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Peter-Tobias Stoll

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A. Introduction: History and Overview

1 When designing the post-World War II international system, policymakers were aware of the world economic crisis of the 1930s and the lack of efficient mechanisms on the international level to cope with such events. A new concept of peace emerged, including economic and social aspects. The establishment of the ECOSOC (→ *United Nations, Economic and Social Council [ECOSOC]*) as a principal organ of the United Nations, reflected this idea, as did the creation of a monetary order and related institutions like the → *International Bank for Reconstruction and Development (IBRD)* ('World Bank') and the → *International Monetary Fund (IMF)* by the → *Bretton Woods Conference (1944)*. The ECOSOC soon took the initiative to create an order for international trade and to institute a United Nations agency, specialized for that purpose. Primarily driven forward by the US, a United Nations Conference on Trade and Employment was convened, which adopted the → *Havana Charter (1948)* (Charter for an International Trade Organization). During the conference, important progress was made concerning the lowering of tariff barriers.

2 In order to save and immediately put into effect such concessions, in 1947, the General Agreement on Tariffs and Trade ('GATT') was formulated on the basis of parts of the Charter's draft text and a Protocol on its provisional application was concluded. The Havana Charter was a very ambitious document providing for a comprehensive and far-sighted system for the world economy, including, inter alia, rules on employment, trade in primary commodities, and competition. Due to strong political resistance in the US, the Charter was never submitted for ratification to the US Congress and accordingly did not enter into force. The GATT, however, remained. At its second meeting, the contracting parties—the principal organ—entrusted the Interim Commission for the International Trade Organization ('ICITO'), established by the final session of the Conference for Interim Purposes, with secretariat functions. It was later to be called the GATT Secretariat. Rather frequently, so-called 'GATT rounds' took place, further reducing tariffs and—chiefly at the Tokyo Round in 1979—concluding additional and separate agreements, called 'codes' which had different membership ('GATT á la carte').

3 The → *Uruguay Round* (1986–94) was initiated to address a crisis of the GATT, caused specifically by the failure of a 1982 Ministerial Meeting in Geneva and more generally by the decline of the GATT system within international economic relations, and ended with a formidable reinforcement of its institutional structures and rules. Above all, the World Trade Organization ('WTO') was established (Marrakesh Agreement establishing the World Trade Organization ['WTO Agreement']) to provide for a sound and consolidated institutional basis for world trade relations, largely building on GATT structures and the GATT Agreement, which for the sake of clarity now is called 'GATT 1947'. It has been incorporated into the new WTO legal order by a specific agreement, called the 'GATT 1994' (→ *General Agreement on Tariffs and Trade [1947 and 1994]*). The GATT 1994 comprises, moreover, protocols and lists relating to tariff concessions, protocols of accession, decisions on waivers still in force on the date of entry into force of the WTO Agreement, and other decisions of the contracting parties to the GATT 1947 (see para. 1 (b) introductory note). The legal order was considerably harmonized, especially by requiring—with a few minor exceptions—all members to accept all agreements on the basis of a so-called single-undertaking approach. The dispute settlement system was further developed by the new Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU') in order to strengthen the rule of law and to effectively bar recourse to unilateral action and bilateral circumvention, which had considerably threatened GATT effectiveness in the past (→ *World Trade Organization, Dispute Settlement*). New rules were added to address newly felt concerns: for instance the → *Agreement on Trade-Related Aspects of Intellectual Property Rights (1994)* ('TRIPS Agreement') and, in order to cover new trade sectors, most importantly the → *General Agreement on Trade in Services (1994)* ('GATS').

Some provisions addressed issues covered by the Havana Charter but missing in GATT, which were focussed on by other international institutions, such as, for example, investments by the Agreement on Trade-Related Investment Measures ('TRIMs Agreement').

4 The WTO has developed well. Its dispute settlement mechanism has seen and settled more than 350 cases and a new round of negotiations was initiated in 2001, the so-called → *Doha Round*, which, however, has recently experienced a stalemate, mainly because of unresolved issues between developed and developing countries such as, for instance, subsidies on agricultural products. Also, it has to be noted that the WTO has been the subject of a fair amount of criticism, which in substance points out that the system has importantly promoted trade liberalization and globalization, but is allegedly incapable of addressing its important developmental, social, and environmental consequences (see also Trade and Culture; Trade and Environment).

B. The WTO as an International Organization and its Structure

5 The WTO is largely built on GATT structures, furnished with the status and rights of an international organization (Art. VIII WTO Agreement), including international legal personality, privileges, and immunities and, inter alia, the authority to conclude a headquarters agreement (Art. VIII). It 'shall provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement' (Art. II (1)), 'facilitate the implementation, administration, operation, and further the objectives' of the several agreements of the WTO legal order (Art. III (1)), and 'provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements' (Art. III (2)). Furthermore, in accordance with Art. III (3) and (4), the WTO shall administer the dispute settlement system and the trade policy review mechanism.

1. WTO Organs

6 The GATT originally relied on the contracting parties as the sole organ. In practice, secretariat functions were provided for by help of the ICITO and a body was established for inter-sessional work—the General Council. The WTO is furnished with three main organs. The principal organ is the Ministerial Conference which shall meet at least once every two years (Art. IV (1) WTO Agreement). In the intervals between Ministerial Conferences, its functions shall be conducted by the General Council, composed of representatives of all members and meeting as appropriate (Art. IV (2)). The third organ is the Secretariat, headed by a Director-General (Art. VI).

7 The Ministerial Conference and General Council head a vast sub-structure of more specific councils, committees, and working parties, often mirroring in scope the different agreements. Membership in these bodies is open to all WTO members. In accordance with Art. IV (5), three specific councils shall operate under the general guidance of the General Council. These are the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-Related Aspects of Intellectual Property Rights. As called for by Art. IV (7), the Ministerial Conference has established Committees on Trade and Development, Balance-of-Payments Restrictions, and Budget, Finance, and Administration. It has the power to establish additional committees as it may deem appropriate (Art. IV (7)).

8 Furthermore, the WTO Agreement provides for a Dispute Settlement Body and a Trade Policy Review Body. In both cases, the General Council is charged with those responsibilities, convening in the name of those bodies with the right to elect a distinct chairperson and in accordance with rules of procedures to be established for that purpose as appropriate (Art. IV (3) and (4)).

2. Decision-Making

9 In accordance with Art. IX (1) WTO Agreement, the WTO shall continue the GATT 1947 practice of making a decision by consensus. In cases where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting unless explicitly excluded (see for instance Art. 2 (4) DSU; Art. 12 (1) Agreement on the Application of Sanitary and Phytosanitary Measures ['SPS Agreement']). Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their Member States which are members of the WTO. Decisions of the Ministerial Conference and the General Council shall in general be taken by a majority of the votes cast. A qualified majority is required in some cases. Decisions on accessions shall be taken by the Ministerial Conference with a two-thirds majority of members (Art. XII (2) WTO Agreement). A three-quarters majority is required for decisions relating to interpretations of the WTO Agreement and the other multilateral trade agreements (Art. IX (2)) and waivers (Art. XI (3)). Art. X provides for a complex scheme of different majority requirements regarding amendments, even requiring acceptance by all members in some cases. The 2004 Sutherland Report put forward some suggestions as how to possibly reform the decision-making procedure by, inter alia, reducing the number of subjects requiring consensus or resorting to 'plurilateralism' in cases where a majority of WTO members supports a proposal.

3. Membership and Accession

10 The WTO system does not only provide for general rights and obligations. Rather, members are also bound by, and profit from, trade concessions negotiated between them. Therefore, aside from acceptance of the agreements, membership requires States to negotiate and to conclude such concessions. Members of the GATT 1947, having accepted the WTO Agreement and the Annexes and having made concessions, became original WTO members pursuant to Art. XI WTO Agreement. Other States have to negotiate and to agree to terms of accession prior to becoming members of the WTO by decision of the Ministerial Conference. These terms of accession often go well beyond the general obligations set forth in the WTO Agreement (so-called 'WTO-plus commitments'). In particular China had to undertake far-reaching additional obligations so as to attain other WTO members' consent to its application. However, least-developed countries, recognized as such by the United Nations, will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial, and trade needs, or their administrative and institutional capabilities (Art. XI (2)). At present, the WTO has 160 members (as of July 2014). China joined the WTO in 2001 and Saudi Arabia did so in 2005. The last major State joining the WTO was Russia in 2012.

4. Relationship with the UN and other Intergovernmental and Non-Governmental Organizations

11 Art. V (1) WTO Agreement directs the General Council to make appropriate arrangements for effective cooperation with other intergovernmental organizations. On this basis and mandated by the Council, arrangements were made between the WTO Director General and the United Nations Secretary General based upon the long standing relationship between the GATT and the United Nations, whereby the GATT was, and the WTO later will be, treated as a de facto specialized agency of the United Nations. The

arrangement also encompasses future cooperation with the United Nations Conference on Trade and Development (UNCTAD) in view of the International Trade Centre UNCTAD/WTO (ITC) which has been established jointly by UNCTAD and the GATT in 1964. Some of the agreements contain more specific provisions on the cooperation with other international organizations, sometimes allowing specific WTO organs to enter into such cooperation (see for instance Art. 68 TRIPS Agreement and Art. 12 (3) SPS Agreement). Art. III (5) WTO Agreement emphasizes that the WTO shall cooperate with the IMF and the World Bank Group with a view to achieving greater coherence in global economic policy-making.

12 In accordance with Art. V (2) WTO Agreement, the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO. The General Council in this regard adopted Guidelines for Arrangements on Relations with Non-Governmental Organizations on 18 July 1996. In accordance with para. II

> Members recognize the role NGOs [non-governmental organizations] can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs.

The Guidelines refer to derestriction of documents, the role of the Secretariat, and participation of chairpersons of councils and committees in discussions and meetings with NGOs, but also emphasize that direct involvement of NGOs in the work of the WTO is not possible. After a ruling of the Appellate Body it is now established that documents provided for by NGOs may be considered by panels in dispute settlement proceedings (*US—Shrimp [Report of the Appellate Body]* paras 101–10).

C. The Legal Order of the WTO

13 The WTO legal order relies on GATT structures and therefore is based on a variety of different agreements. Divided membership, constituting a major problem in the GATT, has been largely cured by the single-undertaking approach adopted in the Uruguay Round and now reflected by Art. II (2) WTO Agreement, stating that all the ‘multilateral trade agreements’ are integral parts of the WTO Agreement, binding on all members. Only four minor exceptions were allowed, classified as ‘plurilateral agreements’, of which only two are still relevant: the Agreement on Trade in Civil Aircraft; and the Agreement on Government Procurement. Adoption of new plurilateral agreements is not foreclosed; fragmentation of membership to existing agreements, while not totally excluded in the case of amendments, is restricted by burdensome procedural requirements.

14 While formally assuming an equal status as public international law treaties, the WTO Agreement with its basic institutional provisions has a prominent status among the manifold instruments. It figures as the lead agreement, whereas the bulk of other instruments form annexes thereto. In substance, its special status is based on Art. XVI (3) stipulating the prevalence of its provisions over those of other agreements to the extent of a conflict.

15 Within the annexes to the WTO Agreement, Annex 1 contains the substantial trade provisions, whereas Annex 2 and Annex 3 relate to general institutional mechanisms: the DSU and the Trade Policy Review Mechanism (‘TPRM’). Annex 4 contains the plurilateral Agreements.

16 Annex 1 is subdivided according to the distinction between trade in goods—the traditional domain of the GATT and related agreements (Annex 1A)—and the new sectors:

trade in services (Annex 1B: GATS) and intellectual property rights (Annex 1C: TRIPS Agreement).

17 A number of special provisions address the interrelationship and potential conflicts between the agreements. However, in a number of particular cases such interrelationship has been considered difficult and has led to disputes (eg *Canada—Periodicals [Report of the Appellate Body]* 19; *EC—Bananas III [Report of the Appellate Body]* para. 220; and *Canada —Autos [Report of the Appellate Body]* para. 151).

18 In accordance with Art. 3 (2) DSU, customary rules of interpretation of public international law apply in WTO dispute settlement. As this may show, the WTO legal order is part of public international law. Its provisions are 'not to be read in clinical isolation from public international law' (*US—Gasoline [Report of the Appellate Body]* 17). Consequently, the WTO does not constitute a self-contained regime, as has been suggested on occasion in the past.

1. General Principles and Mechanisms

19 The WTO and the GATT do not prescribe free-trade as such but encourage liberalization as a means to other ends. This correctly points to their achievements and describes the proper place that both instruments assume within the system of international economic and social relations and related regimes. On the other hand, it might clarify that the GATT and the WTO lack aspiration of a more far-reaching economic and market integration. However, seen in more detail, the free trade notion needs clarification As far as the objectives are concerned, preamble para. 1 of the WTO Agreement refers to more general and overarching economic policy goals, including standards of living, employment, equality of income, expanding production in trade, optimal resource allocation, sustainable development, and economic development. Free trade language, however, is also missing in the operative parts. Neither the GATT nor the WTO require members to pursue a pure free-trade-type policy. Trade restrictions and related policy choices are not per se prohibited, but rather disciplined in substantive and procedural perspective. What is more, trade restrictions are made negotiable between members on the basis of reciprocal concessions which in the end result in trade liberalizations.

20 A very basic first principle of the WTO legal order is the governance of the rule of law in trade, internationally as well as nationally (World Trade, Principles). It includes, on the international level, the legally binding force of WTO obligations and concessions, their enforceability between members by means of the dispute settlement system, and the obligation of members to ensure the conformity of their laws, regulations, and administrative procedures with their WTO obligations (Art. XVI (4) WTO Agreement). However, the WTO principle of the rule of law also addresses the national level. Chiefly, Art. X GATT 1994 and, similarly Art. VI GATS require members to safeguard transparency (Art. X (1) GATT 1994), to administer laws, regulations, decisions, and rulings in a uniform, impartial, and reasonable manner (Art. X (3) (a) GATT 1994), and to maintain or institute judicial, arbitral, or administrative tribunals or procedures for prompt review and correction, which shall be independent of the agencies entrusted with administrative enforcement (Art. X (3) (b) GATT 1994). A number of agreements, inter alia, the anti-dumping rules in the Agreement on Implementation of Article VI of the GATT 1994 and the TRIPS Agreement contain even more specific rules concerning national procedures, judicial review, and substantive standards.

21 A second important principle is non-discrimination, including two standards: most-favoured-nation-treatment ('MFN'; Most-Favoured-Nation Clause); and national treatment (National Treatment, Principle). Most favoured nation treatment mandates that

> any advantage … granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties (Art. I GATT 1994, similarly: Art. II GATS, Art. 4 TRIPS Agreement; Like Products).

It applies throughout the WTO legal order with a limited number of general, and some specific GATS, exceptions. It most importantly means that choices between different foreign sources shall be exclusively driven by economic considerations. The MFN principle has an important impact on the system of mutual concessions as it requires that third States will automatically benefit from concessions made by one member vis-à-vis another one.

22 In contrast, national treatment means that treatment accorded to foreign goods, services, and intellectual property rights, shall not be less favourable than that accorded to like items of national origin. It does not foreclose 'positive discrimination'. National treatment disallows policies based on distinctions between internal and domestic and external or foreign sources and origins. Where it applies, markets are open to competition and a 'level-playing field' between domestic and foreign products. However, with the exception of Art. 3 TRIPS Agreement, which follows somewhat different principles of international intellectual property protection, application of national treatment is importantly limited, as it in fact only applies where States have opened their markets by trade concessions. Art. III GATT 1994 is based on a territorial concept, calling for national treatment within the internal market only and thus applies only when goods have passed the border, subject to border measures as being defined by relevant concessions. The GATS is not based on such a territorial approach. However, in accordance with Art. XVII (1) GATS national treatment only applies in sectors inscribed in a member's schedule, subject to any conditions and qualifications set out therein.

23 Market access on the basis of 'reciprocal and mutually advantageous concessions' (Art. XXVIII GATT 1994) can be considered another important principle of the WTO legal order. The initiation and conduct of negotiations, the implementation of results, and the safeguarding of their value, including means of readjustment, are addressed by numerous provisions.

24 Another element of the WTO legal order is the principle of rationality, effectiveness, or proportionality of trade measures. A number of provisions direct members to apply the most effective and least trade-distorting measure to achieve their objectives. The GATT, for instance, strongly favours tariffs over quantitative restrictions for that reason. Regarding anti-dumping and subsidies, the calculation of offsetting duties is disciplined and a halt of procedures is mandated when effects are considered minimal. Finally, retaliatory action in dispute settlement is limited to the equivalent of the nullification or impairment of benefits (Art. 22 (4) DSU).

25 Lastly, the WTO legal order contains rules addressing fairness in trade. They include anti-dumping, a regulatory concept addressing the conduct of privates, and subsidies; thus addressing unfair State conduct. They enable States, upon certain conditions and on the basis of national procedures guided by WTO rules, to impose anti-dumping respectively

countervailing duties on imports considered dumped or subsidized. It is worth mentioning that this concept relates to trade fairness rather than to fair competition.

2. Trade in Goods

(a) General

26 Rules on trade in goods form the major part of the WTO legal order. Largely building on experience and evolution under the GATT, the WTO incorporated the old regulations of the GATT 1947 together with its entire aquis, additional interpretative understandings, and the Marrakesh Protocol, which was concluded during the Uruguay Round, into the new GATT 1994. The Uruguay Round Understandings refer to specific GATT provisions and clarify their scope and application. They address Art. II (1), Art. XVII, the balance of payments provisions, Art. XXIV, waivers of obligations, and Art. XXVIII. The Marrakesh Protocol contains schedules of concessions and modalities of their application. At its core, GATT 1994 seeks to reduce trade barriers. Other rules and standards, such as the principle of non-discrimination and transparency are to secure the economic benefits resulting from such a reduction. The GATT 1994, however, allows for exceptions and differential treatment of developing countries. The GATT 1994 is further clarified and supplemented by a number of sector-specific agreements dealing with, inter alia, agriculture, textiles, health and safety standards, subsidies, and safeguards. In accordance with the General Interpretative Note to Annex 1A, these instruments are lex specialis to the GATT 1994. They are appended to the WTO Agreement under Annex 1A.

(b) Bound Tariff Rates

27 The GATT 1994 distinguishes between tariffs and non-tariff barriers to trade, the latter referring to quantitative restrictions, tax measures, measures with regard to sanitary and phytosanitary standards, technical barriers to trade, and unfair trade conduct. Tariffs are duties raised on goods upon the crossing of a border. They are considered a legitimate means of regulating trade and may take the form of import-, export-, or transit-duties. Although the WTO authorizes this form of domestic trade protection, it binds its members to their tariff concessions (Art. II GATT 1994), ie tariffs may not be increased above the bound rate unless compensation is paid to adversely affected members. Tariff concessions are negotiated between members and the resulting commitments are set forth in each member’s tariff schedule. These schedules form an integral part of the GATT (Art. II (7) GATT 1994). By means of the most-favoured-nation rule individual tariff reductions are extended to the whole WTO membership. The binding of tariffs does not foreclose the application of lower tariffs in practice (‘applied tariffs’).

28 The effectiveness and administration of the tariff bindings is facilitated by the Agreements on the Rules of Origin (Rules of Origin), Customs Valuation, and Preshipment Inspection. Also, the most-favoured-nation principle multiplies their effect. In the interest of further liberalization, the preamble to the GATT and Art. XXVIII bis envisage multilateral tariff negotiations. Art. XXVIII bis calls for negotiations on ‘a reciprocal and mutually advantageous basis’. The established practice for ascertaining the value of concessions is to multiply the trade volume in the particular good by the percentage points of the proposed tariff reduction. During the preceding negotiation rounds, members had made considerable tariff reductions on a product-by-product basis or in linear (across the board) fashion. Concession may be temporally suspended or permanently withdrawn in accordance with the specifications under the different exception provisions and Art. XXVIII. The

Understanding on the Interpretation of Article XXVIII GATT 1994 (Concession Withdrawal Understanding) further interprets the procedures in this regard.

(c) Prohibition of Quantitative Restrictions

29 Quantitative restrictions to trade, which are often referred to as quotas, are generally prohibited under the WTO pursuant to Art. XI (1) GATT 1994. Thus, in general, members are not allowed to generate a short supply of imported or exported goods in order to increase their price and to protect domestic industries in that way. The economic rationale of this prohibition relates to the intransparency of these restrictions and the potential for arbitrariness and discrimination inherent in the necessary allocation process. Art. XXVIII bis expresses a clear preference for tariffs because their effects are more visible and more accountable and, in this respect, they are easier to deal with in the course of trade negotiations. This preference, as well as the aforementioned prohibition, are often considered to reflect a principle of tariffication inherent in the WTO system.

30 Because the drafters of the GATT were aware that a complete ban of quantitative restriction could not be upheld, they entitled the members to impose quantitative restrictions in a number of exceptional cases. Thus, under narrow circumstances, such restrictions may be applied on the basis of Art. XI (2) as an exceptional means to cope with balance of payment situations as provided for by Art. XII and the related Understanding on the Balance-of-Payments Provisions and in the area of trade in textiles and agricultural goods. A number of provisions and chiefly Arts XI (2) and XIII discipline such imposition in that it requires that quotas be applied in accordance with the principle of non-discrimination.

(d) Technical Barriers to Trade: Health and Safety Standards in the WTO

31 Trade barriers similar to quantitative restrictions may be further caused by all sorts of requirements and standards, including technical regulations, testing and certification procedures, and conformity assessment. These so-called technical barriers to trade are the subject of two agreements within the WTO: The Agreement on Technical Barriers to Trade (‘TBT Agreement’) and the Agreement on Sanitary and Phytosanitary Measures (‘SPS Agreement’), the latter being lex specialis to the former (Art. 1 (5) TBT Agreement). Historically and conceptually, they are to further the objectives of Art. XX GATT 1994 and clarify the exception clause in this respect (preambles to the TBT and SPS Agreements). The case law on both agreements (EC-Hormones Case [Report of the Appellate Body]; *EC—Sardines [Report of the Appellate Body]*; *EC—Biotech [Report of the Panel]*; EU—SEAL [Report of the Appellate Body]) has, however, stressed the members’ sovereign right to unilateral regulation in this area at their chosen level of protection and shifted the burden of proof to the member challenging the regulation. This understanding is particularly significant because compliance with the SPS Agreement creates the presumption of GATT conformity (Art. 2 (2) SPS Agreement). The recent case-law on the TBT-agreement (US—Clove Cigarettes [Report of the Appellate Body], US—Tuna II Case [Report of the Appellate Body], US—COOL [Report of the Appellate Body] and EU—SEAL [Report of the Appellate Body]) has again increased the importance of that very Agreement.

32 Both the TBT Agreement and the SPS Agreement build on the principle of non-discrimination (Art. 2 (1) TBT Agreement, Art. 2 (3) SPS Agreement) but go well beyond that by proscribing regulation, which is more trade-restrictive than necessary to fulfil a legitimate objective (cf Art. 2 (2) TBT Agreement, Art. 2 (2) SPS Agreement). This negative type of integration is supplemented by provisions on the mutual recognition of domestic standards (Art. 2 (7) TBT Agreement, Art. 4 SPS Agreement) and by positive harmonization through the introduction of conformity assessment systems (Arts 2 et seq TBT Agreement, Arts 2 (2), 3 et seq SPS Agreement). In relation to the latter, members shall ensure that their regulations respect scientific principles (Art. 2 (2) SPS). Unilateral action is thus made

subject to risk assessment, regulatory consistency, least-trade restrictiveness, and certain procedural requirements (eg Art. 5 SPS Agreement). Art. 5 (7) SPS Agreement recognizes the fact that situations may arise where members need to address risks promptly and without waiting for sufficient scientific evidence confirming the existence of the risk and its extent, and thus reflects in some rather limited way, the principle of precaution. In the interest of further harmonization, members are encouraged to adopt their measures in accordance with internationally accepted standards (Art. 2 (4)–(5) TBT Agreement, Art. 3 SPS Agreement). In this respect, the WTO strengthens the role of international standardization bodies. When based on the relevant standards, members benefit from a presumption that their measures conform to the necessity condition.

(e) The Principle of Tariffication in the Agriculture and Textiles Sector

33 The Agreement on Textiles and Clothes ('ATC') led to fundamental changes in the worldwide trade of textiles. Prior to the GATT 1994, there were no provisions on tariffication of textiles included in the GATT 1947. Therefore, importation from developing countries to industrial countries was often subject to quotas outside the GATT System. Headed by the Multifibre Agreement ('MFA') (Arrangement regarding International Trade in Textiles) that contained provisions on the admissibility of quantitative restrictions, the quotas were negotiated bilaterally.

34 When the GATT 1994 entered into force with the aim of including the textiles and clothes sector into the GATT, over 1000 bilateral negotiated restrictions of trade had to be reduced. ATC was treated as part of the WTO (Art. II (2) WTO Agreement and Annex 1 to the WTO Agreement). Art. 9 ATC provided for determination of the agreement in 2005. Up to that date products listed in the Annex to the ATC should be integrated into the GATT 1994 (Art. 2 ATC). This measure aims at further liberalization in the textiles and clothes sector.

35 Agriculture was until the determination of the Uruguay Round covered by several exceptions to the general principles of the GATT 1947, and the usage of import restrictions was allowable under certain conditions by virtue of a broad waiver. The Agreement on Agriculture heads for a tariffication; it therefore restricts quantitative restrictions and contains specific and strict rules on subsidies.

(f) Fair Trade Standards: The Agreements on Anti-Dumping, Subsidies and Government Procurement

36 The WTO contains a number of mechanisms to ensure a level playing field in regard to the competitive relationship in trade and its potential distortion by private conduct and government action. These include rules on anti-dumping, subsidies (Subsidies, International Restrictions), and government procurement (Government Procurement, International Restrictions), as provided for by Arts VI and XVI GATT 1994 and the related Agreements on Anti-dumping, on Subsidies and Countervailing Measures, and on Government Procurement. Sometimes, the term 'trade remedies' is used in connection to measures and rules related to anti-dumping and subsidies because the related WTO rules allow members to impose special duties, which are supposed to offset potential distortions of competition.

37 When the GATT was drafted, it was considered necessary to address the practice introduced by some members in the early 20th century of imposing specific duties on imports to protect their domestic industries, against what was felt to amount to predatory pricing. Art. VI allows members to levy such specific duties which otherwise would have been inconsistent with the principles of tariff bindings and most-favoured-nation treatment.

At the same time, the provision aims at putting some disciplines on this practice of anti-dumping in view of its protectionist tendency. Art. VI (1)

> recognize[s] that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.

38 In an attempt to prevent anti-dumping from becoming a major source of protectionism, a set of additional rules was introduced with the establishment of the WTO by the Agreement on Implementation of Article VI of GATT—often referred to as the Anti-dumping Agreement. The Agreement aims at more precisely defining and guiding the determination of 'dumping' (Art. 2), 'injury' (Art. 3), and the relevant 'domestic industry' (Art. 4) and furthermore aims at disciplining the investigation procedures (Art. 5 et seq) and the imposition of anti-dumping duties (Art. 9 et seq). These additional disciplines are particularly welcome, as a number of members, for instance, China, have newly introduced anti-dumping instruments since the establishment of the WTO.

39 The new rules have been the subject of a considerable number of disputes, which signifies the critical importance of the issue. To mention but one, a panel found that WTO rules do not allow for the passing on of the amounts collected as anti-dumping duties to the domestic industry which had initiated the investigation as that would severely distort the level playing field between a foreign exporter and the domestic industry (*US—Byrd Amendment [Report of the Panel]*). The recent conflict between the European Union and China over Dumping practices in case of the export of Chinese Solar panels to the European Union was solved before initiating the WTO Dispute Settlement procedure.

40 Under the GATT, the issue of subsidization was addressed quite the same way as anti-dumping. Art. VI indeed envisages so-called 'countervailing duties', which aim at offsetting the distortions of competition caused by unfair subsidization in the export country. While the WTO mainly disciplines member's actions in the case of anti-dumping, proper multilateral standards were introduced with the WTO Agreement on Subsidies and Countervailing Measures ('SCM') in order to respond to the critical importance of distortions of competition caused by subsidies as a governmental conduct. Consequently, members have two options to address unfair subsidization by other members: they may undertake investigations and impose countervailing duties on their own; or have recourse to the WTO dispute settlement system.

41 The SCM defines subsidies to be covered by the agreement by reference to the term 'specificity'. Thus, the provisions are only applicable to subsidies, which are available only for certain enterprises (Art. 1). They are prohibited, if they are legally or factually contingent upon export performance or the use of domestic over imported goods (Art. 3). The agreement also contains a second category of subsidies, which are defined as actionable (Art. 5). These are subsidies, which might adversely affect the interests of another member by causing injury to the domestic industry of such a member (Art. 5 (1) (a)), by amounting to a nullification or impairment of benefits (lit (b)) or by resulting in a serious prejudice to the interest of another member (lit (c)). The consequence for a subsidy of being qualified as actionable is that it is subject to the dispute settlement procedure (Art. 7). The Agreement furthermore envisages a category of 'non-actionable' subsidies, which, however, was only applicable until the end of 1999 and has not been extended.

42 The SCM-Agreement applies to all sorts of goods. However, the Agreement on Agriculture contains some more specific rules and particularly provided for a 'peace clause' (Art. 13), which, however, was due to expire in 2003.

43 The Agreement on Government Procurement opens public procurement markets by providing for most-favoured-nation and national treatment in this trade sector. The fairness standard applied is thus one of non-discrimination and transparency.

(g) Trade-Related Investment Measures

44 While the issue of foreign direct investments and their control still falls largely outside the scope of the WTO system, some specific issues are addressed by the TRIMs Agreement. That agreement largely builds on and reiterates the findings of the 1984 panel report on the Canadian Investment Review Act, which had found that certain elements of national investment controls may come into conflict with Art. III and XI. Aside from establishing a committee, establishing a requirement of notification (Art. 5), and calling for transparency (Art. 6), the TRIMs Agreement mainly set out an illustrative list of investment measures, which may be inconsistent with Art. III and XI (1) GATT and which members should not apply. These include measures amounting to local content requirements or export performance targets.

3. Trade in Services

(a) General

45 While trade in goods has been regulated in the world trade order since the provisional application of the GATT 1947, States were long reluctant to establish a multilateral framework addressing the trade aspects of services. The increasing volume of world-wide requests for services and export resulting from this underlines the achievement of the WTO architects in concluding a General Agreement on Trade in Services. Trade in services accounts for more than 10% of global GDP. Until the 2008 financial crisis growth rates were in the double-digit percentage range but then decreased substantially. Now listed as Annex 1B to the WTO Agreement, GATS builds on rules and mechanisms similar to those contained in the GATT 1994. Together with schedules of concessions and the specific additional Annexes, Protocols, and Reference Papers, the GATS forms a body of law on its own, and thereby accommodates the conceptual particularities of trade in services and its liberalization and regulation. Members individually commit to liberalization of individual services sectors and modes of supply (see para. 60 below) as a matter of unilateral decision or as the outcome of negotiations. These commitments are set forth in Member States' schedules of specific commitment, which form an integral part of the GATS (Art. XX (3)). GATS is headed by the Council for Trade in Services (Art. XXIV (1) GATS), under which the Committees on Financial Services and on Specific Commitments and the Working Parties on Domestic Regulation and on GATS Rules work towards improved classification, licensing and acquisition standards.

46 As the GATS is designed as a wholly separate body of law, distinct from the rules on trade in goods under GATT, it also addresses a number of basic issues in parallel to, but sometimes differently from, the GATT. Thus, the GATS has its own rules on regional economic integration (Art. V and V bis), general and security exceptions (Art. XVI and XVII), subsidies (Art. XV), government procurement (Art. XIII), safeguard measures (Art. X), and rules for the restorations to safeguard the balance of payments (Art. XII). Furthermore, and most remarkably, the agreement explicitly addresses the issue of business practices (Art. IX)—an issue, which is also dealt with in the TRIPS Agreement but which so far has not been agreed on in the realm of trade in goods.

(b) Minimum Standards

47 Due to the novelty and complexities inherent in multilateral service trade regulation, the GATS adopts a two-tiered approach, which envisages general obligations and disciplines (Art. II–XV), just like the most-favoured-nation principle (Art. II) and transparency (Art. III), through publication of measures and establishment of contact points (Art. III (1) GATS), as well as the mutual recognition of qualification and certification standards (Art. VII GATS).

(c) Additional Commitments and Liberalization

48 A number of more advanced standards and disciplines come into play, where members have made concessions. These include national treatment (Art. XVI (1)), unrestricted financial transfer (Art. X), procedural obligations, such as the impartial operation of the law (Art. VI (1–3) GATS) and specific reporting requirements (Art. III GATS), as well as positive harmonization through negotiated standards (Art. VI (4) GATS), and—lastly—a control of domestic monopoly suppliers (Art. VIII).

49 Just as is the case for trade in goods, service trade liberalization under the WTO is based on multilateral negotiations and mutual concessions. Such liberalization and regulation has to take into consideration the complexities of service trade, which basically result from the multiplicity of supply modes. Whereas trade in goods necessarily involves the movement of a good from one customs territory to another by passing a border, services may be traded in different ways, which includes movements of suppliers and customers and the establishment of a commercial presence. Art. I (2) (a–d) sets out four modes of supply, namely: cross-border supply; consumption abroad; commercial presences; and the presence of natural persons. As these modes have quite different policy implications, they are treated differently both in negotiations and concession lists.

50 Furthermore, in each sector of services trade, a number of issues have to be addressed to secure a meaningful market access. This is true for technical standards, government approvals and licenses, and even for competition issues, which play quite a role, for instance, in the area of telecommunications, where some domestic enterprises may have a dominant position in the market. Furthermore, mode three—commercial presence—involves a number of issues, which so far have been primarily dealt with in the context of investment law, and mode four—presence of natural persons—is closely interlinked with a whole lot of issues, which include visa policies and immigration. Trade liberalization thus requires a lot of conceptual work and has therefore been negotiated sector-by-sector.

(d) Special Sectoral Rules and Protocols

51 In each case, the conceptual issues were treated first and are normally outlined in a reference paper. Afterwards, negotiations take place. Their results have often been laid down in additional protocols, such as the Second Protocol on financial services from 1995, the Third Protocol, which relates to the movement of natural persons (1995), the Fourth Protocol, which is about basic telecommunications (1997), and a Fifth Protocol, which again addresses financial services (1999).

4. Trade-Related Aspects of Intellectual Property Rights

(a) Development and Concept

52 With the establishment of the WTO, rules on intellectual property became an inherent part of the world trade order (Intellectual Property, International Protection). Generally speaking, these rules differ from the disciplines governing trade in goods and services in that they impose positive obligations on the Member States and do not only outlaw certain State measures. While intellectual property issues have so far been dealt with outside the trade regime by a number of often long-standing international agreements, which are

administered by the World Intellectual Property Organization (WIPO), the TRIPS Agreement is part of the outcome of the Uruguay Round and defines additional substantial minimum standards with regard to intellectual property rights, but also contains provisions on domestic enforcement and dispute settlement, which hitherto have been scarcely addressed by international instruments. The background to the establishment of TRIPS was the increasing number of pirated and counterfeit goods on the world market since the 1970s and a manifest controversy between the North and the South as to the appropriateness of the international standards. The Uruguay Round negotiations on the issue started with a fierce debate on the mandate and the competence of the trade regime to address the issue. By reference to two panel cases concerning the compatibility of border measures against allegedly infringing imports with Art. XX (d) GATT, a mandate of the Uruguay Round was established and the negotiations soon went considerably beyond the narrow subject area of these disputes.

53 According to its preamble, the TRIPS Agreement aims at reducing distortions and impediments to international trade by taking into account the need to promote effective and adequate protection of intellectual property rights but also by ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.

(b) Substantive Standards

54 Part II of the agreement deals with substantive standards concerning the availability, scope, and use of intellectual property rights and addresses copyright and related rights, (Art. 9 et seq), trademarks (Art. 15 et seq), geographical indications (Art. 22 et seq), industrial designs (Art. 25 et seq), patents (Art. 27 et seq), layout-designs (topographies) of integrated circuits (Art. 35 et seq), and the protection of undisclosed information (Art. 39), which includes the protection of trade secrets. These substantive rules often refer to existing international instruments administered by WIPO, such as the Berne and the Paris Convention as well as the Rome Convention, which provides for the protection of performers, producers of phonograms, and broadcasting organizations. Often, the provisions of the TRIPS Agreement go beyond a simple reference to such provisions by way of clarifications or additions. Furthermore, in the case of Art. 35 TRIPS Agreement, reference is made to the 1989 Washington Treaty on Intellectual Property in Respect of Integrated Circuits, which never entered into force. In sum, it is fair to say, that the standards defined in this way are considerably higher than those envisaged by the existing intellectual property rights instruments.

(c) Enforcement and Dispute Settlement

55 A major concern with regard to the WTO rules on intellectual property, as embodied in the TRIPS Agreement, has been the issue of enforcement, which includes two different aspects. First, enforcement is an issue at hand between the State Parties or members concerned. Second, the rules and procures are at stake, which allow the private owners of an intellectual property right to enforce such right by help of the courts or other authorities. The TRIPS Agreement addresses both these issues.

56 As regards the enforcement of obligations among parties, the classical international instruments in most cases simply referred to the International Court of Justice. In view of the intricate procedural issues involved and the diplomatic implications, this option has hardly ever been used and therefore was considered quite ineffective. In contrast, as Art. 64 (1) TRIPS Agreement clarifies, disputes concerning the proper compliance of members with the TRIPS Agreement can be brought to WTO dispute settlement, including the option to eventually enforce any decision by means of trade sanctions. In one case so far, the parties had recourse to arbitration under Art. 25 DSU and compensation was granted for the nullification or impairment of benefits under the TRIPS (*US—Copyright Act—Recourse to*

Arbitration under Article 25 of the DSU [Award of the Arbitrators]). Art. 64 (2) TRIPS Agreement had excluded the admissibility of non-violation and situation claims for a transitional period of five years, which, however, has been prolonged by a decision of the Ministerial Conference (Ministerial Conference 'TRIPS Non-violation and Situation Complaints—Ministerial Decision' WT/MIN(13)/31, WT/L/906 [7 December 2013]).

57 Linking rules on intellectual property rights to WTO dispute settlement also implies that compliance with such rules may become the subject of possible retaliatory action. Indeed, members, according to Art. 22 DSU, have sought and were granted the authority to suspend their obligations under the TRIPS Agreement in some particular cases on very specific terms and conditions (eg *EC—Bananas III—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU [Decision by the Arbitrators]* para. 139). As far as can be seen, however, such members eventually did not make use of such authority. It is an open question, how such suspension, if it were actually implemented, would conform with the parallel obligations of members under other international intellectual property instruments.

58 The maintenance and enforcement of intellectual property rights among privates by means of the national or regional legal systems is provided for by Part. III TRIPS which specifies the necessary civil and administrative procedures and remedies as well as provisional measures. Furthermore, some disciplines are defined in view of border measures and criminal sanctions, of which border measures are currently subject to a dispute (*European Union and a Member State—Seizure of Generic Drugs in Transit* WT/DS409).

59 Establishing an advanced level of intellectual property protection on a global scale has of course met with some concern and criticism. These mainly touch upon the areas of agriculture, food, and health, but also the protection of folklore, traditional knowledge of indigenous people, and genetic resources. In particular the latter issues have been discussed in the TRIPS Council. Art. 27.3 (b) TRIPS provides for a review to assess the patentability of animal and plant inventions as well as plant varieties. The Doha Declaration, moreover, suggested discussing the relationship between the TRIPS and the UN Convention on Biological Diversity ([concluded 5 June 1992, entered into force 29 December 1993] 1760 UNTS 79) and the protection of traditional knowledge and folklore.

60 A particularly sensitive issue has been access to essential medicines. While the TRIPS Agreement generally acknowledges the relevance of public health concerns (Art. 8) and also envisages non-voluntary licenses in Art. 31, the wording of lit (f) of the said article seemed to be a potential hurdle for access to medicines, as it required a non-voluntary licence to be issued 'predominantly for the supply of the domestic market of the Member'. It thus prevented the manufacture of such medicines under a non-voluntary licence for the export to those members, which, while facing grave public health emergencies such as AIDS, tuberculosis, or malaria, lack domestic industries capable of producing such pharmaceuticals on their own. On occasion of the 2001 Ministerial Conference in Doha, a Declaration on the TRIPS Agreement and Public Health was adopted, which

> recognize(d) that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement.

It was implemented by a decision of the General Council in 2003, which included a waiver in order to allow for a combined solution. That solution envisaged the manufacture of medicines in one member under a non-voluntary licence and the import of the resulting products by a member, where a health emergency exists by virtue of another compulsory licence. In 2005, the General Council furthermore decided to amend the TRIPS Agreement

along the lines of this solution. So far, however, the necessary number of members accepting the amendment has not been achieved.

5. Rules and Exceptions in the WTO Legal Order

61 A number of provisions allow for an exception or relaxation of obligations or commitments under the WTO, by reason of international security, of public policy, in certain macro-economic situations or other exceptional circumstances, and where specific trade relations between some members require them to do so. These provisions define substantive requirements and procedures, and sometimes envisage that other affected members may seek a readjustment.

(a) Security Exceptions

62 Art. XXI GATT 1994, Art. XIV bis GATS, and Art. 73 TRIPS Agreement contain security exceptions, which largely have identical wording. They exempt members from obligations under the agreements regarding information disclosure and trade in military supply of certain categories, when considered necessary regarding essential security interest by such a member. Likewise, action taken in time of war or another emergency or in pursuance of obligations under the UN Charter for the maintenance of international peace and security are exempted. Art. XIV bis GATS additionally stipulates an obligation to inform the Council for Trade in Services to the extent possible. On a number of occasions, Art. XXI GATT was invoked by members and discussions arose as to the meaning of member's consideration of essential security interests. According to reports from preparatory work, 'essential' was put because otherwise Art. XXI GATT would have permitted 'anything under the sun'. However, to date, no definite answer has been given. An unadopted panel report (*US—Trade Measures Affecting Nicaragua*) is inconclusive, because the panel found itself unfit to reach any conclusion, given the fact that its mandate stated 'the Panel cannot examine or judge the validity or motivation for the invocation of Article XXI (b) (iii) by the United States'.

(b) Public Policy Exceptions

63 Art. XX GATT 1994 and Art. XIV GATS provide for general exceptions, permitting the adoption or enforcement of State measures in a number of specifically defined cases relating to public policy objectives, provided that such measures meet general requirements as set forth in the chapeau of those provisions. Both provisions include (1) measures necessary to protect public morals, or alternatively—in the case of the GATS, necessary to maintain public order (lit (a) of provisions)—and (2) measures necessitated to protect human, animal, or plant life or health (lit (b) of provisions). Furthermore they (3) refer to measures necessary to secure compliance with certain laws or regulations. In the case of the GATT 1994, Art. XX (d) in this regard refers to customs enforcement, enforcement of monopolies, protection of patents, trademarks, and copyrights, and the prevention of deceptive practices. Art. XIV (c) GATS mentions the prevention of deceptive and fraudulent practices, default of contract, protection of privacy, and safety. A number of further exceptions are stipulated, including prison labour (Art. XX (e) GATT 1994), protection of national treasures of artistic, historic, or archaeological value (lit (f)), and the conservation of exhaustible natural resources (lit (g)), as well as measures relating to taxation (Art. XIV (d) and (e) GATS).

64 The chapeau of both provisions requires that measures are not applied in a manner constituting a means of arbitrary or unjustifiable discrimination between countries, where the same conditions prevail, or a disguised restriction on trade. Those additional conditions

have to be interpreted taking into account the design of the measure at hand and the specific exception clause applicable in a given case.

(c) Exceptions to Address Certain Economic Situations: Balance-of-Payment Purposes and Safeguards

65 Temporary relaxation of obligations and commitments for members experiencing economic difficulties is provided for in a number of cases. In accordance with Art. XII and, similarly, Art. XVIII (b) GATT 1994 a contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported under certain conditions, subject to consultations. Art. XI and XII GATS contain similar provisions for services. The Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 provides for procedures for consultations in the newly established Committee on Balance-of-Payments Restrictions. It also calls for replacing the quantitative restrictions, as provided for in this context, as much as possible by 'price-based measures', which have less trade-distorting effects.

66 If they cause or threaten serious injury to domestic producers, Art. XIX GATT 1994 permits a contracting party to suspend an obligation or withdraw or modify concessions. Procedural and substantial preconditions of these so-called safeguards are further defined in the WTO Agreement on Safeguards (Safeguards). They require prior notification and address the national investigation and determination of serious injury or threat thereof. Also, provisions deal with trade compensation vis-à-vis other affected States. Actions which do not conform to those provisions are expressly prohibited, including any voluntary export restraints or orderly marketing arrangements which had been frequently used under the GATT in an attempt to circumvent Art. XIX obligations. The Appellate Body has, however, interpreted the respective rules far more restrictively than they were understood under former GATT practice. Art. X (1) GATS calls for negotiations on the question of emerging safeguard measures and provisionally rules upon the issue in Art. X (2).

(i) Exceptional Situations: Waiver

67 In accordance with Art. IX of the WTO Agreement, in exceptional circumstances, the Ministerial Conference may decide to waive (Waiver) an obligation imposed on a member, provided that any such decision is taken by three-quarters of the members unless otherwise provided for in this paragraph. The Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994 requires measures, which the member proposes to take, identifying the specific policy objectives, which the member seeks to pursue, and the reasons which prevent the member from achieving its policy objectives by measures consistent with its obligations under the GATT 1994 (described para. 1). All waivers, existing prior to entry into force of the WTO Agreement, are ordered to cease, unless renewed under these new provisions (para. 2). Furthermore, a member may resort to dispute settlement if it considers benefits accruing to it under the GATT 1994 nullified or impaired (para. 3).

(ii) Specific Trade Relations: Regional Integration and Development

68 Members are also allowed, under the WTO legal order, to grant more preferential treatment to certain other States in the context of special trade relationships. Art. XXIV GATT 1994 permits such treatment in the case of frontier traffic and most notably in the case of customs unions and free trade areas, subject to some conditions and requiring prior notification. The Understanding on the Interpretation of Article XXIV of the General

Agreement on Tariffs and Trade 1994 further defines the conditions and procedures. Art. V and V *bis* GATS contain similar provisions.

69 States may also grant preferential treatment to developing States. Originally, this was based on a waiver. Now it is based on a Decision of GATT contracting parties on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (1979) which is still in force.

D. Policymaking and Development of the WTO Legal Order

70 While the GATT 1947, as an organization, has been strictly confined to administering the agreement, the WTO is designed to also take care of policymaking functions. As Art. II (1) WTO Agreement explicitly states, the organization

> shall provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

Art. III highlights that the WTO not only serves as a

> forum for negotiations among its members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement [but] may also provide a forum for further negotiations among its members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations.

71 On that basis, reviews and further negotiations are called for in many agreements and decisions. In their entirety, these manifold provisions are often referred to as the ‘built-in agenda’ of the WTO.

72 On top of that, the WTO has continued the practice of the GATT of regularly conducting trade negotiation rounds. One such negotiation round has been launched by the 2001 Ministerial Conference at Doha, Qatar and has since been referred to as the Doha Round of Multilateral Trade Negotiations. These trade rounds often have a broad mandate, which may include tariff concessions, market access commitments, and legal rules. In the case of the Doha Round, the mandate, embodied in a Ministerial Declaration, became known as the Doha Development Agenda, as it is mainly aimed at addressing the needs and concerns of developing members.

73 Developments of the legal order may be achieved by different means. Concessions can be negotiated in accordance with a number of specific provisions. Rules and obligations may be interpreted, waived or amended. In accordance with Art. IX (2) WTO Agreement, the Ministerial Conference and the General Council may adopt interpretations of the WTO agreements with a three-quarters-majority of the members. Such interpretations shall not be used in a manner undermining the provisions in Art. X on amendments. Furthermore, the Ministerial Conference may decide to waive an obligation imposed on a member in exceptional circumstances on the basis of a three-quarters majority and further requirements outlined in Art. IX (3) WTO Agreement. Waivers were mostly granted in order to allow preferential treatment of developing countries such as the Cotonou Convention (Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one Part, and the European Community and its Member States, of the other

Part [signed 23 June 2000, entered into force 1 April 2003] [2000] OJ L317/3; Lomé/Cotonou Conventions).

74 Art. X WTO Agreement contains a fairly complex provision on amendments. Generally, amendments, submitted by the Ministerial Conference or the General Council to members for acceptance, take effect only after a certain number of members accept and only in between those members (Art. X (3)). However, Art. X (4) envisages that amendments shall take effect for all members upon acceptance by two-thirds of the members, if they do not alter the rights and obligations of the members. On the other hand, amendments to the provisions on interpretation, decision-making, amendments, and to the basic most-favoured-nation guarantees, require acceptance of all members (Art. X (2)).

75 As regards the development of the legal rules of the WTO, dispute settlement must also be mentioned. According to Art. 3 (2) DSU, among others, the dispute settlement mechanism of the WTO is also supposed to clarify the rules, but may not add to, or diminish the rights and obligations provided in. the covered agreements. Its potential contribution to a further development of the WTO legal order is thus limited.

76 In sum, the WTO is furnished well with the authority and the means to engage in policymaking and to dynamically develop its legal structures. Indeed a number of instruments have been concluded and entered into force, and interpretations and waivers have been adopted since its establishment. To name but a few, the Protocols to the GATS (eg on Financial Services), the Agreement on Information Technology, and the Waiver concerning the Access to Medicines must be mentioned here. Numerous issues are under negotiation in the Doha Round. These negotiations are considerably delayed, and therefore hinder the implementation of a number of improvements which are already close to agreement. At this point, the package deal approach of the WTO, which on one hand has enabled the system to address even difficult issues, results in an important delay.

E. Enforcement and Dispute Settlement

1. Dispute Settlement

77 The WTO legal order enjoys reputation for its strong and effective dispute settlement mechanism, which has been further strengthened by the Uruguay Round and the adoption of the DSU. In accordance with Art. 3 (2) DSU, it is a central element in providing security and predictability to the multilateral trading system. Art. 23 DSU clearly bars unilateral action which some States had resorted to under the GATT. In sum, dispute settlement procedures can be initiated by States against States failing to comply with their obligations, but also when they consider benefits they could reasonably expect to be nullified or impaired by measures of other members, or other situations which do not amount to non-compliance (non-violation complaints) (Art. XXIII GATT 1994; Art. 3 (8) DSU; Art. XXIII GATS).

78 Individuals have rights to judicial review under national law, which is sometimes even required so by WTO rules, and are sometimes given a right to trigger government action in the WTO nationally. Direct access to dispute settlement procedures through arbitration is, however, provided for in Art. 4 Agreement on Preshipment Inspections between individual exporters and inspection entities. The WTO itself, and its organs, do not have a right to action under the DSU. Instead, they may resort to other and more political procedures, most prominently the TPRM.

2. Trade Policy Review Mechanism

79 The Trade Policy Review Mechanism is supposed

> to contribute to improved adherence by all members to rules, disciplines and commitments … and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of members (at Section A (i)).

Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual members' trade policies and practices and their impact on the functioning of the multilateral trading system. It is not, however, intended to serve as a basis for the enforcement of specific obligations under the agreements, neither is it intended for dispute settlement procedures or to impose new policy commitments on members.

3. Nature and Effect of WTO Laws

80 Generally, WTO rules take effect in the national legal order only by way of implementation, as called for by Art. XVI (4) WTO Agreement. A direct effect of international trade rules has been accepted by courts in the past in particular cases but is firmly denied today in most members' internal laws. In many cases, such as in the US, Canada, and Japan, such direct effect is explicitly foreclosed by implementing legislation.

81 The same has been held by the European Court of Justice as far as the EU is concerned (ECJ Case C-149/96 *Portugal v Council*). The Court also recently denied a claim for damages suffered by European enterprises as a result of retaliatory measures taken by third members under the DSU (ECJ Case C-120 and 121/06 *FIAMM*). The lack of 'direct effect' is justified by the court primarily with reference to the necessary space for manoeuvre of EU negotiators. However, in the internal legal order of some EU members, some specific provisions of the TRIPS Agreement are still considered to be directly applicable. Moreover, according to the Court, the rules of the WTO may be taken into consideration as a means of interpretation of legislation, which aims at implementing WTO obligations.

82 This state of affairs is sometimes criticized. The most-favoured-nation and national treatment provisions are considered to be especially apt for direct applicability and to contain important and basic individual rights (Treaties, Direct Applicability). Furthermore, it is argued that individual action based on direct application of WTO law may considerably contribute to enforcement which otherwise relies only on dispute settlement between Member States, subject to many political considerations. The lack of direct applicability of such major principles is sometimes considered to endanger the stability of the world trading system. Another, separate issue is the so-called constitutional function of the WTO. The GATT/WTO has been characterized as a second line of national constitutional entrenchment of economic freedom. Based on political economy reasoning, it is held that participation in the WTO system may strengthen national governments to withstand protectionist endeavours.

F. The WTO and Development

83 Economic development has been a key issue in the world trade regime for a long time. The issue was first addressed through an amendment of the GATT 1947, which inserted a Part IV to the GATT, with rules on non-reciprocal preferential treatment of developing countries. However, in view of most developing countries, these provisions have so far been rather ineffective. Nowadays it is reflected in the preambular in para. 2 of the WTO Agreement, which recognizes the need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the

growth in international trade commensurate with the needs of their economic development. The relevance of this statement becomes apparent when considering, that two-thirds of the members of the WTO qualify as ‘developing’ or even ‘least developed countries’. Such qualification is determined by announcement of the members at hand, which regularly follows classification schemes of the United Nations. In the case of the least developed countries (‘LDCs’) the WTO relies on the UN qualification.

84 A major element in this regard is preferential market access for developing countries, which has been proposed already in the 1958 Haberler Report. Responding to an initiative of the first United Nations Conference for Trade and Development in 1964, a generalized system of preferences (‘GSP’) was developed within the GATT. To address the incompatibility of such preferential treatment with the most-favoured-nation principle as provided for by Art. I (1) GATT, two waivers were agreed upon in 1971 for a duration of 10 years.

85 In 1979, the contracting parties agreed on a permanent solution by adopting a Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, which became known as the ‘enabling clause’. It has been incorporated into the WTO legal system by virtue of para. 1 (b) (iv) of the GATT 1994 Agreement. Today, a number of GSP programmes exist, including those of the US, Japan, and the EU. It has to be highlighted that the enabling clause does not entirely exclude the applicability of Art. I (1) GATT and importantly requires that the GSP is ‘generalized, non-reciprocal and non-discriminatory’. Thus, members, when granting preferential treatment, must observe the principle of non-discrimination when determining the eligibility of members for such a program, as the Appellate Body clarified 2004 in *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*.

86 In order to promote trade with least-developed countries, a Decision on Preferential Tariff Treatment for Least-Developed Countries was taken by the General Council in 1999, which waives Art. I (1) for developing members in view of preferential treatment afforded to such least developed members.

87 Institutionally the issue of development is taken care of by the WTO Committee on Trade and Development. Also, close links are maintained with the UNCTAD by way of the International Trade Centre (UNCTAD/WTO). A number of programs and activities are aimed to serve capacity building and assistance for developing members. The Secretariat plays an important role in this regard and, furthermore, an Advisory Centre on WTO law has been set up in 2001 by 32 members to offer independent legal support.

88 The ongoing Doha Round of Multilateral Trade Negotiations specifically aims at addressing the needs of developing members, as the mandate indicates with its name: the Doha Development Agenda. It addresses a huge number of detailed questions; in particular special and preferential treatment, market access for agricultural products, and the subsidies.

G. Assessment and Further Developments

89 It is hardly an overstatement to consider the establishment of the WTO as an important landmark for international economic relations as well as for the international legal order at large. This, however, neither implies that its development has reached a final stage, nor that it is uncontroversial. To the contrary, as the negotiations in the Doha Round may indicate, a strong need is felt for improvement, which in part results from the fact that the further liberalization and expansion of trade always tends to create a need for further cooperation and regulation. Furthermore, the establishment of such an elaborate and strict system of international trade regulation has raised concerns in view of its proper interaction with

other parts of the international legal order, including, for instance, peace and security, human rights, social standards, and international environmental law. The impact and relevance of the WTO thus has to be assessed not only in view of its role in the realm of international economic relations, but also in more general terms.

1. The WTO's Proper Role in the International Economic Order

90 As regards the international economic order, which can be understood as the ensemble of policies, rules, and institutions of the world economy as governed by international economic law, the establishment of the WTO can be considered an important breakthrough. It reinforced the world trading regime under the GATT, which had experienced a considerable decline before. The WTO agreements and market access achievements represent a considerable progress. Also, the system and its dispute settlement mechanism have importantly strengthened the rule-orientation of international trade relations and enabled the settlement of some long-standing disputes, as for instance the one about the EC bananas importation regime and the one on US foreign sales corporations. Also, the WTO with its broad coverage of issues enabled progress in a number of highly contested subjects on the basis of a trade off. This is true, for instance, for the TRIPS Agreement, which did put an end to a decade-long controversy about proper standards of intellectual property rights protection, by offering market access in turn for a harmonization and improvement of standards.

91 The future role of the WTO basically depends on its maintained stability and relevance, which in turn relies on the ability of the system to adapt to changing circumstances and to provide for a balance of interest of the different members at hand. The accession of politically and economically important States like Russia and China may—in this context—complicate the future development of the WTO.

92 Caution is warranted at this point in view of the Doha Round, as the negotiations, which include a number of important improvements to the system, are considerably delayed. However, the history of the world trading system has seen such delays in the past. Thus, as of this date, there is no reason for concern over the success of the Doha Round. However, in more general terms, this delay is telling. It highlights, that the kind of package deal approach, which originally brought the WTO into being, may now result in a serious obstacle. A stalemate in one of the negotiation subjects may cause the whole negotiations to break down, even if important progress is made in other areas. For this reason, at the 9th Ministerial Conference, held in Bali, Indonesia from 3 to 7 December 2013, the WTO members negotiated on a limited number of issues, picked/selected from the Doha Development Agenda, to achieve at least some progress on these issues. The topics negotiated were trade facilitation, food security and the improvement of the Least Developed Countries' role in world trade.

(a) New Issues: Competition Policy and Investment

93 Decision-making plays a role in particular in regard to the further development of the system. Such need for development is inherent in a system, which opens up markets and thereby succeeds in the expansion of trade. With the reduction of trade barriers, other distortions of trade become more apparent and may require further regulatory action. Aside from improvements of existing WTO rules and market access two other issues are worth mentioning in this regard.

94 One of these issues concerns restrictive business practices, which may become more and more difficult to control by existing national and regional legislation in the event of the growing number and relevance of international transactions. In view of these concerns, the 1948 Havana Charter already contained a whole chapter on the issue (Chapter 5). Later, the issue has been taken up by UNCTAD and the *Organization for Economic Co-operation and Development (OECD)*, without much result. Existing WTO rules scarcely deal with restrictive business practices. Art. 40 TRIPS Agreement and Art. XI GATS basically reiterate the competence of members to address the issue, and call for some cooperation. Also, Art. VIII GATS and a number of specific provisions in the market access schedules deal with monopolies and exclusive service suppliers.

95 After some controversial discussion, the Singapore Ministerial Conference in 1996 established a Working Group on the Interaction between Trade and Competition Policy, including Anti-Competitive Practices. The 2001 Doha Ministerial Declaration directed the group to study, inter alia, core principles, provisions on hardcore cartels, as well as modalities for cooperation and capacity building. After the 2003 Cancun Ministerial Conference, however, the General Council decided in August 2004, as part of the so-called 'July package', that no work towards negotiations within the Doha Round should take place on the issue. Because of this, the working group stopped its work for the time being.

96 Investment may become another area of activity for the WTO. As stated, the existing TRIMs Agreement only addresses some particular aspects. Other issues such as investment protection are largely dealt with by the numerous bilateral investment treaties ('BITs') which envisage their own dispute settlement system. After an unsuccessful initiative by the OECD to transform the numerous bilateral agreements into one multilateral instrument—the proposed Multilateral Agreement on Investment ('MAI') ([22 April 1998] DAFFE/MAI(98)7/REV1)—the issue has been included on the agenda of the 1996 Singapore Ministerial Conference, where a working group was established. However, similar to the activities in the area of competition policy, the issue was soon set aside, by the same 'July package'-Decision as it was felt to be too controversial for the ongoing negotiations. However, it may soon become necessary to again address investment, as there is some overlap between WTO rules and BITs in the area of intellectual property rights and services. The latter results from the fact, that the one of the four modes envisaged by Art. I (2) GATS includes the provision of a service through a commercial presence, which implies that investments are afforded.

(b) The WTO and the Allocation of Authority in International Economic Order

97 As the delays in the negotiations in the Doha Round and the difficulties to carry on discussions on new issues indicate, it might not be easy for the WTO to respond to new circumstances, the demand for further regulation, and concerns about an appropriate balance of interests. The growing number of bilateral and regional trade agreements and interregional trade agreements indicate that there is an interest, and that there are means to move forward in the regulation of international trade in smaller groups or coalitions. Also, it becomes apparent, that the international economic order consists of a number of separate institutions, regimes, and agreements, which are poorly coordinated. At this point, the question of the allocation of authority in the international economic order arises. Furthermore, it becomes apparent, that in spite of its outstanding achievements and political relevance, the WTO can hardly be said to be assuming such a leading role, if at all. Such a role, according to the text of the UN Charter, had been assigned to the ECOSOC, which, however, hardly fulfilled its expectations.

2. The WTO and other International Regulatory Regimes

98 Due to its far-reaching regulation of international trade and its political relevance, the WTO is relevant for areas of international relations beyond the limits of economic relations in a narrow sense. This is especially so, as economics play a growing role in other policy areas, such as the environment, agriculture, and health, both as a factor in problem analysis and as a basis for policy instruments.

99 As far as the environment is concerned, the WTO acknowledges such interrelationship already in preamble Rec. 1 of the WTO Agreement, which spells out as an objective of the WTO to allow

> For the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

A Committee on Trade and Environment ('CTE') has been established in this regard (LT/UR/D-6/2 [15 April 1994]). Its rather broad agenda includes, inter alia, trade measures for environmental purposes, including those pursuant to multilateral environmental agreements, eco-labelling and exports of domestically prohibited goods.

100 A number of disputes (see for example *EC—Biotech*; *US—Shrimp*; *Dolphin Tuna I*; *Dolphin Tuna II*) already arose relating to unilateral trade measures addressing environmental issues. The core problem in this regard is an interpretation of Art. XX GATT 1994 and especially its lit (b), relating to human, animal, or plant life or health and (g), relating to the conservation of exhaustible natural resources. This is especially relevant in cases where the measures target the production process rather than addressing characteristics of the affected product itself. In the view of some scholars, these so-called process and production methods ('PPMs') can be the basis to distinguish between products which are on the surface identical, but whose production methods vary in terms of impact on the environment or compliance with core labour standards. From this point of view, one may advocate to treat formally identical products not as 'like', in order to offset cost advantages derived from the different production method. This view is, however, highly contested and the WTO adjudicative bodies have not taken it up so far.

101 While these disputes may have helped to bring about an advanced and common understanding of the relevant provisions of the GATT they do not answer the lingering question about the interrelationship between the WTO and existing and future multilateral environmental agreements as such. This is so because panels and the Appellate Body have focused on the disputed measure at hand and its compatibility with the exemptions of Art. XX. So far, it has not been clarified how the provisions of an international environmental agreement might be taken into consideration in a case where a measure at hand is based on such instrument. A main problem in this area relates to the fact that the membership of such an environmental instrument is very likely to deviate from the one of the WTO.

102 A possible solution for some cases could be to follow the lines of the SPS Agreement, which explicitly refers to international sanitary and phytosanitary standards and risk assessment standards in Arts 3 and 5 SPS Agreement. Also, the TBT Agreement may be mentioned in this regard, in view of technical standards. However, the Appellate recently rejected a Panel's approach to consider an international agreement on environmental issues as a standard (*US—Tuna II [Report of the Appellate Body]*).

103 Nevertheless, it has to be concluded that a better linkage is urgently required between the WTO and other organizations and agencies involved in international regulatory policies in the area of the environment, health, consumer protection, and agriculture, in view of the fact, that on one hand, such rules and standards play an important role in the application of trade rules, and on the other hand, that trade is an important factor to consider in policymaking in these other areas.

104 However, the WTO relates even more to more fundamental areas in international relations, such as, for instance, social and human rights. Low labour cost represents a legitimate and welcome competitive advantage in a free trade order. Concerns, however, have been raised in view of labour costs driven down by denial of social rights and labour standards, which may seriously distort competition. Whereas Art. 7 Havana Charter did comprehensively deal with 'fair labour standards', the only relevant provision in the WTO is Art. XX (e) GATT 1994, relating to prison labour. It is often claimed, that some basic labour rights, such as the right to found and engage in unions and the right of collective bargaining, minimum working age, or even more specific social standards and elements, like compulsory social insurance should also be included in trade measures. As is true for environmental matters, the WTO social standards issue is an interface problem because the International Labour Organization (ILO) is the competent body to define such standards. Even more, the ILO has rather specific procedures and mechanisms to enact and to enforce such standards. Therefore, the proposal to deal with labour standards in the WTO has been firmly rejected by a considerable majority of States. The Singapore Ministerial Declaration, for instance, only referred to core labour standards and in this regard only envisaged a close cooperation with the ILO. The 2001 Doha Ministerial Conference only reaffirmed that decision.

105 The vivid discussion about the role that labour standards or core labour rights may play in the WTO focuses on the kind of standards which could be related to the WTO legal system, in a way that their observance would be subjected to WTO dispute settlement. It should, of course, be highlighted, that first and foremost the ILO is the competent international organization for such standards and that it is highly questionable whether States would have agreed upon such standards on the understanding that they could be enforced by way of trade 'sanctions'. Thus, a clarification as to the role of the two institutions and the legal effect of decisions and agreements concluded within their auspices is needed. Also, clarification is needed about the very basis of the proposal to link trade and labour rights.

106 Aside from a pure instrumental view, which focuses on the enforcement issues, the matter also has a 'constitutional' dimension. It points to the question, whether it is acceptable as a matter of principle to maintain trade relationships with States which do not observe such core standards. In more general terms, this is also true for human rights in general or even the question whether a State can be considered to be a democracy. The manifold questions, which arise at this point, cannot be fully explored here. Trade may stabilize an authoritarian government but at the same time may give rise to changes. The denial of trade may cause suffering to those, who already suffer under an unjust regime.

107 Any discussion on trade and human rights very likely has to take into consideration that the role that trade can play in this regard is a rather limited one. Thus, it has to be emphasized that action by other international institutions seems to be more suitable to address these situations in first place (see in particular the debate between Petersmann, and Alston and Howse). On the other hand, it has to be highlighted, that trade—or more precisely—the denial of trade can be an element of a more encompassing international action. Both the GATT and the GATS contain exceptions in view of actions taken in view of international peace and security (Art. XXI GATT; Art. XIV *bis* GATS). Also, it might be

mentioned, that the WTO recently adopted a waiver in view of the Kimberley process, which might indicate, that trade remedies can effectively be taken under the WTO in order to promote international peace and security.

H. Outlook

108 The 2008 financial crisis has again shown the historical achievement of a multilateral trade system based on the rule of law, which may prevent States from resorting to unilateral measures in the event of economic difficulties. Its further development depends on the outcome of the ongoing negotiations of the Doha Round and, more generally, on its ability to adapt to new circumstances and to constructively comfort the diverging interests of members, both developing and developed ones. The outcome of the Ministerial Conference in Bali is one—maybe smaller as proclaimed—step ahead. The WTO is certainly not the supreme authority of the international economic order, and even more may be put into question by the tendency to establish bilateral and regional, as well as interregional, trade agreements outside. However, a strong multilateral forum for international trade especially benefits those members whose bargaining power is limited. The WTO is in need of better linkage with other areas of international regulation and in particular with international environmental policies and their development. Overall, the mandate of the WTO is limited. It embodies a trade system, which should not be burdened with other international concerns, just like the further implementation of social standards and human rights, which require action by other and more appropriate international institutions. That said, however, it is amply clear, that trade—and its denial—can and has a role to play in more comprehensive international action addressing those concerns.

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