CHAPTER 11

INTERNATIONAL TRADE AND THE WTO

THE ROLE OF LAW

International trade involves the flow of goods (trade in goods) and services (trade in services) across national frontiers. International trade law, at any rate traditionally, has been concerned mainly with domestic trade legislation focusing at the interface of domestic borders regarding goods, services and trade-related policies. As such, international trade law plays a significant role in the shaping of international trade relations as between States. This law is on the whole characterised by rules, and a substantial and growing case law. There is thus not much difficulty in identifying the general corpus of international trade jurisprudence—despite its complexity and detailed character. However, by no means is it easy to comprehend, given that it has evolved, rather than been the subject of specific design as such. Thus, the picture of clarity that rules evoke is only partial. Further, the regime is plagued with exceptions; and suffers from overlapping legal regimes, both from within the discipline, as well as the potential of conflicts with extraneous disciplines. In addition, in its treatment of the concerns of developing States it tends to engage in soft law; in its institutional and enforcement regimes it has on occasions pandered to its power-orientated clientele; and in its substantive concerns the developed States have not been ignored. Yet of all the branches of International Economic Law international trade law is the most developed, and one of the most sophisticated. This state of affairs has been set against the background of a movement in international trade from a non-judicious alliance of law with pragmatism, to a judicious blend of law and pragmatism. The future orientation promises to be closer to law, and augmented by transparency.

International trade law or World Trade Law has been painted as one of the most significant branches of international economic law by some of its key enlighteners. This was particularly true with regard to the term World Trade Law after the establishment of the World Trade Organization in 1995 as the first truly global multilateral international organisation in this field. Certainly, trade in international economic relations is a key sphere of concern
for developed States. From that vantage such an attribution of significance is clear. However, such prioritisation is to a certain extent politically premised. For the vast majority of States, which comprise developing States, development is surely more of significance. To the extent that development can be export induced (export-induced or export-led growth), the two may be heavily interrelated.\(^1\) Obviously, the examples of Germany and Japan in the nineteenth century and after World War II as well as more recently an important number of Asian and Latin American countries, including most recently China and Brazil, are normally referred to as examples. However, be that as it may, the significance of the role of law in international trade is also an attribute of the fact that international trade requires the clarity and predictability of an orderly system. It lends itself to a predetermined decision-making process. Further, both the need for greater international trade, and the advent of globalisation call for a supranational regime ensuring co-operation, order and harmonisation. In addition, because international trade is about market access\(^2\) to trade, it involves according the “concession” of market access to other States. As such, international trade has a built-in enforcement mechanism, which not only serves it well in its implementation and development, but also is a powerful tool for legislating in allied spheres. Finally, the success of the normative regime is also to be attributed to the fact that important developed state interests are served by its development. Thus, much of the development of the international trade order in the 20th century has been driven by the initiatives, and caprice of the US.

At the level of general International Law few norms regulating international trade can be discerned. There are no restraints on a State engaging in protectionist foreign trade practices. A State can define the terms upon which it accords access to foreign trade to its market. This is because, historically, States engaged in international trade with zeal\(^3\) thus ensuring a permissive international trade framework.

This permissive regime has now been supplanted in 1994/5 by the World Trade Organization (WTO), which provides the basic “constitutional” framework, facilitating the development of international trade law. The WTO provides an executive, legislative and enforcement apparatus for a code of conduct regulating international trade policies and practices of nation States. The scope of this regulatory regime is no longer confined to cross-border aspects of international trade. It encompasses internal aspects which have a bearing on international trade. However, not all States are members of

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\(^1\) See Asif H. Qureshi “International Trade for Development: the WTO as a Development Institution,” 43:1 Journal of World Trade, (February 2009) p.173 – 188


\(^3\) Mercantilism can be summarised as a nationalistic policy which promotes exports and inhibits imports so as to ensure high levels of foreign exchange reserves. See for example B. Hoekman and M. Kostecki, The Political Economy of the World Trading System (Oxford University Press, Oxford, 1995), p.2.
the WTO. Further, by its own terms of reference the WTO framework tolerates regional integration processes which are subject to a different regulatory regime; as well as differential burdens of disciplines in accordance with the level of development of States. In addition, the WTO regime does not cover all aspects of international trade. Some of the spheres not covered are governed by other multilateral or bilateral regimes, including soft-law codes of conduct. Indeed, in the international trade sphere there are other institutions which also play a role in the development of international trade, for example, the United Nations Conference on Trade and Development (UNCTAD), the World Intellectual Property Organization (WIPO) and the International Labour Organization (ILO).\(^4\) To a certain extent, the parameters of the normative framework of international trade can only be mapped against a clear notion of the phenomenon of international trade.

Another important development is due to the fact that already since the 1950s members of the GATT and later the WTO have engaged in preferential trade agreements (PTA); European Economic Community (EEC) 1957,\(^5\) European Free Trade Agreement (EFTA) 1960, first Agreements between the EEC and States in Africa, the Caribbean and the Pacific (ACP countries) 1975\(^6\) etc. These agreements were originally mostly concluded between countries of a particular region, hence the term “regional trade agreements” (RTAs) normally used in the GATT and WTO context. Today it is more and more common that these agreements are concluded simply between two parties (bilateral agreements) irrespective of their geographic constellation. Despite their preferential character (which contradicts the most-favoured-nation (MFN) principle of the trade agreements under the WTO and therefore the very spirit of the multilateral trading system) they are exceptionally acceptable under Art. XXIV GATT (with regard to trade in goods) and Art. V GATS (with regard to services).\(^7\)

While the conclusion of the Uruguay Round of Multilateral Trade negotiations (Marrakesh Agreements of 1994) and the creation of the WTO as of January 1, 1995 were generally greeted as an important step for the strengthening of the multilateral trading system, they were also accompanied by a new wave of regional trade agreements coming into force: North American Free Trade Agreement (NAFTA) 1993/4,\(^8\) the European Economic Area (EEA) 1992/4,\(^9\) and Mercosur 1991, etc. For many developed States, their trade relations are these days predominantly governed by bilateral agreements while the WTO remains fundamental for certain developing states and

\(^{4}\) On the role of labour standards in international trade negotiations and with regard to migratory flows see Ch.15.  
\(^{5}\) Now integrated into the European Union.  
\(^{6}\) Now in the process of being phased out and replaced by so-called Economic Partnership Agreements (EPAs)—see below.  
\(^{7}\) See Ch.12 for details regarding these provisions.  
for the time being also for the trade relations between traditional and new trading powers (USA-EU-Japan-Russia-China-India). As an example one can mention Mexico, which has managed to conclude free trade agreements with the United States (NAFTA 1994), the European Union (2000) and Japan (2004) and thereby assures its market access to these traditionally important markets for its car production. There is ongoing debate on the interrelationship of the multilateral and the preferential system and whether they are mutually supportive or whether the increase of regional agreements in recent years leads to a loss of interest in the multilateral system and an increase of power-play by rich countries.\(^{11}\)

The role of the lawyer in international trade has a number of facets. The lawyer has a function not only in its elucidation and development, but also has the responsibility of enlightenment in an objective manner. Where the enlighteners are acknowledged they carry with them the responsibility of not plugging their own governmental policy interests. At the practising level the international trade lawyer performs mainly two functions. First, in advising States and NGOs private lawyers can now participate in WTO dispute settlement processes involving State litigation.\(^{12}\) Many governments do not have in-house international trade lawyers. Further, the lawyer has a role in assisting in the submissions put forward by NGOs in international trade disputes between States to WTO dispute panels.\(^{13}\) Secondly, at the national level the lawyer has a role in advising exporters and domestic producers particularly. This is performed by applying international trade law to national systems, both in domestic processes where this is possible, for example through judicial review of administrative decisions on trade anti-dumping proceedings; as well as a prelude to inter-State intervention at the international level in the WTO dispute settlement forum. Thus, it is not enough to have knowledge of international trade law. This needs to be supplemented with knowledge of domestic trade regimes (particularly of those regimes applying important policy tools in this area, such as trade remedies.\(^{14}\) Where the national legal system of another State is involved, it may call for liaising with foreign lawyers.

International trade law needs to be understood with some background


\(^{14}\) See Ch.12 on these tools.
of its economic underpinnings—particularly the theory of comparative advantage. At the same time some of the pragmatism that is embellished in the international trade order can only be understood with some political insight. Further, it needs to be noted that the elucidation of international trade law is dominated by American and European jurists. Often the commentators are advisers to respective governments, or have had insights into the operation of the WTO. Their analysis, therefore, whilst being invaluable, needs to be approached with some caution where it is too rosy-eyed or underpinned by national policy objectives and perspectives.

INTERNATIONAL TRADE PROBLEMS

International trade problems\textsuperscript{15} are varied, but by no means are they all clearly identifiable, or perceived universally as trade problems. They are problems, however, of international concern because national foreign trade policy impacts upon foreign producers, exporters and consumers. Similarly, national foreign trade policy can be destructive of national prosperity, and as such of international interest. It is estimated that the bill in 1995 to the OECD taxpayer for maintenance of trade protection in the agricultural sector alone was $145 billion, and $190 billion to the OECD consumers!\textsuperscript{16} In a sense, like the balance of payments problem, there is a case for a State to maintain its international trade relations in a manner that is not destructive of national and international prosperity. Without international constraints on the manner in which national foreign trade policies are conducted, a situation reminiscent of the 1930s wherein States conducted their policies in a beggar-thy-neighbour fashion, would resurface. In such a situation States tried to obtain through their national foreign trade practices economic advantage at the expense of other nations, by restricting imports (protectionism) and inflicting subsidised goods on other nations.\textsuperscript{17} In turn other States would retaliate in a similar manner, thus seriously inhibiting international trade. During the recent financial crisis it could be shown that a number of States were tempted to take protectionist measures—and would probably have taken even more of them without existing WTO (and RTA) obligations.\textsuperscript{18}


\textsuperscript{16} See President of the UK Board of Trade Mansion House Speech April 7, 1998.

\textsuperscript{17} Roessler (1985).

A State engages in its foreign trade policy through the use of national trade policy instruments. The range of these trade instruments is wide—as long as there are no treaty obligations (WTO, RTAs etc.) limiting their use. These measures are particularly famous with regard to trade in goods but today they are also increasingly important with regard to trade in services as the latter’s importance is rising. Thus, first, a State may impose quantitative restrictions, i.e. limits on the amount or value of a product that can be imported into the country, or exported from the country. Such quantitative restrictions or quotas may be global or allocated amongst exporting nations. In the area of services a prohibition to buy services from certain foreign suppliers (e.g. health services) has similar effects. Secondly, a State may impose tariffs. A tariff is a duty, a form of an indirect tax, paid on a product upon its import (import tariff). Some countries apply also export tariffs—often to benefit domestic producers with regard to the availability of cheap inputs into their production process. Tariffs are not available normally to discourage the import of services, but discriminatory tax treatments (just as in the case of trade in goods) can have a similar effect. Thirdly, a State may enter into “Voluntary Export Restraint” arrangements (i.e. VERs, also referred to as “orderly marketing arrangement”; OMAs) with a supplying State or with suppliers. These are arrangements to restrict imports, normally implemented by the exporting nation through export licences. Fourthly, a State may impose, intentionally or otherwise, non-tariff barriers. These are barriers other than tariffs, and strictly include quantitative restrictions. However, in the international trade vernacular quantitative restrictions and other non-tariff barriers are normally further distinguished. Non-tariff barriers are potentially open-ended and can take various forms. Thus, a State may accord a subsidy to a particular industry and thereby distort trade flows. Subsidies can be of different kinds, and can be directed at different activities, for example, a production subsidy or an export subsidy. Similarly, States impose administrative measures at the border. These can relate, for instance, to the valuation of the goods (customs valuation), the determination of the origins of the goods (rules of origin), or the according of import licences. These border measures can involve unnecessary delays or the payment of bribery and thereby reduce trade flows. Further, a State may impose disguised restrictions on trade, for example, unnecessary or onerous technical specifications or standards (technical barriers to trade, often referred to as TBTs). Measures ostensibly introduced for the protection of human, animal or plant life will often also reduce trade flows; they are normally referred to as sanitary and phytosanitary measures (SPS measures). In addition, a State may channel its trade through State trading enterprises which may not, for example import, or procure domestically, on a competitive basis. Fifthly, States have been known to abuse legitimate responses (i.e. trade remedies) to trade from other

States. Examples are the use of anti-dumping duties when a product is considered to have been cheaply exported or a countervailing duty when a good is considered to have been unduly subsidised by the exporting government. Sixthly, States impose discriminatory regulations and taxes once goods and services are inside the territory. Finally, States sometimes engage in the discriminatory enforcement of domestic policies, e.g. industrial policy (assisting a particular industry); intellectual property rights, and competition policy.20

At the core, international trade problems arise when States use the trade policy instruments at their disposal against goods and services from abroad, and use them particularly in a manner that is discriminatory, that distorts or inhibits trade by making imports less competitive, and/or is protectionist. The trade policy instruments all raise varying degrees of problems for international trade and the domestic economy.21 They can be evaluated not only in terms of their impact on the flow of international trade, but also in terms of the costs to the domestic importer and consumers. For example, from an economic standpoint, production subsidies are economically less costly than tariffs, quotas and VERs.22 Tariffs, quotas and VERs affect both the capacity of an industry as well as the price of goods and services; whilst production subsidies only affect the capacity of the industry. Tariffs, whilst affecting the domestic price of the imports do not decouple the relationship of domestic prices with international prices. On the other hand this is the effect of quotas. Where there is a de-coupling of the price relationship with international prices, consumers suffer with higher domestic prices. Further, quotas are normally imposed through administrative measures, whereas tariffs are legislated. There is therefore more transparency in the imposition of tariffs than quotas. VERs are the least economically sound. They are secret arrangements and economically benefit the exporters more.23 Thus, the greater and the more obvious the trade distortion resulting from a trade policy instrument, the more forefront its position in the classification of trade barriers.24 From this standpoint, the classification of trade instruments may be ranked as follows (beginning with the worst measure): quantitative restrictions; tariffs; discriminatory practices; non-tariff barriers (e.g. State trading; customs procedures); unfair trade practices (e.g. subsidies); and trade-related aspects of other measures (e.g. intellectual property rights and investment protection).

The international trade problem discourse is premised mainly on David Ricardo’s economic theory of comparative advantage25; and the political

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20 See, for example, Arake and Marceau (1998).
24 For an examination of economic, political and legal ranking of trade policy instruments see, for example, F. Roessler “The constitutional function of the multilateral trade order” in M. Hilf and E-U Petersmann, National Constitutions and International Economic Law (Kluwer Law International, 1993).
theory of the transnational economic rights of the individual. From both of these premises the case for liberal trade is articulated. Ricardo’s theory has been described by Paul Krugman as “truly, madly, deeply difficult. But it is also utterly true, immensely sophisticated—and extremely relevant to the modern world”.

One particular reason for the difficulty in understanding the theory of comparative advantage, especially for lawyers, is that the idea is grounded in mathematical models, and is often explained in the rather simplistic form of a two-country scenario, with each engaged in the production of two different commodities. In essence, the theory of comparative advantage predicts that barriers to trade and discrimination in trade, particularly in the long run, do not contribute positively to the economic welfare of the national and the international economy. A State should specialise and export in that product (product A) in which it has a cost advantage comparative to another State, and import in that product (product B) where the cost advantage is relatively smaller, even where the State had an absolute cost advantage in products A and B. Where there is such a specialisation and trade, then there will be an overall increase in world production of the products in question. Such trading benefits the consumer (in choice and price), and provides a competitive stimulus to local enterprises. Thus, comparative advantage provides for an efficient allocation of world resources and increased choices for the consumer.

Accordingly, the political trade theory is often premised on the rights of an individual to freely import and export products and services. It is contended that such rights are human rights and should be recognised as such. This argument is based on the liberal premise that the primary task of the State is to maximise individual liberty and choices.

Both the economic and political arguments for free trade and a liberal world economic order are set against a series of assumptions, and are not without adversarial comment. However, be that as it may, there are also other reasons why restrictions for international trade are called for, although not necessarily all the time justifiably. Thus, arguments for trade restrictions can be grounded, inter alia, in mercantilism; concerns about domestic employment and industry, particularly infant industry; national security; cultural homogeneity; revenue through tariffs; correction of market imperfections; protection of domestic concerns such as the environment, and human


THE WTO—INSTITUTIONAL ASPECTS

The World Trade Organization (WTO)\(^\text{32}\) was operational on January 1, 1995. It was created as a consequence of the results of the Uruguay Round of


Multilateral Trade Negotiations (MTN), which took place under the framework of the General Agreement on Tariffs and Trade (GATT) of 1947—namely the WTO predecessor international trade regime. The multilateral trade negotiations leading to the establishment of the WTO were launched in 1986 as a consequence of the GATT Ministerial Meeting at Punta del Este, Uruguay. The so-called Uruguay Round of multilateral trade negotiations, much of which took place in Geneva, was the eighth of such multilateral trade liberalisation negotiation rounds. Its distinctive feature has been that not only did it ensure further liberalisation of international trade like previous rounds, but it resulted in the metamorphosis of the GATT into a fully fledged institution, viz. the WTO. At the Ministerial Meeting in Marrakesh the Final Act (“Final Act”) was signed on April 15, 1994.

The establishment of the WTO on January 1, 1995 has placed the international trading system on a firm institutional footing. For the first time, the pillars of the international trading system rest on a full-fledged international organisation, with international legal personality. The international community was denied the existence of GATT 1947 as an organisation, though it did operate de facto as such. A key player in international trade, viz. the US, contributed to this denial, by opposing successive attempts at the creation of an international trade organisation. This was done by the US to the ITO (International Trade Organisation) Charter drafted at the Havana Conference in 1948, and later the draft proposal for the Organization for Trade Cooperation (OTC), under a 1955 GATT Review Session, to provide an institutional framework for GATT. The significance of the very establishment of the WTO qua an international organisation is best measured against the fundamental shift that has taken place from the approach by the international community and indeed the US, to the institution of the de facto GATT.


33 See Art XXVIII bis of GATT 1947.

34 See the Punta del Este Declaration 1986.

35 The first round took place in 1947 in Geneva; the second round at Annecy, France in 1949; the third round at Torquay, England in 1950; the fourth round at Geneva in 1956; the fifth round, the Dillon round, in Geneva in 1960, named in honour of US Under-Secretary of State Douglas Dillon; the sixth round, the Kennedy round in Geneva in 1964; the seventh round, the Tokyo round, in Geneva in 1973. In November 2001, already under the WTO, was launched the Doha (Development) Round in Doha, Qatar (see final section of this chapter).
1947. The WTO as an institution is now more effectively able to administer the international trade code of conduct, to liaise with other international economic organisations (e.g. the World Intellectual Property Organization (WIPO) or the International Monetary Fund (IMF)), and to offer more effective legislative and enforcement mechanisms. This is particularly evidenced by the prolific use of the WTO dispute settlement mechanism,\textsuperscript{36} and the continuing international discourse on further trade liberalisation proposals.

Purposes and objectives

The Marrakesh Agreement (establishing the World Trade Organization) of 1994 sets out the purposes and objectives of the WTO, along with its institutional framework. The purposes and objectives of the WTO can be discerned from the preamble to the WTO Agreement.\textsuperscript{37}

\textbf{WTO Agreement: Preamble}

The \textit{Parties} to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is 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,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

\textbf{Determined} to preserve the basic principles and to further the objectives underlying this multilateral trading system,

Agree as follows: ...

\textsuperscript{36} See Ch.13.

These purposes and objectives shed light not only on the Agreement establishing the WTO but are also relevant to the interpretation of the other Uruguay Round Agreements which are an integral part of the WTO Agreement.\textsuperscript{38} The primary purposes of the WTO relating to trade liberalisation are three-fold: to ensure the reduction of tariffs and other barriers to trade, and the elimination of discriminatory treatment in international trade relations, and a rule-oriented trading environment (including dispute settlement).\textsuperscript{39} The WTO is to ensure these primary purposes regarding multilateral trade relations in order to facilitate in the economies of Member States higher standards of living, full employment, growing volume of real income and effective demand, and an expansion of production and trade in goods and services. These national objectives correspond to those of other international organisation, e.g. the International Monetary Fund (IMF).\textsuperscript{40}

There are however three main qualifications to the pursuit of these national objectives. First, national objectives must be pursued in a manner that is consistent with the optimal use of the world's resources. Thus, the rationale of the theory of comparative advantage may be stated to be embedded in the preamble of the agreement establishing the WTO. This is because the emphasis is on the optimal use of the world's resources. By specialising in the production of those goods in which a Member State has a comparative cost advantage and trading in those goods in which such advantage is relatively less, the world's resources are optimally used and maximised.

Secondly, account must be taken of the need for sustainable development\textsuperscript{41} and the protection and preservation of the environment. This requirement reinforces the first. It is, however, contingent upon the respective circumstances of a particular member and its level of economic development. Thus, environmental policies are to be formulated with reference to their appropriateness to the conditions prevailing in each Member State—presumably both in terms of actual needs and economic means”.\textsuperscript{42} Further, sustainable development objectives need to be approached on a multilateral rather than unilateral basis—especially as they relate to the integration of environmental

\textsuperscript{38} Art. II of the Marrakesh Agreement.

\textsuperscript{39} See Preamble to the Marrakesh Agreement Establishing the World Trading Organization.

\textsuperscript{40} Although, the reference in the IMF Articles of Agreement relating to employment, refers to the promotion and maintenance of high levels of employment, as opposed to full employment. See Art.I (II) of the IMF Articles of Agreement.


concerns into trade issues. Therefore formulated sustainable development and environmental concerns arguably are like a basket full of holes to draw water from a well! This basket is of course in form a political compromise between developed and developing countries.

Thirdly, it is stipulated in the preamble that the objectives are to be pursued so as to ensure that developing countries, especially the least developed, obtain a level of share in the growth of international trade that reflects the needs of their economic development. This is not so much a statement that the international trading system must fairly allow all members to share in the growth of international trade according to their respective contribution to it, though doubtless that is implicit, but rather that in so far as developing and least developed members are concerned positive efforts are to be made to ensure that they secure a share in the growth of international trade that reflects the needs of their respective economic development. Herein is the articulation of the differential and more favourable treatment standard as it relates to developing members. At the same time, one should not forget that the complexity of the WTO—coverage and institutional set-up—make it increasingly difficult for developing countries to participate fully in the organisation.

To sum up, one might perhaps state, albeit somewhat cynically, that the ideals of the WTO as articulated in the preamble of the Marrakesh Agreement have been driven by the politics of international economic relations of an era, rather than necessarily from a sense of a vision of the world order and the condition of mankind as a whole.

**Functions**

The functions of the WTO may be described as follows. First, the WTO provides a substantive code of conduct directed at the reduction of tariffs and other barriers to trade, and the elimination of discrimination in international trade relations. Secondly, the WTO provides the institutional framework for the administration of the substantive code. It provides an integrated structure for the administration of all past (and future) trade agreements, including the agreements under the Uruguay Round of Multilateral Trade Negotiations. Thirdly, the WTO ensures the implementation of the substantive code. It provides a forum for dispute settlement in international trade matters, and conducts surveillance of national trade policies and practices in order to prevent disputes and contribute to increased transparency and efficiency. Fourthly, the WTO acts as a medium for the conduct of international

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trade relations amongst Member States, both bilaterally and multilaterally. Particularly, the WTO is to act as a forum for the negotiation of further trade liberalisation, and improvement in the international trading system. Finally, the WTO is expected to engage in the achievement of greater coherence in global economic policy-making by co-operating with the IMF and the World Bank Group, but also other institutions and actors. This must imply an acknowledgement that in international economics trade is but a component, and that the WTO mandate in trade is constrained by this function.

Organisational structure

The organisational structure of the WTO is as follows:

The Ministerial Conference, which is the highest organ, is to meet at least once every two years. It is composed of representatives of all the members—normally Ministers of Trade or otherwise in charge of the trade policy of a Member. The Ministerial Conference has supreme authority over all matters (Art.IV:1 WTO Agreement). The General Council is composed of the representatives of all the members—normally country trade delegates based in Geneva. The General Council is in session between the meetings of the Ministerial Council. In essence it is the real engine of the WTO, and has all the powers of the Ministerial Conference when that body is not in operation. The General Council also acts as the Dispute Settlement Body, and the Trade Policy Review Body (Art.IV:2-4 WTO Agreement).

The Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) have been established with specific spheres of responsibility, arising from respective agreements defining their tasks (Art.IV:5 WTO Agreement).

Decision-making

A central question in relation to any international organisation is the manner in which decisions are arrived at. Unlike the IMF or the World Bank there is no weighted voting at the WTO as such. Formally, all members have equal

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45 See Art.III of the Marrakesh Agreement.
46 Art. III of the Marrakesh Agreement.
47 The Council for Trade in goods is to be responsible for the functioning of the following agreements: GATT 1994; Agreement on Agriculture; Agreement on Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement on Technical Barriers to Trade; Agreement on Trade-related aspects of investment measures; Agreement on Implementation of Article VI of GATT; Agreement on Implementation of Article VII of the GATT; Agreement on Preshipment Inspection; Agreement on Rules of Origin; Agreement on Import Licensing Procedures; Agreement on Subsidies and Countervailing Measures; Agreement on Safeguards. The Council for Trade in Services is to be responsible for the General Agreement on Trade in Services. The Council for Trade-Related Aspects of Intellectual Property Rights is to be responsible for the Agreement on Trade-Related Aspects of Intellectual Property Rights.
votes. Voting prowess is not dependent on a member’s contribution to international trade, or its contribution to the budget of the WTO. Prima facie, thus the decision making process is democratic. Regrettably, Professor John Jackson has described this democratic form of majority voting as “majority voting by sometimes irresponsible one-nation one-vote procedures”. This is a highly regrettable and unjustifiable slur on the voting habits of States. Presumably, the reference is to the majority developing members. It is one thing to argue for a voting system which reflects all interests adequately, it is another to characterise as irresponsible the voting habits, albeit sometimes, of developing members. Developed members equally can vote sometimes irresponsibly in a weighted voting system.

Similarly, the characterisation by Hoekman and Kostecki of the WTO

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Council as “an unwieldy structure” in which each member is represented with an equal voice\textsuperscript{49} is equally controversial; as is the suggestion that the WTO emulate the IMF and World Bank Group by constituting its Council along the lines, for example, of the IMF Executive Board.\textsuperscript{50} The operation of the IMF Executive Board has been criticised on grounds of good governance; and good governance requires democratic and representative organisations.

However, be that as it may, and a detached observer would not be surprised to learn that the “one vote one member” system has been qualified in the WTO, through a system known also in other organisations as “consensus” decision-making. Normally, in the first instance, decision-making is through consensus. A decision is considered to have been arrived at through consensus if no member present at the meeting formally objects to the proposed decision.\textsuperscript{51} Consensus decision-making can facilitate maximum participation in decision-making, thus allowing a greater say to developing members through the formation of coalitions.\textsuperscript{52} Further it avoids the formality and divisiveness attached to a system based on formal voting.

In the event that a decision cannot be arrived at by consensus, then the decision-making takes place through voting. However, the ability of a member to sustain an objection depends on the member’s capacity to withstand objections to its objection.\textsuperscript{53} At the Ministerial Conference and the General Council each Member State has one vote. In the case of the European Union (EU), the EU is to have the number of votes equal to its Member States. Although it is a distinctive member itself, it does not have extra votes. Decisions are generally arrived at when there is a majority vote cast in favour of the decision. Thus, the normal voting system is designed with reference to the votes cast and not the majority of the membership.\textsuperscript{54}

There are a number of points to note with respect to the system of decision-making in the WTO.\textsuperscript{55} First, decision-making by consensus can be as potent as a formal system of weighted voting. This is because the mood of the forum in question will be influenced implicitly by the weight of the opinions proffered by the economically more dominant members. In a sense, decision-making by consensus can be regarded as decision-making through latent weighted voting. Professor John Jackson suggests that this manner of decision-making wherein members defer to economically more power-

\textsuperscript{51} Art.IX of the Marrakesh Agreement.
\textsuperscript{54} Art.IX (i) of the Marrakesh Agreement.
ful members under the consensus framework of decision-making formed a customary practice under GATT, and therefore should prevail under the WTO in the light of Art.XVI(1) of the Marrakesh Agreement. This Article states inter alia that the WTO “shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947”. This analysis of Professor Jackson is controversial for the following reasons. First, there is no evidence of such a practice. Certainly, Professor Jackson does not substantiate his claim. The reasons why members engage in certain types of decision-making is complex. To establish deference to economically powerful members as a motive for decision-making needs actually to be proven and would be difficult to substantiate. Further, the assertion that there is the likelihood of such deference is not the same as it actually transpiring. Secondly, Art.XVI (1) refers to the practices of the Contracting Parties and the GATT bodies. It does not refer to the individual practice of Member States or contracting parties. Finally, to suggest that the WTO Charter actually enshrines servility on the part of certain members may be offensive to those members.

Secondly, because consensus decision-making requires a higher degree of consensus amongst the membership present it can be a slower mechanism for bringing about change. However, this has to be weighed against the value of winning as much consent as possible from the membership in question.

Thirdly, the voting can be through a show of hands. Thus, for example, the hand of the Bangladesh delegate is lifted in full view of the US delegate. Again, in a sense, the decision-making, albeit through “one member one vote”, can have the same effect as a weighted voting system.

Fourthly, some sense of the de facto influences in decision-making need to be taken aboard. One particular factor of note is the relationship of a member’s contribution towards the expenses of the WTO and influence in decision-making. Broadly, the contribution a member makes towards the expenses of the WTO reflects, inter alia, a member’s share of the total international trade of the WTO membership. Although the level of contribution or share of international trade is not intended formally to have a bearing on decision-making, it cannot be without significance. There is an interesting question in this respect as to the relationship of posts in the WTO Secretariat, and the nationality profile of its staff—particularly in key positions. Certainly, some of the process involving the appointment of the Appellate Body judges

57 Under GATT 1947, the Contracting Parties written in capital letters referred to all the parties taken as a whole, thereby constituting a kind of treaty organ.
58 On the role of Art.XVI:1 WTO in general see also Japan—Taxes on Alcoholic Beverages, WT/DS 8, 10, 11/AB JR, AB. Report adopted on November 1, 1996.
60 Art.VII of the Marrakesh Agreement. See also, “World Trade Organization: WTO analytical index”. (Geneva, World Trade Organization; Cambridge [u.a].)
involved the advancement of national nominees on grounds of the share of world trade of the respective national State.61

Legislative and constitutional changes and relationships

11-016 The constitution of the WTO allows for changes in international trade law to take effect so that the WTO can respond effectively to the exigencies of international trade relations. This is done through provisions allowing, under specified circumstances, for individual waivers of obligations; authoritative interpretative decisions; amendments of the agreements arrived at under the Uruguay Round of Trade Negotiations62; decisions of the organs of the WTO; and through the negotiation of new agreements.

However, special voting procedures and arrangements apply to each of these respective “legislative” mechanisms. Thus, a waiver of an obligation imposed upon a member under any of the Uruguay Round agreements is to be given only in exceptional circumstances, for a limited period, and subject to constant review.63 Waiver decisions are thus to be interpreted with great care, taking into account the fact they are subject to strict disciplines.64 Further, decisions as to a waiver are to be arrived at by the Ministerial Conference, and only in the event of a three-fourths majority of the membership votes. In this manner, the integrity of the international trading system is guarded, whilst avoiding rigidity.

Proposals to amend provisions of the agreement may be made by any member to the Ministerial Conference or the General Council. The voting requirements and the effect of the amendment differ according to the nature of the amendment.65 Thus, generally, in the absence of a consensus decision, amendment decisions are to be arrived at by a two-thirds majority vote. However, amendments relating to Arts I (MFN), II (Tariff concessions) of GATT 1994; Art. IX (Decision-making) of the Agreement Establishing the WTO; Art.II:1 (MFN) of GATS and Art.4 (MFN) of the Agreement on TRIPS can only be made by the acceptance of all the members.66 Generally, amendments are binding only in relation to those members that have accepted them.67 However, members who have not accepted an amendment can be invited by the Ministerial Conference, by a two-thirds majority, to accept the amendment or withdraw from the Agreement, or remain a

61 See, for example, the EU argument for having two EU judges rather than one as is the case on the grounds that EU share of world trade represented 45% of the total world trade. See Financial Times (November 1, 1995). The new distribution of world trade among emerging economies and traditional stakeholders will certainly lead to further pressures on this system.

62 See General Council, WT/L/641 December 8, 2005 Amendment of the TRIPS Agreement, Decision of December 6, 2005.

63 See Art.X(3) and (4) of the Marrakesh Agreement.


65 See Art.X of the Marrakesh Agreement.

66 Art.X(2) of the Marrakesh Agreement.

67 Art.X(3) of the Marrakesh Agreement.
member only with the consent of the Ministerial Conference. It is thought that such pressure is unlikely to be brought against the key international trade players. As of 2011 there has been only one formal amendment under para.1 of Art.X of the Marrakesh Agreement. Interestingly enough, the amendment could not enter into force as the WTO members did not proceed in sufficient number to ratification. For the time being the content of the amendment is guaranteed through a waiver—a temporary decision not to apply an existing WTO rule.71

Amendment of the TRIPS Agreement – Decision of 6 December 2005
(GENERAL COUNCIL/WT/L/641/8 December 2005)

The General Council;

Having regard to paragraph 1 of Article X of the Marrakesh Agreement Establishing the World Trade Organization ("the WTO Agreement");

Conducting the functions of the Ministerial Conference in the interval between meetings pursuant to paragraph 2 of Article IV of the WTO Agreement;

Noting the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2) and, in particular, the instruction of the Ministerial Conference to the Council for TRIPS contained in paragraph 6 of the Declaration to find an expeditious solution to the problem of the difficulties that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing under the TRIPS Agreement;

Recognizing, where eligible importing Members seek to obtain supplies under the system set out in the proposed amendment of the TRIPS Agreement, the importance of a rapid response to those needs consistent with the provisions of the proposed amendment of the TRIPS Agreement;


Having considered the proposal to amend the TRIPS Agreement submitted by the Council for TRIPS (IP/C/41);

Noting the consensus to submit this proposed amendment to the Members for acceptance;

Decides as follows:

1. The Protocol amending the TRIPS Agreement attached to this Decision is hereby adopted and submitted to the Members for acceptance.

2. The Protocol shall be open for acceptance by Members until 1 December 2007 or such later date as may be decided by the Ministerial Conference.

68 Art.X of the Marrakesh Agreement.
70 General Council, WT/L/641 December 8, 2005 Amendment of the TRIPS Agreement, Decision of December 6, 2005. See also para.12-046.
71 See below.
3. The Protocol shall take effect in accordance with the provisions of paragraph 3 of Article X of the WTO Agreement.

[...]


The General Council,

Conducting the functions of the Ministerial Conference in the interval between meetings pursuant to paragraph 2 of Article IV of the Marrakesh Agreement establishing the World Trade Organization (the "WTO Agreement"),

Having regard to paragraph 2 of the Decision of the General Council of 6 December 2005 on the Amendment of the TRIPS Agreement (the "TRIPS Amendment Decision") and paragraph 3 of the Protocol Amending the TRIPS Agreement (the "Protocol")\(^{72}\), which provide that the Protocol shall be open for acceptance by Members until 1 December 2007 or such later date as may be decided by the Ministerial Conference;

Recalling that the General Council, by its decision of 18 December 2007 (the "2007 Extension Decision")\(^{73}\), initially extended the period for acceptances of the Protocol by Members until 31 December 2009 or such later date as may be decided by the Ministerial Conference;

Recalling also that, pursuant to paragraph 3 of the TRIPS Amendment Decision and paragraph 4 of the Protocol, the Protocol shall take effect and enter into force in accordance with the provisions of paragraph 3 of Article X of the WTO Agreement;

Noting that acceptance of the Protocol by two thirds of the Members in accordance with paragraph 3 of Article X of the WTO Agreement is taking longer than initially foreseen;

Having considered the proposal to further extend the period for acceptances of the Protocol submitted by the Council for TRIPS (IP/C/54);

Decides as follows:

The period for acceptances by Members of the Protocol Amending the TRIPS Agreement referred to in paragraph 2 of the TRIPS Amendment Decision and paragraph 3 of the Protocol, and extended by the 2007 Extension Decision, shall be further extended until 31 December 2011 or such later date as may be decided by the Ministerial Conference.

11-018 The obligations of members may differ not only according to whether or not they have accepted a particular amendment, but also according to whether or not a member has consented to the application of a particular Uruguay Round agreement or agreements\(^{74}\) as between itself and another member at

\(^{72}\) WT/L/641.

\(^{73}\) WT/L/711.

\(^{74}\) I.e. the Marrakesh Agreement Establishing the WTO and the Multilateral Agreements on Trade in Goods; GATS; TRIPS, and the Understanding on Rules and Procedures Governing the Settlement of Disputes.
the time of becoming a member. In such an event the agreement or agreements in question are not binding as between the two members.\footnote{Art.XIII of the Marrakesh Agreement. For non-application of GATT see Art.XXXV of GATT 1994. See also L. Wang, "Non-application in the GATT and the WTO", J.W.T. Vol.28 No.2, p.49.}


Insofar as interpretative decisions are concerned, the Ministerial Council and the General Council have exclusive authority to adopt interpretative decisions.\footnote{Art.IX of the Marrakesh Agreement.} The two organs are, however, to act on the advice of the relevant Council under whose remit the relevant agreement falls. Interpretative decisions are to be arrived at by a three-fourth majority of the membership votes. The interpretative decisions are to be in accordance with customary rules of interpretation of public International Law.\footnote{See Art.3(2) of the Understanding on rules and procedures governing the settlement of disputes. See also Arts 31–33 of the Vienna Convention On The Law Of Treaties 1969.}

The GATT *acquis* is incorporated expressly,\footnote{Art.XVI of the Marrakesh Agreement.} and also flow from Arts 31\footnote{Art.31 of the Vienna Convention on the Law of Treaties states: (1) A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. (3) There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. (4) A special meaning shall be given to a term if it is established that the parties so intended.} and 32\footnote{Art.32 of the Vienna Convention on the Law of Treaties states: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."} of the Vienna Convention on the Law of Treaties. Thus, the aids to interpretation include, inter alia, the *travaux préparatoires* of the agreements under the Uruguay Round; the subsequent practice of the WTO; the decisions and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established under the GATT 1947\footnote{Art.XVI of the Marrakesh Agreement. See also US—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, Report of the AB adopted on May 20, 1996, Section III B.}; and the
principles of the Havana Charter. However, Panel Reports adopted by the GATT Contracting Parties and the WTO Dispute Settlement Body do not constitute subsequent practice as understood under Art.31 of the Vienna Convention. This is because the GATT Panel Reports, even when adopted, did not amount to an agreement of the parties regarding interpretation of the GATT. The Report bound only the parties to the dispute. Similarly, in the context of the WTO the fact that exclusive interpretative authority is reserved for the Ministerial Conference and the General Counsel precludes such authority from existing by implication or by inadvertence elsewhere. However, adopted decisions under GATT should be taken into account where relevant to any dispute given they are part of the GATT aequis specifically incorporated under the Marrakesh Agreement. However, such decisions are not binding. Unadopted GATT panel reports have no legal status in GATT or the WTO. However, a dispute settlement panel may nevertheless resort for guidance to such reports if relevant. Resorting for guidance is not, however, the same as reliance—which is not permitted.

Three points are of particular note insofar as the interpretative function is concerned. First, it is not clear what constitutes an “interpretative” decision. Secondly, the authority to interpret the agreements is vested with political organs. This has the advantage of attuning interpretative decisions with the general consensus of the membership at any given time, and thus allowing for a teleological approach to interpretation of the agreements. In this manner the prospects of compliance with such interpretative decisions is also enhanced. However, the process arguably could result in a form of creeping legislation, which could undermine the original undertakings given by the members, despite the edict that interpretative decisions are not to undermine the amendment provisions. Finally, interpreting the WTO normative framework is complex, involving a variety of sources as aids to interpretation—including for example not only the travaux préparatoires but also subsequent practice and agreements on interpretation, as well as any relevant rules applicable as between the members—including bilateral or multilateral agreements. Thus, for example bilateral and multilateral environmental treaties can put a gloss on the trade obligations of the parties. On this basis, the Appellate Body has confirmed that WTO rules must not be interpreted in clinical isolation of public International Law. In addition, reference can be

83 Art.XXIX of the GATT 1994. See also “World Trade Organization: WTO analytical index”, (Geneva: World Trade Organization; Cambridge [u.a.]).
86 Art.XVI of the Marrakesh Agreement.
87 Art.XVI of the Marrakesh Agreement.
89 Art.XII(2) of the Marrakesh Agreement.
made to Art.31(3)(e) of the Vienna Convention on the Law of Treaties, which calls for treaties to be interpreted in accordance with any relevant rules of International Law applicable in the relations between the parties.

Membership and accession

Membership of the WTO is open to any State, or separate customs territory which has autonomy over the conduct of its external commercial relations and in matters covered under the WTO and the multilateral trade agreements. Membership is open on such terms as are agreed as between the WTO and the State or the Customs territory. Further, under Art.XXXXIII of GATT 1994 accession by a government is permitted, so that an entity that is not a State can also be a party to the agreement. An important example is the membership of the European Union (EU) as it is in charge of the common commercial policy of its members.

However, an application for membership is not a mere formality. Application for membership has to be negotiated. The decision to approve accession to the WTO is to be taken by a two-thirds majority of the members of the WTO.

It should also be noted that membership of the WTO implies acceptance of all multilateral agreements as contained in the Annexes 1–3 of the WTO Agreement (single undertaking). However, Annex 4 of the WTO Agreement contains a number of Agreements which are referred to as Plurilateral Trade Agreements that are only binding on those members that have explicitly accepted them. In so far as accession to these Plurilateral Trade Agreements is concerned, participation in those agreements is dependent upon the terms of the respective agreement in question.

The procedures adopted in the consideration of an application for accession briefly are as follows. The WTO establishes a Working Party to consider the application. The applicant is requested to submit a Memorandum on its Foreign Trade Regime. WTO members are then invited to pose questions to

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92 See also “World Trade Organization: WTO analytical index”. (Geneva, World Trade Organization; Cambridge [u.a.]).

93 See Art.XII of the Marrakesh Agreement.

94 These are agreements that bind only those members that are party to them. See Art.II(3) of the Marrakesh Agreement.

95 Art.II(3) of the Marrakesh Agreement.

96 World Trade Organization: WTO analytical index. (Geneva, World Trade Organization; Cambridge [u.a.]).

97 World Trade Organization: WTO analytical index. (Geneva, World Trade Organization; Cambridge [u.a.]).
the applicant based on the information provided in the Memorandum which is circulated to them for this purpose. Parallel with the work of the Working Party on accession, tariff negotiations are held between the applicant and interested members of the WTO. Upon the completion of tariff accession negotiations, the schedule of tariff concessions is annexed to the report by the Working Party and the draft Decision and Protocol of Accession. All of these are then submitted to the Council for adoption.

Thus, the Working Party is essentially involved in establishing the trade and tariff concessions and commitments that the applicant would be prepared to give as the price of its entry into the WTO in return for the benefits it would receive from the membership.\(^{98}\) In the practice of GATT, members have negotiated entry into the system on the basis of some sort of reciprocity\(^ {99}\) between the tariff and non-tariff concessions offered by the State negotiating accession and other interested members. The reciprocity relates to the benefits in terms of trade flow which would ensue as a consequence of the commitments given. They are referred to as market access commitments. There is no express stipulation in the WTO code that such negotiations must be on the basis of reciprocity.\(^ {100}\) The calculation of reciprocity in the tariff concession negotiations is a complex exercise and not necessarily precise. Calculation of reciprocity in the context of non-tariff concessions, and its interaction with tariff concessions is an even more complex affair.\(^ {101}\) There is a fair amount of judgement involved in arriving at a reciprocal arrangement. In the case of developing countries the expectation of reciprocity is subject to it being consistent with the developing country's individual development, financial and trade needs or administrative and institutional capabilities.\(^ {102}\)

The accession negotiations are conducted from a number of standpoints—and not merely market access. The standpoints may be summarised as follows:

1. Ensuring the appropriate price of entry into the system (i.e. market access).

2. Ensuring that the acceding member accepts the application of the common code of conduct amongst the members of the WTO (i.e. the application of the WTO code).

3. Ensuring that the member at the time of entry enters with a foreign trade regime that is consistent with the WTO code.

\(^{98}\) World Trade Organization: WTO analytical index. Geneva, World Trade Organization; Cambridge [u.a.].


\(^{100}\) However, Art.XXVIII bis does refer to reciprocity but in the context of multilateral trade negotiations.

\(^{101}\) See, for example, Jackson (1989), p.123; and World Trade Organization: WTO analytical index. (Geneva, World Trade Organization; Cambridge [u.a.]).

\(^{102}\) See Art.XI(2) of the Marrakech Agreement and Art.XXXVI(8) of GATT 1994.
4. Ensuring that the acceding member will be able to continue complying with the WTO code.

The criteria against which the Working Party evaluates the applicant State's case for entry does not appear to be transparent. It is not clearly stated anywhere in the WTO code. At its core it is synonymous with the WTO code and ensuring acceptable market access commitments. As such it is concerned with the foreign trade regime of the State in question. However, in practice the review seem to be fairly wide, focusing on the general state of the economy and on economic matters which strictly arguably are not within the remit of the WTO code. Non-economic considerations, for example, human rights reported in the press as conditions for entry, if made, are made outside the WTO framework. There is no current method in the framework of the WTO to ensure that political considerations do not permeate the decision-making at this level.

These particular conditions accepted in the accession process can also be enforced through the dispute settlement process against the particular member after accession.\(^{104}\)

DISPUTE DS363: China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (Official Summary by the WTO Secretariat, available online)

On 10 April 2007, the United States requested consultations with China concerning: (1) certain measures that restrict trading rights with respect to imported films for theatrical release, audiovisual home entertainment products (e.g. video cassettes and DVDs), sound recordings and publications (e.g. books, magazines, newspapers and electronic publications); and (2) certain measures that restrict market access for, or discriminate against, foreign suppliers of distribution services for publications and foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment products.

[...] The United States claims that in relation to the two above-mentioned categories of measures possible inconsistencies with the Protocol of Accession, [...] arise as follows:

Regarding trading rights, the measures at issue appear not to allow all Chinese enterprises and all foreign enterprises and individuals the right to import the products into the customs territory of China. It also appears that foreign individuals and enterprises, including those not invested or registered in China, are accorded treatment less favourable than that accorded to enterprises in China with respect to the right to trade. Accordingly, the measures at issue appear to be inconsistent with China's obligations under the provisions

\(^{103}\) For example, in the context of the US attitude to the membership of the People's Republic Of China. See also for the EU, H. Zimmermann, "How the EU negotiates trade and democracy", *European Foreign Affairs Review*, 13 (2008), 2, 255-280.

of paragraphs 5.1 and 5.2 of Part I of the Protocol of Accession, as well as 
China’s obligations under the provisions of paragraph 1.2 of Part I of the 
Protocol of Accession (to the extent that it incorporates commitments in 
paragraphs 83 and 84 of the Report of the Working Party on the Accession of 
China). Furthermore, to the extent that the measures at issue impose prohibitions 
or restrictions other than duties, taxes or other charges, on the importation 
into China of the Products, these measures appear to be inconsistent with 
China’s obligations under Article XI.1 of the GATT 1994.

[...]

On 21 December 2009, the Appellate Body report was circulated to 
Members. With respect to China's measures pertaining to films for theatrical 
release and unfinished audiovisual products, the Appellate Body upheld the 
panel’s conclusions that Article 30 of the Film Regulation and Article 16 of 
the Film Enterprise Rule are subject to these provisions are inconsistent with 
China’s trading rights commitments in its Accession Protocol and Accession 
Working Party Report. The Appellate Body also upheld the Panel’s conclusion 
that Article 5 of the 2001 Audiovisual Products Regulation and 
Article 7 of the Audiovisual Products Importation Rule are inconsistent 
with China’s obligation, in paragraph 1.2 of China’s Accession Protocol and 
paragraph 84(b) of China’s Accession Working Party Report, to grant in a 
non-discretionary manner the right to trade.

Relationship with other international organisations

The WTO is not a specialised UN agency.\(^{105}\) Thus, it does not have an agreement with the UN creating such a relationship. However, the WTO engages actively in relations with other international organisations\(^{106}\) and is explicitly required to co-operate with the IMF and the World Bank group.\(^{107}\) To this effect, it has negotiated agreements with the IMF and the World Bank establishing the manner of co-operation as between the two organisations.\(^{108}\)

The WTO has a particular relationship with the IMF given that trade and monetary matters impinge upon each other. Thus, the WTO and the IMF are to cooperate specially in co-ordinating policies with regard to exchange questions.\(^{109}\) Further, in matters of monetary reserves, balance of payments or foreign exchange the WTO is to consult with the IMF and accept its findings—especially in the application of the safeguard restrictions for balance

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105 See, for example, Jackson (1998), p.52. See also WT document WT/GC/W/10 cited by Jackson (1998).
107 Art. III of the Marrakesh Agreement.
of payments purposes.\textsuperscript{110} Further, a member is expected not to frustrate through trade measures the intent of the provisions of the IMF Articles of Agreement.\textsuperscript{111} Finally, a member of the WTO is expected to be a member of the IMF and if not it is under an obligation to enter into a special exchange agreement with the WTO.\textsuperscript{112}

The WTO also has the mandate to enter into arrangements for consultation and co-operation with other international organisations,\textsuperscript{113} and non-governmental organisations concerned with matters related to the WTO.\textsuperscript{114} Thus, the WTO has joined forces with WIPO to assist developing countries in trade-related aspects of intellectual property rights\textsuperscript{115}; and it also co-operates with UNCTAD, especially in the framework of the jointly managed International Trade Centre (ITC) in Geneva. Similarly, the WTO has addressed the question of the role of NGOs in WTO-related matters by having a plan for enhanced cooperation with them. In essence this involves more participation of NGOs in the deliberations of the work of the WTO, in the form, for example, of briefings for NGOs and circulation of NGO documents to members.\textsuperscript{116} In recent years, the WTO has undertaken important steps to provide NGOs with more information about its policies and better access to documents and representatives, e.g. through organising the annual WTO Public Forum and establishing an NGO Contact Point.

Guidelines for arrangements on relations with Non-Governmental Organizations (WT/L/162, 23 July 1996)

Decision adopted by the General Council on 18 July 1996

I. Under Article V:2 of the Marrakesh Agreement establishing the WTO "the General Council may make appropriate arrangements for

\begin{itemize}
  \item Art.XV of GATT 1994.
  \item See Art.XV of GATT 1994.
  \item See Art.XV of GATT 1994.
  \item See Art.V of the Marrakesh Agreement. An important example are the relations between the WTO and the Codex Alimentarius Commission, established by the World Health Organization (WHO) and the Food and Agriculture Organization (FAO), with regard to sanitary and phytosanitary (SPS) measures; see J. Evers, "Dueling risk assessments: why the WTO and codex threaten U.S. food standards", Environmental Law, 30 (2000) 2, 387-412 and Ch.13 on this issue.
  \item See WTO Press Release. On July 18, 1996 the General Council further clarified the framework for relations with NGOs by adopting a set of guidelines (WT/L/162) which "recognizes the role NGOs can play to increase the awareness of the public in respect of WTO activities".
\end{itemize}
consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.\(^1\)

II. In deciding on these guidelines for arrangements on relations with non-governmental organizations, Members recognize the role NGOs 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.

III. To contribute to achieve greater transparency Members will ensure more information about WTO activities in particular by making available documents which would be derestricted more promptly than in the past. To enhance this process the Secretariat will make available on on-line computer network the material which is accessible to the public, including derestricted documents.

IV. The Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate. This interaction with NGOs should be developed through various means such as inter alia the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO.

V. If chairpersons of WTO councils and committees participate in discussions or meetings with NGOs it shall be in their personal capacity unless that particular council or committee decides otherwise.

VI. Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.

With regard to dispute settlement, the Appellate Body has decided that NGOs can make submissions in a trade dispute (amicus curiae briefs) to a panel—although it is open to the panel to accept or reject such submissions.\(^{17}\) Similarly, a member party to a dispute may adopt as part of its own submissions information and advice compiled by NGOs.\(^{18}\)


Conclusions

In conclusion, the institutional framework of the WTO can be said to provide a basic, but by no means complete, constitutional framework for the international trading system.\textsuperscript{119} The system provides for a legislative machinery in the field of international trade, for a dispute settlement apparatus, a surveillance mechanism, and an administrative structure. The constitutional structure appears to be sufficiently flexible, so as to be responsive within its limits to the exigencies of international trade relations. Further, the place of the WTO in the context of the wider international economic order is acknowledged. Thus, the WTO is to co-operate with the IMF and World Bank Group in order to facilitate greater coherence in global economic policy-making.\textsuperscript{120} However, the international apparatus for greater coherence in this respect has not been able to deal effectively with conflicting obligations of members arising, for example, from membership of the IMF and the WTO.\textsuperscript{121} Thus, in a recent WTO Panel and Appellate Body Report, Argentina’s contention that its statistical tax although in violation of Art. VIII of GATT 1994, was in fact imposed to meet IMF commitments, did not succeed in absolving it from its WTO commitments.\textsuperscript{122} Although the Appellate Body held that the precise nature and extent of the Argentinean commitments undertaken in relation to the IMF were not clear and proven it added that the 1996 Agreement between the IMF and the WTO did not make provision for substantive rules for the resolution of conflicts between obligations under the IMF and the WTO of a member.\textsuperscript{123}

There are a number of stress points at the level of the basic constitution. First, the purposes and objectives of the WTO are arguably limited in scope. Secondly, the WTO does not appear to have any effective mechanism to ensure that the development of international trade regulation in future will be responsive to the needs of the international trading system as objectively determined, rather than by the influence of international lobbyists. Thirdly, it is contended that the WTO, independent of the volition of its membership, has a fairly rudimentary international personality. Finally, the creation of


\textsuperscript{120} Art.III(5) of the Marrakech Agreement.


the WTO has not been negotiated *de nouveau* but has emerged rather from the GATT. Thus, the WTO inherits some of the shortcomings of the former institution. Indeed, past GATT practice is to have a bearing on future WTO conduct.\textsuperscript{125} Further, from a technical perspective, the substantive law under the framework of the WTO has not been codified. The international trading system still comprises of a mosaic of different international agreements. This not only creates for complexity; but can potentially give rise to conflicts or inconsistencies as between agreements. There will doubtless be institutional changes in the WTO in future. On January 17, 2005, the WTO Secretariat presented a Report entitled "The Future of the WTO", the so-called "Sutherland Report". This report addressed several institutional issues, with recommendations to reform the way the organisation works and how decisions are made.\textsuperscript{126}

With regard to the multilateral trade negotiations in general, the conclusion of the Uruguay Round had been followed a number of negotiations on left-overs, especially in the area of services (Financial services, Telecommunications)\textsuperscript{127} until 1997. In a number of areas a so-called "built-in agenda" foresaw automatically further negotiations. At the Singapore Ministerial in 1996 the so-called Singapore issues were identified for further negotiations\textsuperscript{128} besides the remaining liberalisation and negotiation endeavours, but the Seattle Ministerial of 1999 was considered a complete disaster in view of the absence of consensus between WTO members and riots in the streets. Only in 2001 was launched the so-called Doha Round in Doha (Qatar). It was referred to as a Development Round in view of the continued lack of integration of developing countries into the world trading system. A particular emphasis was laid on market access for developing countries, especially in the area of agriculture.\textsuperscript{129} The Ministerial Conference of Cancun (2003) was not considered a success and only the following Ministerial Conference in Hong Kong in 2005 gave renewed hope of concluding a round in the near future by limiting the negotiations to a number of key issues. Due to the lack of consensus about the kind of tariff cuts (especially in the agricultural sector, but also with regard to industrial goods) and market openings (especially in the field of services) that were needed for a balanced result, the negotiations were suspended again in July 2006 and only resumed a few months later with the hope to reach a breakthrough at some point in 2007. Another ministerial meeting was held in July 2008. On this occasion a so-called July 2008 package was presented in order to allow for the conclusion of the negotiations.

\textsuperscript{125} Art.XVI of the Marrakesh Agreement.
\textsuperscript{126} The report was written by a Consultative Board set up by the WTO Director General at that time, Dr. Supachai Panitchpakdi. The Group was chaired by Peter Sutherland, a former Director-General of GATT and the WTO, Peter Sutherland. See also, A. V. Bogdandy, "The "Sutherland Report" on WTO reform", *World Trade Review*, 4 (2005) 3, 439–447.
\textsuperscript{127} For example, the so-called Reference Paper; in this respect see Mexico—Measures Affecting Telecommunications Services, Panel Report adopted on June 1, 2004.
\textsuperscript{128} See Ch.12.
\textsuperscript{129} See Ch.12.
July 2008 package was considered as a stepping stone on the way to concluding the Doha Round. According to the WTO Secretariat, the main task before WTO members was to settle a range of questions that would shape the final agreement of the Doha Development Agenda. Consultations took place in Geneva among a group of ministers who were considered representing all interests in the negotiations. As a result the so-called “modalities” of the negotiations in agricultural and non-agricultural goods were revised. These are formulas and other methods to be used to cut tariffs and agricultural subsidies, and a range of related provisions. Nevertheless, the result was a document that was considerably more complicated than formulas alone. But the aim remained still to strike a deal to enable governments to open their markets and reduce trade-distorting subsidies. The results were more consultations and negotiations but no meaningful results were achieved. On April 29, 2011 WTO ambassadors endorsed Director-General Pascal Lamy’s plan\(^{139}\) to consult delegations in Geneva and ministers around the world in the search for a different way of achieving a breakthrough in the Doha Development Agenda negotiations. There are now more and more voices calling for the official termination (without results) of the negotiations in view of the lack of political will among WTO members to make meaningful concessions. At the same time many Members fear that such a step would further weaken the WTO as a multilateral institution and enhance the tendency of countries around the world to seek bilateral agreements.\(^{131}\)

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**WTO—Trade Negotiations Committee (TN/C/W/58, 15 April 2011)**

Open Letter on the WTO Doha Round Negotiations

15 April 2011

The attached letter has been received from the delegation of Australia on behalf of the delegations of Australia, Chile, Colombia, Costa Rica, Hong Kong China, Indonesia, Korea, Malaysia, Mexico, New Zealand, Norway, Singapore, Switzerland with the request that it be circulated to all WTO members.

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139 On April 21, 2011 the negotiating chairs circulated documents representing the product of the work in their negotiating groups. An accompanying report was issued by the Chair of the Trade Negotiations Committee, Pascal Lamy. Director-General Pascal Lamy, in his cover note to the documents, said that for the first time since the Round was launched in 2001 “Members will have the opportunity to consider the entire Doha package”. He says the picture is “impressive” in the significant progress achieved so far, but also “realistic” in what it shows on the remaining divides. He asked Members to think hard about “the consequences of throwing away ten years of solid multilateral work” and called on members to “use the upcoming weeks to talk to each other and build bridges”\(^{139}\).

determination that for the sake of all countries the Round now needs to be brought quickly to a successful conclusion.

We are deeply concerned that despite the great deal of effort and energy through intensified work in the last few months, there has been very little progress in the Doha negotiations.

We are now in a very difficult situation and our ability to conclude the Round this year might seriously be in question.

We want to work with all Members to ensure that every effort is made to conclude the Round. We believe that a deal is achievable. We believe a deal is also worth fighting for, both in its own right, and in the longer-term interests of the multilateral trading system upon which we all so heavily rely. The Round’s significant contribution to development must also be at the forefront of our thinking.

We are not prepared to stand by with such important stakes in play. We are committed to continue to work across all areas of the negotiations and with all Members to bring an ambitious and balanced conclusion to the negotiations. We are prepared to show further flexibility and to contribute to the successful conclusion of the Round this year. We call on all Members to do the same.

[...]

REGIONAL AGREEMENTS

11-027 The increasing number of regional agreements contain normally only rudimentary institutional provisions. The management of the bilateral trade relations takes often place in a joint committee or a trade commission which holds regular meetings in order to tackle problems, discusses necessary amendments or future liberalisation objectives (e.g. NAFTA Free Trade Commission under Art.2001 of the NAFTA Agreement of 1992\(^\text{132}\), the Association Committee in the Agreement establishing an association between the European Community (now officially the EU) and its Member States, of the one part, and the Republic of Chile, of the other part of 2002). For more technical questions they regularly establish a number of special bodies, e.g. sub-committees.

The exact relationship to other agreements and, in particular, to the WTO is usually only addressed in a very superficial way. It is very common in this type of agreement to simply confirm the existing rights and obligations under existing multilateral agreements (including the WTO). Existing older bilateral agreements, however, are normally terminated except if they contain rules that may not be (entirely) transferred into the new agreement. From the view point of the WTO, obviously, the existence of a bilateral agreement cannot

\(^{132}\) Of particular fame and rather exceptional is the NAFTA-related Commission of Environmental Cooperation, see C.Wold, "Evaluating NAFTA and the Commission for Environmental Cooperation", *Saint Louis University: Saint Louis University Public Law Review*, 28 (2008) 1, 201–232
change the rights and obligations of third parties to the latter—i.e. under the WTO. The dispute settlement organs of the WTO cannot, therefore, accept an argument that a specific violation of the WTO agreements towards a third Party should be justified because there is a duty to behave in a particular way under a bilateral or regional agreement—except if the WTO itself provides for such an exception. At the same time, it is debated to what extent more specific rules in a bilateral agreement can be taken into account among two or more WTO members that have agreed on such rules outside of the WTO. This applies also to the availability of different dispute settlement mechanisms—which potentially can lead to so-called “forum-shopping”. Of particular interest in this respect were a number of cases between Mexico and the United States generally referred to as “soft drink cases” or sweetener cases where the difficult relationship between NAFTA and WTO became evident.

NAFTA Chapter Twenty: Institutional Arrangements and Dispute Settlement Procedures

Section A—Institutions

Article 2001: The Free Trade Commission

1. The Parties hereby establish the Free Trade Commission, comprising cabinet-level representatives of the Parties or their designees.

2. The Commission shall:
   (a) supervise the implementation of this Agreement;
   (b) oversee its further elaboration;

In Brazil—Measures Affecting Imports of Retreaded Tyres (DS 332) the Appellate Body (Report of 3 December 2007) reversed the Panel’s findings that the MERCOSUR exemption and imports of used tyres through court injunctions (i) would not result in the Import Ban being applied in a manner that constituted “arbitrary discrimination”, and (ii) would lead to “unjustifiable discrimination” and a “disguised restriction on international trade” only to the extent that they result in import volumes that would significantly undermine the achievement of the objective of the Import Ban. The Appellate Body determined that the assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure, and found that the MERCOSUR exemption, as well as the imports of used tyres under court injunctions, had resulted in the Import Ban being applied in a manner that constituted arbitrary or unjustifiable discrimination and a disguised restriction on international trade within the meaning of the chapeau of Art.XX.


(c) resolve disputes that may arise regarding its interpretation or application;

(d) supervise the work of all committees and working groups established under this Agreement, referred to in Annex 2001.2; and

(c) consider any other matter that may affect the operation of this Agreement.

3. The Commission may:

(a) establish, and delegate responsibilities to, ad hoc or standing committees, working groups or expert groups;

(b) seek the advice of non-governmental persons or groups; and

(c) take such other action in the exercise of its functions as the Parties may agree.

4. The Commission shall establish its rules and procedures. All decisions of the Commission shall be taken by consensus, except as the Commission may otherwise agree.

5. The Commission shall convene at least once a year in regular session. Regular sessions of the Commission shall be chaired successively by each Party.

Article 2002: The Secretariat

1. The Commission shall establish and oversee a Secretariat comprising national Sections.

2. Each Party shall:

(a) establish a permanent office of its Section;

(b) be responsible for

(i) the operation and costs of its Section, and

(ii) the remuneration and payment of expenses of panelists and members of committees and scientific review boards established under this Agreement, as set out in Annex 2002.2;

(c) designate an individual to serve as Secretary for its Section, who shall be responsible for its administration and management; and

(d) notify the Commission of the location of its Section’s office.

3. The Secretariat shall:

(a) provide assistance to the Commission;

(b) provide administrative assistance to

(i) panels and committees established under Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters), in accordance with the procedures established pursuant to Article 1908, and

(ii) panels established under this Chapter, in accordance with procedures established pursuant to Article 2012; and

(c) as the Commission may direct
(i) support the work of other committees and groups established under this Agreement, and
(ii) otherwise facilitate the operation of this Agreement."

AGREEMENT BETWEEN JAPAN AND THE UNITED MEXICAN STATES FOR THE STRENGTHENING OF THE ECONOMIC PARTNERSHIP (17 September 2004)

Article 163 Joint Committee

1. The Joint Committee composed of representatives of the Governments of the Parties shall be established under this Agreement.

2. The functions of the Joint Committee shall be:

   (a) reviewing the implementation and operation of this Agreement and, when necessary, making appropriate recommendations to the Parties;
   (b) considering and recommending to the Parties any amendments to this Agreement;
   (c) by mutual consent of the Parties, serving as a forum for consultations referred to in Article 152;
   (d) supervising the work of all Sub-Committees established under this Agreement;
   (e) adopting:
      (i) modifications to Annexes referred to in Articles 8 and 37;
      (ii) the Uniform Regulations referred to in Article 10;
      (iii) an interpretation of a provision of this Agreement referred to in Articles 84 and 89;
      (iv) the Rules of Procedure referred to in Article 159; and
      (v) any necessary decisions; and
   (f) carrying out other functions as the Parties may agree.

3. The Joint Committee may:

   (a) establish and delegate its responsibilities to Sub-Committees for the purposes of the effective implementation and operation of this Agreement; and
   (b) take such other action in the exercise of its functions as the Parties may agree.

4. The following Sub-Committees shall be established on the date of entry into force of this Agreement:

   (a) Sub-Committee on Trade in Goods.
   (b) Sub-Committee on Sanitary and Phytosanitary Measures.
   (c) Sub-Committee on Technical Regulations, Standards and Conformity Assessment Procedures.
(d) Sub-Committee on Rules of Origin, Certificate of Origin and Customs Procedures.

(e) Sub-Committee on Cross-Border Trade in Services.

(f) Sub-Committee on Entry and Temporary Stay.

(g) Sub-Committee on Government Procurement.

(h) Sub-Committee on Cooperation in the Field of Trade and Investment Promotion.

(i) Sub-Committee on Cooperation in the Field of Agriculture.

(j) Sub-Committee on Cooperation in the Field of Tourism.

Other Sub-Committees may be established as the Parties may agree.

5. The Joint Committee shall establish its rules and procedures.

6. The Joint Committee shall meet alternately in Japan and Mexico at the request of either Party.

Article 166 Communications

Each Party shall designate a contact point to facilitate communications between the Parties on any matter relating to this Agreement.

Article 167 Relation to Other Agreements

1. The Parties reaffirm their rights and obligations under the WTO Agreement.

2. Nothing in Chapters 3, 7 and 8 shall be construed to prevent either Party from taking any necessary action as may be authorized by Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 to the WTO Agreement, as may be amended.

3. The Convention on Commerce between Japan and the United Mexican States signed at Tokyo on January 30, 1969 shall expire upon the date of entry into force of this Agreement.
INTERNATIONAL ECONOMIC LAW

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