Trade in Goods

The GATT and the Other Agreements Regulating Trade in Goods

PETROS C. MAVROIDIS

Edwin B. Parker Professor of Law, Columbia Law School, NY, Professor at the University of Neuchâtel, Switzerland Research Fellow at CEPR (Centre for Economic Policy Research)



Contents

1.	F	rom GATT 1947 to GATT 1994	1
	1	The Genesis of the GATT	2
	2	Why the GATT?	6
		2.1 Why ask the question? 6	
		2.2 The negotiators say 7	
		2.3 Economic theory suggests 12	
		2.4 And some unexplored avenues 18	
		2.5 To conclude (?) 20	
	3	The GATT in the GATT era: An Agreement, and an Institution	
		as Well	20
	4	The GATT Rounds of Trade Liberalization	23
	5	Expanding the GATT: The Emergence of the Codes	24
	6	The GATT in the WTO era: Just an Agreement, Albeit a Pivotal One	25
		The Modern GATT discipline in a Nutshell	30
		7.1 The GATT in its WTO context 30	
		7.2 The legal relation of the GATT with the WTO Agreement 31	
		7.3 The substantive content of modern GATT 34	
2.	D	isciplines on Trade Instruments	39
	1	Introduction	42
	2	The Treatment of QRs	42
		2.1 The legal text 42	
		2.2 What is a QR? 43	
		2.2.1 The attribution of practices to governments 45	
		2.2.2 The measures covered 50	
		2.2.3 The standard of review: no effects test and no intent test 55	
		2.2.4 The relationship between Art XI and other GATT provisions 58	
		2.2.4.1 Art III of the GATT 58	
		2.2.4.2 Art VI of the GATT 62	
		2.2.4.3 Art XX of the GATT 63	
		2.2.4.4 Art XXI of the GATT 63	
		2.2.4.5 Infant industry protection (Art XVIIIc) 63 2.2.4.6 Arts XII and XVIII of the GATT 63	
		2.2.4.7 Art XIII of the GATT 63	
		2.3 Trade in textiles 67	
		2.4 Discriminatory legal QRs 67	
		2.5 The non-segmentation nature of Art XI of the GATT 68	

xiv Contents

)	1ar	iff Protection in the GALL 68
	3.1	The legal text 68
	3.2	The basic discipline with respect to tariff protection 70
	3.3	Why yes to duties and no to QRs? 71
		The mechanics of binding the duties 72
		3.4.1 The Harmonized System (HS) 72
		3.4.2 What is the tariff promise? Ordinary customs duties,
	,	other duties and charges 74
		3.4.3 The typology of ordinary customs duties 78
		3.4.4 Multilateral trade negotiations (rounds) 79
		3.4.5 The treatment of export tariffs (taxes) under GATT 84
		3.4.6 Certification of schedules 86
	3.5	Interpreting tariff commitments 87
	5.7	3.5.1 The legal relevance of HS 87
		3.5.2 Scheduling of concessions must be WTO consistent 88
		3.5.3 The (non) impact of legitimate expectations 93
	3.6	Changes in tariff protection after their consolidation 93
		3.6.1 Switching between different types of duties 94
		3.6.2 Withdrawing concessions from members leaving the WTO 95
		3.6.3 Renegotiating the tariff protection 97
		3.6.3.1 INR holders 99
		3.6.3.2 PSI countries 100
		3.6.3.3 SI countries 102
		3.6.3.4 MFN trade is the basis for defining PSIs and SIs 102
		3.6.3.5 New products 103
		3.6.3.6 The mechanics of the negotiation 103
		3.6.4 Rectifications and modifications of schedules 112
	3.7	Fees and charges for services rendered 114
		Customs Valuation (CV) 118
		The Agreement on Pre-shipment Inspection (PSIA) 119
		0 The MFN 120
		3.10.1 The MFN discipline in a nutshell 123
		3.10.2 The measures coming under the purview of the MFN 124
		3.10.2.1 Any advantage 124
		3.10.2.2granted to products originating in
		any country 125
		3.10.2.3irrespective whether it discriminates de jure
		or de facto 126
		3.10.3must be extended to like products 126
		3.10.4 The rules of origin 129
		3.10.5 The MFN treatment must be extended immediately
		and unconditionally 132
		3.10.6 No rebalancing permitted 135
		3.10.7 The standard of review: no effect and no intent test 136
	3.1	1 Special and differential treatment for developing countries 137
		3.11.1 The Enabling clause 137
		•

Contents xv

	3.11.2 Some historical features 138	
	3.11.3 The Enabling clause in the WTO legal order 143	
	3.11.4 The test for compliance with the Enabling clause 144	
	3.11.5 Is the candle worth the flame? (criticism of the	
	Enabling clause) 145	
	3.12 Preferential Trade Agreements (PTAs) 148	
	3.12.1 PTAs in the WTO: FTAs and CUs 148	
	3.12.2 Globalization yes, preferences yes as well 148	
	3.12.3 What matters when discussing preferential trade? 150	
	3.12.4 PTAs in the GATT 152	
	3.12.4.1 No per se inconsistency 152	
	3.12.4.2 The Art XXIV of the GATT test in a nutshell 15	3
	3.12.4.3 Designed at home, approved (?) in Geneva 153	
	3.12.4.4 The multilateral track 156	
	3.12.4.5 The bilateral track 168	
	3.12.4.6 Why not litigate more? 171	
	3.12.5 What is the permissible extent from MFN	
	deviation when a PTA is formed? 177	
	4 Export Subsidies 179	
	4.1 Rigidity required? 179	
	4.2 From discouraging to outlawing export subsidies 181	
	4.3 Counteracting prohibited subsidies 184	
2	D	100
Э.	Domestic Instruments	190
	1 National Treatment and its Rationale	193
	2 The Coverage	195
	2.1 Wide coverage 195	
	2.2 Subsidies 195	
	2.2.1 What is a (domestic) subsidy? 195	
	2.2.1.1 Financial contribution 196	
	2.2.1.2 Benefit to recipient 198	
	2.2.1.3 The specificity requirement 200	
	2.2.2 The classification of subsidies 200	
	2.2.3 Counteracting subsidies 201	
	2.2.4 Remedies 201	
	2.2.5 Farm subsidies 202	
	2.2.5.1 The regulation of farm trade in the GATT era 202	
	2.2.5.2 The WTO Agreement in a nutshell 206	
	2.2.5.3 AG over SCM 208	
	2.3 Government procurement 210	
	2.3.1 What is government procurement? 210	
	2.3.2 The basic discipline: non-discrimination 211	

xvi Contents

		2.3.3 The past and present of GPA membership 211
	2.4	The coverage of Art III of the GATT—revisited 212
3	Nati	onal Treatment, and Negative Integration 215
		onal Treatment: The Legal Discipline 216
		Fiscal measures 216
		4.1.1 DCS products 217
		4.1.1.1 Defining DCS 217
		4.1.1.2 SATAP 221
		4.1.2 Like products 234
		4.1.2.1 Defining like products 234
		4.1.2.2 Taxation in excess 236
	4.2	Non-fiscal measures 237
		4.2.1 A measure 237
		4.2.2 affecting sale, offering for sale, 238
		4.2.3 of like products 238
		4.2.4 Less favourable treatment 242
		A critique of the case-law concerning NT 247
	4.4	General exceptions 254
		4.4.1 Coverage 254
		4.4.2 An exception to which provisions? 254
		4.4.3 Regulatory diversity 259
		4.4.4 A two-tier test for compliance with Art XX of the GATT 260
		4.4.5 Public morals (Art XX(a) of the GATT) 261
		4.4.5.1 Coverage 261
		4.4.5.2 The necessity requirement 262
		4.4.6 Human, animal and plant life (Art XX(b) of the GATT) 262 4.4.6.1 Coverage 262
		4.4.6.2 The necessity requirement 262
		4.4.6.3 No science required 263
		4.4.7 Domestic laws and regulations (Art XX(d) of the GATT) 264
		4.4.7.1 Coverage 264
		4.4.7.2 The necessity requirement 264
		4.4.8 Exhaustible natural resources (Art XX(g) of the GATT) 266
		4.4.8.1 Coverage 266
		4.4.8.2 Jurisdictional limits 268
		4.4.8.3 Measure must be relating to the objective pursued 269
		4.4.8.4 Measures restricting domestic production or
		consumption 270
		4.4.9 The chapeau of Art XX of the GATT 271
		4.4.9.1 The scope of the chapeau 271
		4.4.9.2 Complying with the chapeau 271
		4.4.9.2.1 Arbitrary or unjustifiable discrimination 271
		4.4.9.2.2 Disguised restriction of trade 274
		4.4.10 A critique of the case-law 276 4.4.10.1 The discontents of an exhaustive list 276
		4.4.10.1 The discontents of an exhaustive list 2/0

	••
Contents	XVII

	5	4.4.10.3 A two-tier test? 285 4.4.10.4 The standard of review 285 4.5 A specific exception: films 286 Dealing with NTBs	287
		5.1 The TBT and SPS Agreements 2875.2 The legal relationship between GATT, TBT, and SPS 288	
		5.3 TBT 288	
		5.3.1 Coverage 288	
		5.3.2 International standards 289	
		5.3.3 Unilateral technical regulations 295	
		5.3.4 Domestic standards 296 5.4 The WTO SPS Agreement 297	
		5.4 The WTO SPS Agreement 297 5.4.1 Coverage 297	
		5.4.2 The SPS Agreement in a nutshell 298	
		5.4.3 International standards 299	
		5.4.4 Unilateral measures based on scientific evidence 299	
	_	5.4.5 Measures adopted on the basis of precaution 309	
	6	State Trading Enterprises (STEs)	315
		6.1 STEs: definitional issues 3156.2 The legal obligation in a nutshell 316	
		6.2 The legal obligation in a nutshell 316	
4.	St	ate Contingencies	320
		Introduction	321
	2	National Security (Art XXI of the GATT)	322
		2.1 The legal discipline 322	
		2.2 Practice in the GATT years 322	
	2	2.3 Practice in the WTO era 330	221
		BoP Evaluation Proteins	331
		Exchange Restrictions Antidumping (Art VI of the GATT)	335 338
	J	5.1 An unfair (?) price discrimination 338	330
		5.2 Finding dumping 343	
		5.3 Establishing injury 349	
		5.4 Sunset reviews 352	
		5.5 Price differentiation in antitrust statutes 358	
		5.6 What does the 'anti' in AD refer to? 361	
		5.6.1 Discriminatory pricing 361 5.6.2 Predation 362	
		5.6.3 Strategic dumping 363	
		5.6.4 AD as a safeguard mechanism 364	
	6	Countervailing Duties (CVD)	365
		Safeguards	365
		7.1 The regulatory framework 365	
		7.2 The typology of safeguards 366	
		7.3 Safeguards imposed by PTAs 367	

xviii Contents

	7.4 Conditions for lawful application of safeguards 368	
	7.4.1 Initiation of investigation 368	
	7.4.2 Unforeseen developments 370	
	7.4.3 Increased imports 371	
	7.4.4 Injury 371	
	7.4.5 Are safeguards truly non-discriminatory? 375	
	7.4.6 The issue of compensation 376	
	7.4.7 The duration of safeguards 378	
	7.5 Safeguards and voluntary export restraints (VERs) 380	
	7.6 Safeguards: a safe harbour too far? 381	
	8 The Notion of Market Access Revisited	385
5.	Institutional Provisions	388
	1 Introductory Remarks	389
	2 Participation	390
	2.1 Contracting Parties to the GATT, WTO members 390	
	2.2 Accession 391	
	2.3 Non-application 394	
	3 Decision Making	395
	3.1 Consensus, the default rule 395	
	3.2 Special procedures 396	
	3.2.1 Interpretations 396	
	3.2.2 Amendment of the GATT 397	
	4 Dispute Settlement	398
	4.1 The early GATT years 398	
	4.2 The late GATT years 400	
	4.3 The WTO DSU 402	40.4
	4.4 The WTO: exclusive forum for adjudication of trade dispute	s 404
	4.5 A closer look into procedures 406	
	4.5.1 Request for establishment of a panel 406 4.5.2 Burden of proof 407	
	4.5.3 Discovery powers 408	
	4.5.4 Standard of review 410	
	4.5.5 The process before the AB 411	
	4.5.6 The types of complaints before panels and the AB	11
	4.5.6.1 Violation complaints 412	. – –
	4.5.6.2 NVCs 412	
	4.5.6.3 Situation complaints 415	
	4.5.7 Recommendations and suggestions by panels and th	e AB 416
	4.6 Enforcing WTO obligations 417	
	4.6.1 The process in a nutshell 417	
	4.6.2 The types of complaint matter for enforcement purpos	ses 418
	4.6.3 Compliance within a reasonable period of time 418	
	4.6.4 Compliance panels 419	
	4.6.5 Compensation 420	
	4.6.6 Suspension of concessions 421	

Contents xix

4.6.6.1 Procedural issues 421	
4.6.6.2 Quantifying suspension of concessions 422	
4.7 Monitoring compliance 424	
4.8 The value of precedent in the WTO 425	
4.9 Does WTO enforcement work? 426	
5 Waivers	435
6 Transparency	436
6.1 Introductory remarks 436	
6.2 Trade Policy Review Mechanism (TPRM) 437	
6.3 Art X of the GATT 440	
6.3.1 The discipline in a nutshell 440	
6.3.2 The coverage 441	
6.3.3 The standard of review 442	
6.3.4 Laws of general application 443	
6.3.5 Uniform, reasonable, and impartial administration 443	
6.3.5.1 Uniform administration 444	
6.3.5.2 Reasonable administration 444	
6.3.5.3 Impartial administration 445	
6.3.6 The obligation to maintain independent tribunals 445	
7 Relation to the Havana Charter	446
6. The GATT, Then and Now	447
1 The GATT 1947: A Solid Text (with some compromises)	447
2 The Evolution of the GATT: No Keeping up with the Joneses	448
3 Rule of Reason	451
y Mare of Reason	1/1
Appendices	455
References	478
Index	499
A1F0F00V	1//