

Guide to the WTO and GATT

Autar Krishen Koul

Guide to the WTO and GATT

Economics, Law and Politics

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*To
My Grand Children
Siddarth, Shrikant, Nancy, Maya,
Ruby and Dev
Who are very dear to me*

Preface

The sixth edition of the Guide to the WTO: Economics, Law and Politics 2018 was prompted by the developments which have taken place in the last decade at the international trade relations level among the member states of WTO, and the membership of WTO has also swelled to more than 161 countries of the world. Further, WTO has got a new lease of life by negotiating the Ninth Ministerial Conference in December 2013 at Bali, Indonesia. The Ninth Ministerial Conference has yielded some important decisions, especially the Trade Facilitation Agreement, 2013 which came into force from February 2017. Also, some concessions have been extended to the least developed and the developing countries. This edition takes care of the developments taken place after the publication of the fifth edition, 2015.

It is a fact that International Trade Relations and Law has entered into a new phase wherein all the member countries of WTO are under obligations to oblige and comply with the WTO decisions taken regularly either through the various institutional structures of WTO or through the negotiations of Ministerial Conferences. There is also a happy augury that the division of the world into developed, developing and least developed has been arranged in such a way that there is an order in the international economic relations and law interse these countries supported by the decisions delivered by the dispute settlement systems of WTO.

It cannot be doubted that the international economic institutions and the international economic law have assumed a central importance in global economic relations in the middle of the twentieth century, especially after the end of the Second World War. However, it took five more decades to complete the unfinished agenda of establishing the international economic institutions such as World Trade Organisation (WTO), General Agreement on Tariffs and Trade (GATT 1994), International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD). These so-called Bretton Woods Institutions, International Trade Organisation (ITO), IMF and IBRD established in the year 1947 were half-way houses as ITO died a premature death and was replaced by a slender reed called GATT 1947, which essentially was a stop-gap arrangement. But, by the fortuity of circumstances, GATT 1947 made the international economic order and

law functional and prosperous. GATT 1947 was riddled with many inherent contradictions and was often sidetracked by ingenious methods of grandfather clauses, protocols of provisional applications and escape clauses. Yet, the allegiance to GATT continued unabated and the membership of GATT swelled. The effectiveness of GATT has been proved by seven tariff rounds concluded under GATT 1947 which not only reduced tariffs in international trade but also gave a stimulus to the growth and volume of global commerce. It is often said that the interpretative techniques developed and employed by the Contracting Parties of GATT 1947 till 1994 revealed the mystique of GATT amidst the thicket of economic verbiage in its articles, which led to the evolution of a 'jurisprudence' unique in its content and foresighted in its approach to international trade and economic relations.

The GATT's eighth round, the Uruguay Round of tariff negotiations (1987–1994), further strengthened the earlier international economic and trade law jurisprudence and completed the unfinished agenda of the Bretton Woods by setting up a new regime of trade institutions such as World Trade Organisation (WTO) and General Agreement on Tariffs and Trade (GATT 1994), modifying and replacing GATT 1947. Various side Agreements were also negotiated, such as Agreement on Technical Barriers to Trade, Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing, Agreement on Trade-Related Investment Measures, Agreement on the Implementation of Article VI of GATT 1994, Agreement on Pre-shipment Inspection, Agreement on the Implementation of Article VII of GATT 1994, Agreement on Rules of Origin, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures and Agreement on Safeguards. World trade regime was further reinforced by major Agreements as part of WTO dispensation, namely General Agreement on Trade in Services (GATS), Agreement on Trade-Related Intellectual Property Rights (TRIPs), Dispute Settlement Understanding (DSU), Trade Policy Review Mechanisms (TPR) and Plurilateral Agreements on Public Procurement, Civil Aircraft, International Dairy Products.

The Ninth Round of Ministerial Conference produced the Bali Package and the Trade Facilitation Agreement 2013 (TFA) which entered into force in February 2017. TFA is believed to reduce the cost of trading, smoothen customs procedures, reduce red tape and enhance efficiency and transparency in international trade transactions. The Agreement makes it obligatory on the developed countries to assist the developing and the least developed countries to update their infrastructure and train customs officials for any costs associated with implementing the Agreement. The Agreement is in furtherance of the mandate imposed by the three articles of GATT 1994 such as Article V involving freedom of transit, Article VIII dealing with border fees and formalities and Article X dealing with publication and administration of regulations.

There are various estimates of economic gains flowing from the Trade Facilitation Agreement; some believe that the agreement could increase global GDP by one trillion USD; others believe that the reforms in this area of international trade would reduce costs by 14.5% for low-income countries, 15.5% for

lower-middle-income countries and 13.2% for upper-middle-income countries. However, the agreement is conceived to simplify customs procedures and lower transaction costs. There have been various concerns expressed by developing countries as to how to implement the trade facilitation measures conceived in TFA in the face of technological, scientific and economic constraints. Therefore, the final text of the agreement is divided into two parts: the first describes specific commitments countries will have to make to improve their custom procedures (Section I); the second involving special and differential treatment for developing countries (Section II). Achieving a balance between foreign commitments in Section I and technical assistance and capacity building in Section II was the measure stumbling block while negotiating the Agreement.

In order to reconcile the above objectives, the final agreement contains provisions allowing for flexibility in the scheduling and sequencing of implementation and linking commitments to acquired capacity resulting from technical assistance. There is a marked departure from the usual WTO practices that developing countries and least developing countries are allowed to self-define their implementation period within three categories of implementation modalities: Category A includes those provisions that are implemented immediately upon the agreement entering into force; Category B includes those commitments that will be implemented after a 'self-selected' transition period; Category C involves those commitments that will require both self-selected transition period and technical assistance. In the last category, the mechanism ensures that assistance arrangements be notified by donor countries before least developed countries would be obligated to notify their definitive implementation date, thereby linking implementation obligations to the provision of technical assistance and capacitive building. All these provisions in a great measure change the current approach to special and differential (S&D) treatment for developing countries, creating a new and innovative template for future solutions.

So far as agriculture negotiations are concerned, Bali package concentrated on reform of farm trade of developed countries: export subsidies and tariff rate quotas.

During the negotiations, concern was expressed by India that public food stock holding by India should not be considered as an infringement to the obligations of under either the WTO Agreement on Agriculture or any other WTO commitments as food security programs are essential for sustaining the poor and vulnerable sections of society. The WTO members gave two-year concessions to India and all other countries having similar programmes, and the General Council of WTO was asked to find a solution to India's and similar such food security programs.

The other issues such as developing and least developed countries concerns were the weakest components of the Bali package. However, it was agreed in principle that least developed countries would be extended duty-free, quota-free market access. The Bali package also established a monitoring mechanism on special and differential treatment which will serve as a focal point within WTO for analysing and reviving all aspects of the implementation of S&D treatment provisions. In case the review faces problems, the monitoring mechanism may put forward recommendations and possible negotiations would ensue in the relevant WTO body.

One of the elements of the Bali package deals with Rules of Origin which have been conferred to the products traded internationally. In the context of trade preferences granted to least developed countries, i.e. duty-free, quota-free, the rules of origin would define how much processing must take place locally before goods are considered to be of a least developed origin and may therefore get the benefit of preferential treatment; further, the rules of origin should be transparent, simple and objective. It also mandates that every country has the freedom to choose the methods to make rules of origin transparent and objective.

So far as least developed countries trade in services is concerned, the Bali ministerial agreed that WTO Council for Trade in Services shall initiate a process aimed at promoting the expeditious and effective operationalisation of the least developed countries services waiver.

In the area of duty-free, quota-free market access for least developed countries, the Bali package decided that duty-free, quota-free market access is an obligation on the developed countries members and the developed countries members should provide much more coverage for duty-free, quota-free market access to the products of the least developed countries. There has not been any substantial change so far as Cotton is considered as a symbol of the development dimension, as a discussion on Cotton remained inconclusive as Bali recognised that WTO has yet to deliver on the Cotton initiative and as such members requested to continue the negotiation in this sector.

At this juncture, it is important to emphasise that the international economic institutions and law have a unique interface with social, political, economic and cultural contexts, as such the study of GATT/WTO becomes unwieldy. However, for every practitioner and student of international trade law, the above interface cannot be avoided or eschewed. Thus, the important goal which this author has set for himself is to unravel in a systematic and coherent manner, the jurisprudence of GATT/WTO by collecting and collating the working of the GATT/WTO system along with main and side Agreements in a manner that the study of the international economic relations and the law is made intelligible and obvious to both the uninitiated and the practitioner of the subject.

The scope of GATT/WTO encompasses a wide array of subjects including new topics like environment, labour standards and competition on its agenda. Therefore, this author has tried to unfold the matrix of the subjects for a clear understanding of international trade law as propounded and laid down by GATT/WTO system. WTO in its Preamble states that the international economic institutions and law have to aim at raising the living standards, ensuring full employment and a large and steadily growing volume of real income and effective demand and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objectives of sustainable development, seeking to both protect and preserve the environment' of the member nations. It thus underpins the fact that liberal trade or free trade is a panacea for achieving further prosperity of both the developed and developing countries. WTO, in fact, claims that open trade fuels engines of economic growth and creates new jobs, new incomes and power of open markets takes care of the poor.

Today, GATT/WTO is being considered as wealth-churning machines and indispensable tools for facilitating economic growth and job creation in the world at large. Of course, the justification for WTO/GATT is based on the theory of comparative cost advantage as propounded by economic theorists such as Adam Smith, David Ricardo, Paul Samuelson, and Jagdish Bhagwati.

In a globalised, liberalised and interdependent world, WTO has assumed an unprecedented role in shaping and fostering co-operation among member nations. It has also provided a forum for conflict resolutions through its dispensation of Dispute Settlement Understanding (DSU), which is considered a jewel in the crown of the WTO system. Moreover, WTO is playing a crucial role in lowering tariffs and reducing trade barriers, thereby maximising the world welfare.

The literature on GATT/WTO since 1994 has proliferated so much that for a keen observer including a student and practitioner of GATT/WTO jurisprudence the terrain is full of contradictions and complexity. It is true also of the panel and appellate decisions of WTO/DSB, as the decisions rendered by the dispute settlement bodies are lacking coherence, precedential value and are full of verbose. Therefore, the tasks of an author to marshal the literature and case law become quite tedious and asymmetrical. Further, as disciplines other than law, such as science, technology, economics and politics, are veered around the various Agreements having centrality to WTO, writing a book on GATT/WTO is equally daunting.

In view of the above challenges, the author's goals in this book are threefold.

First, to explain the subject in a coherent manner so that the convergence of economics, politics and international economic law is unfolded in a simple and lucid style; second, to explain how international trade law principles as evolved by the international economic institutions have interfaced with municipal legal principles and other contexts such as social, cultural and political; and third, to study the impact of decisions rendered by the international economic institutions such as GATT/WTO and how the settlement of disputes by the dispute settlement systems of WTO has opened up the municipal economic and legal systems of member nations to the jurisdiction and surveillance of WTO, its standards and norms keeping in view the interests of various and diverse stakeholders.

Finally, the major goal of this book is to make available and easily accessible vast and varied materials in a systematic and cohesive manner of a subject, which is virtually borderless. The student and practitioner alike have found the book very useful as it offers both of them a learning experience of a subject which is not only new but unique. The book has also been extensively used as a tool for further research in tackling real problems which are continuously being brought to the fore in international trade law jurisprudence.

As the book was first published in the year 2005, and the response of the scholars, lawyers and policy-makers was more than expected, the sixth edition was brought keeping in mind the developments which have taken place at the WTO/GATT counter and the decisions rendered by DSB on various critical issues from 2005 to 2017. The author has updated all the developments which have taken place over the last decade and has added a new chapter on WTO, International Trade and Human Rights. This addition takes care of WTO and Trade Policy

Review and the attendant changes brought in TRIPs by DOHA and the Ninth Ministerial Conference in December 2013, Declaration. A complete chapter on the Trade Facilitation Agreement, 2013 as entered into force in 2017 and Bali Package has been added in this edition.

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Autar Krishen Koul

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Abbreviations

AMS	Aggregate Measurement Support
ASP	America Selling Price Method
ATC	Agreement on Textiles and Clothing
BDA	Budget Deficit Assessment
BDV	Brussels Definition of Value
BFA	Banana Framework Agreement
BITS	Bilateral Investment Treaties
CBD	Convention on Biological Diversity
CBI	Caribbean Basin Initiative
DMA	Domestic Marketing Assessment
DPCIA	Dolphin Protection Consumer Information Act
DSB	Dispute Settlement Body
DSU	Dispute Settlement Undertaking
EC	European Community
EEC	European Economic Community
EEP	Export Enhancement Programme
ETP	Eastern Tropical Practice
FAA	Fund Articles of Agreement
FAO	Food and Agriculture Organization
FDI	Foreign Direct Investment
FOGS	Functioning of the GATT System
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GNG	Group on Negotiations of Goods
GNP	Gross National Product
GNS	Group on Negotiations of Services
HS	Harmonized System
IBRD	International Bank for Reconstruction and Development (also known as World Bank)

ICAO	International Civil Aviation Organization
ICSID	International Centre for Settlement of Investment Disputes
IMF	International Monetary Fund
IPIC	Intellectual Property in respect of Integrated Circuits
IPPC	International Plant Protection Convention
IPR	Intellectual Property Right
ITO	International Trade Organization
LDCs	Least Developing Countries
LTA	Long-Term Agreement
MAI	Multilateral Agreement on Investments
MFA	Multifibre Arrangement
MFN	Most Favoured Nation
MIGA	Multilateral Investment Guarantee Agency
MMPA	Marine Mammal Protection Act (of USA)
MTA	Multinational Trade Agreement
NAFTA	North American Free Trade Agreement
NIC	Newly Industrialized Country
NIEO	New International Economic Order
OECD	Organization for Economic Cooperation and Development
OIE	Office International Des Epizooties
OMA	Orderly Marketing Agreement
PGE	Permanent Group of Experts
PSE	Producers Support Estimates
RTA	Regional Trade Agreement
S&D	Special and Differential
SCM Code	Subsidies and Countervailing Measures Code
SG&A	Selling, General and Administrative
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TMB	Textile Monitoring Body
TNC	Trade Negotiations Committee
TPRM	Trade Policy Review Mechanism
TRIMs	Trade-Related Investment Measures
TRIPs	Trade-Related Aspects of Intellectual Property Rights
TSB	Textile Surveillance Body
VER	Voluntary Export Restraints
VIEs (or VIEA)	Voluntary Import Expansion Agreements
VRA	Voluntary Restraint Agreement
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization