure affects imported goods. One possible limitation on this conclusion is found in an additional note to Article III, which suggests that Article III limits the scope of Article XI. This approach would see “border measures” governed by Article XI and “behind the border measures” that may also be enforced at the border governed by Article III. The following readings examine this issue.


*Suggested Further Reading*
Among many articles written about the issues, the following is well worth reading:

Health Exceptions under the General Agreement on Tariffs and Trade (Part 1)

In this class students will be introduced to the general exceptions applicable under Article XX of the GATT and, in particular, to Article XX(b). The 'weighing and balancing' test applied by the Appellate Body of the WTO in determining the necessity of a measure will be considered in detail. Students should consider the extent to which this test defers to domestic regulatory choices.

Readings
- Article XX of the GATT
- Handout on Article XX

In EC – Asbestos the Appellate Body applied the weighing and balancing test to the French ban on asbestos discussed in topic 2. The outcome was something of a watershed moment for public health in WTO law.


More recently, a panel and the Appellate Body had to consider application of Article XX(b) to the Brazilian ban on the importation of waste- and retreaded-tyres.


Suggested Further Readings
It is arguable that Brazil – Tyres is a shift in the case law towards an interpretation of Article XX that preserves a significant degree of regulatory autonomy. The following readings explore the potential implications of the case.

Health Exceptions Part 2: The Chapeau

In *US – Gasoline* the Appellate Body sought to explain the function and operation of the *chapeau*.


In *US – Shrimp* the Appellate Body considered application of the *chapeau* to a US measure restricting the importation of shrimp. Among other requirements, the measure required that shrimp be caught in a manner that reduced the risk of sea turtles being caught. The measure also prohibited imports from states that were not certified as adopting equivalent standards to the US fishing industry.


More recently, in *Brazil – Retreaded Tyres* the Appellate Body had occasion to reconsider the role played by regulatory purpose in interpretation of the *chapeau*. The Appellate Body also commented on the way in which the panel had considered the trade effects of a measure.


**Suggested further reading**

3. **Risk Regulation and the SPS Agreement**

In this class students will be introduced to the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement applies to many health and quarantine measures. The SPS Agreement plays a particularly important role in the contexts of food safety and public health emergencies of international concern.

**Readings**

- Students should read the SPS Agreement. In addition to the provisions of particular importance, which are set out below, students should pay attention to Articles 4 and 8 (including the related Annex C).

**The Scope of the SPS Agreement**

Article 1 of the SPS Agreement provides that the agreement ‘applies to all sanitary and phytosanitary measures, which may directly or indirectly, affect international trade.’ Annex A sets out the definition of sanitary and phytosanitary measures as:

1. **Sanitary or phytosanitary measure** - Any measure applied:

   (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

   (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

   (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

   (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

**Article 2 - Basic Rights and Obligations**

The basic rights and obligations of WTO Members are set out in Article 2. The provision states:
1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.

2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

4. Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

The Appellate Body has suggested that these general requirements should be considered prior to the more specific requirements in provisions such as Article 5, although panels have tended to take the opposite approach. Students should consider the various ways in which these basic rights and obligations differ from those found in the GATT. One example can be found in reference to scientific principles. What it means for measures to be based on scientific principles was discussed in:


**Article 3 – Harmonization**

Article 3 of the SPS Agreement governs harmonization. The most relevant parts of the provision state:

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.¹ Notwithstanding the above, all measures which result in

¹ For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.
a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

Paragraph 1 requires that measures be ‘based on’ international standards, guidelines or recommendations. In contrast, paragraph 2 deems measures necessary and creates a presumption of compliance with the GATT where a measure ‘conforms’ to international standards. The difference between these terms is discussed in:


International standards, guidelines and recommendations are defined in Annex A of the SPS Agreement in the following terms:

(a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;

(b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;

(c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and

(d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.

The Codex Alimentarius Commission is a joint initiative of the WHO and the Food and Agriculture Organization of the United Nations FAO. The functions of the commission are set out in Article 1 of the Statutes of the Codex Alimentarius Commission:

The Codex Alimentarius Commission shall, subject to Article 5 below, be responsible for making proposals to, and shall be consulted by, the Directors-General of the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) on all matters pertaining to the implementation of the Joint FAO/WHO Food Standards Programme, the purpose of which is:

(a) protecting the health of the consumers and ensuring fair practices in the food trade;

(b) promoting coordination of all food standards work undertaken by international governmental and non governmental organizations;

(c) determining priorities and initiating and guiding the preparation of draft standards through and with the aid of appropriate organizations;
(d) finalizing standards elaborated under (c) above and publishing them in a Codex Alimentarius either as regional or worldwide standards, together with international standards already finalized by other bodies under (b) above, wherever this is practicable;

(e) amending published standards, as appropriate, in the light of developments.

Article 5
Article 5 governs risk assessment, which has proven to be one of the more controversial aspects of the SPS Agreement.

Article 5
Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.
8. When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.

Readings

Case Study
In class, we will examine the responses of various WTO Members to H1N1 (swine flu) in 2009. Some Members prohibited importation of all pork and pork products. Other Members prohibited importation from affected areas. Egypt went so far as to prohibit importation and order the destruction of swine within the country. We will examine how the SPS Agreement applies to these types of measures. In this respect, see the May 2009 joint press release from the WTO, WHO and FAO at http://www.wto.org/english/news_e/news09_e/jt_stat_02may09_e.htm.
4. Technical Regulations and Standards under the TBT Agreement

In this session, we will discuss the Agreement on Technical Barriers to Trade (TBT Agreement). The TBT Agreement applies to technical regulations and standards not falling within the scope of the SPS Agreement.

The TBT Agreement was the subject of three recent disputes in US – Clove Cigarettes, US – Tuna II and US – COOL. These disputes concerned a prohibition on clove flavoured cigarettes, restrictions on use of the claim ‘dolphin safe’ with respect to tuna and country of origin labelling on meat. Like the GATT 1994, the TBT Agreement establishes principles of non-discrimination and necessity. Unlike the GATT 1994, principles of non-discrimination are not subject to exceptions. The concept of necessity is also not found in general exceptions, but in an obligation to ensure that technical regulations are not more trade restrictive than necessary to achieve a legitimate objective.

The United States was found to have violated the TBT Agreement in each of the three disputes mentioned above. We will focus on US – Clove Cigarettes and US – Tuna II.

Readings

- The Agreement on Technical Barriers to Trade (skim the entire agreement and pay particular attention to Article 2)
- Appellate Body Report, United States—Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R adopted 4 April 2012
- Appellate Body Report, United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R adopted May 16, 2012

When reading these summaries consider the impact of the TBT Agreement on domestic regulatory autonomy. The agreement goes further than the GATT 1994 in that it requires WTO Members to ensure that technical regulations are not more trade restrictive than necessary to achieve a legitimate objective. The TBT Agreement also embeds a preference for regulatory harmonization at the international level. To what extent does this undermine domestic regulatory autonomy? How is harmonization likely to affect developing countries as compared to developed countries?

Suggested further reading

The following reading provides a good overview of questions of regulatory autonomy under the TBT Agreement.


The following article describes the relations between the WTO covered agreements discussed so far.

- Gabrielle Marceau and Joel Trachtman, ‘The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the
Case Studies
We will examine how the TBT Agreement applies by reference to a case study on plain packaging of tobacco products in Australia. A number of WTO Members have challenged Australia’s implementation of ‘plain packaging’ of tobacco products. This regulation prohibits branding on tobacco products other than a brand and variant name in a standardized size, font and style. In their Requests for Consultations, the WTO Members challenging the regulation argue that this is more trade restrictive than necessary to protect human health. For documents on this dispute see http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm
5. **Trade in Health Services and the GATS**

In this class, we will discuss application of the General Agreement on Trade in Services (GATS). The general rules found in the GATS are similar to those in the GATT 1994. However, some provisions of the GATS apply only to the extent that WTO Members have made specific commitments with respect to a service sector and the four modes of supply.

**Readings**
- The GATS. Students should skim the agreement, paying particular attention to articles II, XIV, XVI and XVII

Another difference between the GATT and the GATS can be found in Article XVI (market access), which arguably provides far broader protection than is found in Article XI of the GATT with respect to goods. While the optional nature of many GATS commitments means that states retain significant regulatory autonomy, this was brought into question in *US – Gambling*. In that dispute, the panel had to consider whether a US ban on the provision of gambling services via the internet and other cross-border means constituted a restriction on market access for providers of leisure services. The panel held (and the Appellate Body upheld) that the restriction constituted a zero quota contrary to paragraphs (a) and (c) of Article XVI. The conclusion that the measure was a quantitative type measure and not a qualitative type measure was central to the Appellate Body’s reasoning. Students should compare this with the distinction between behind the border regulatory measures governed by Article III:4 of the GATT and border measures governed by Article XI of the GATT.

Leaving this issue to one side, the following readings focus on the implications of the GATS for the health services sector. This is particularly important in the context of health worker migration and the global shortage of health care workers. Students should consider the scope left by the GATS for measures to ensure an adequate supply of health workers.


**Case Study**

We will examine application of the GATS through a case study on measures to ensure the supply of health services. We will analyse a number of specific measures in light of one WTO Member’s GATS Schedule.

In this class, we will discuss the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) and other so-called ‘TRIPS-plus’ agreements. TRIPS obliges WTO Members to ensure minimum standards of protection for intellectual property rights. TRIPS has generated significant controversy with respect access to medicines and the use of trade marks on tobacco packaging. In class, we will explore the minimum standards of protection set out in TRIPS through case studies on these issues. We will also discuss TRIPS Plus commitment found in the intellectual property chapters of free trade agreements, which have been used by industrialized countries to increase the standards of protection for intellectual property rights.

**Readings**

The following readings provide a basic overview of TRIPS, ‘TRIPS plus’ and controversy over access to medicines.

- The TRIPS Agreement (skim the agreement, but focus on Articles 1, 7, 8 and 27 – 33 for our discussion on patents and TRIPS flexibilities)
- Handout on TRIPS and TRIPS Plus commitments
- Decision of the General Council of 30 August 2003 (Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health)

The following article provides a good overview of the legal issues in Australia – Tobacco Plain Packaging.


By making TRIPS part of the single undertaking that is the WTO Agreement developed countries created a grand bargain where developing countries committed to minimum standards of IP protection partly in exchange for access to developed country markets. This has resulted in a significant wealth transfer from developing countries to developed countries with innovative industries and has increased the start-up costs of industrialization in developing countries. In class, we will discuss the role of intellectual property protection in industrialization and development.

**Suggested Further Reading**

7. Agricultural and other Subsidies

Prior to negotiation of the WTO Agreement agricultural trade policies were subject to few restrictions. The GATT 1947 permitted WTO Members to maintain import quotas subject to certain conditions. Export subsidies on primary agricultural products were also permitted provided that they were not used to capture more than an equitable share of the world market. The Agreement on Agriculture (AoA) imposed a number of new disciplines, including on barriers to importation and subsidies.

Readings

A basic overview of the Agreement on Agriculture is provided in:

- The WTO Agreements Series: Agriculture (read the introduction to the agreement to page 26 and then skim the agreement itself)

The AoA has proven particularly controversial in terms of its effect on developing countries. Historically, developed countries have subsidized agricultural production and exportation to a far greater extent than developing countries. Because some commitments in the AoA were based on historical levels of support, many developing countries found their hands tied to a greater extent than developed countries. This occurred in a context where promoting and protecting rural livelihoods is essential to equitable economic development in many countries and where subsidization in developed countries can affect the competitiveness of developing country farmers negatively. Accordingly, agriculture is a key issue in the Doha Round. These issues are discussed in:

- David Orden, David Blandford, Tim Josling, and Lars Brink, WTO Disciplines on Agricultural Support: Experience to Date and Assessment of Doha Proposals, International Food Policy Research Institute, May 2011

In 2013, WTO Members also engaged in negotiations on how to address food security in the context of rising food prices. During the global food crisis a number of developing countries prohibited export of agricultural products such as rice. These countries argued that export restraints were necessary to avoid critical food shortages. A number of countries also engage in food stockpiling, which supports local production. Developing countries argue that these types of programs should be shifted under the AoA to the “green box” despite the fact that they distort trade. See [http://www.wto.org/english/news_e/news13_e/agng_27mar13_e.htm#technical](http://www.wto.org/english/news_e/news13_e/agng_27mar13_e.htm#technical)

Subsidies are also employed outside of the agricultural context. The Agreement on Subsidies and Countervailing Measures prohibits the use of some subsidies altogether, including export subsidies (other than agricultural subsidies) and local content subsidies. In the case of actionable subsidies, such as many production subsidies, the SCM Agreement permits the imposition of countervailing duties on subsidized imports by other WTO Members where there is injury, serious prejudice and nullification or impairment of benefits. The SCM Agreement has been criticized on the basis that local content subsidies were a key industrial policy of many developed countries and have now been limited by the SCM Agreement. Commentators such as Ha Joon Chang argue that developed countries have “kicked away the ladder” to development through agreements such as this.

Readings

- The SCM Agreement
Additional Resources on Trade and Health

Websites
- The O’Neill Institute Trade, Investment and Health [webpage](#).
- [www.wto.org](#).
- [www.worldtradelaw.net](#) (includes case summaries that are accessible if you login through the databases section of the law library webpage).

Books


