

Symposium

The World Trade Organization and the European Union

Guest Editor: Ernst-Ulrich Petersmann

The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization

*Ernst-Ulrich Petersmann **

How can governments be induced to use their foreign policy powers in a peaceful and welfare-increasing manner? Mankind has so far failed to find a convincing answer to this question and has paid dearly for this failure with centuries of war, welfare-reducing abuses of government powers and unnecessary poverty. There is also a long history of abuses of trade policy powers in a mutually impoverishing manner generating international conflicts and 'trade wars'. Due to inadequate constitutional safeguards, governments cannot pursue national economic welfare as their dominant trade policy objective. Since import restrictions operate by taxing *domestic* traders and consumers for the benefit of 'rent-seeking' producer interests, and often limit the freedoms and property rights of *domestic* citizens without effective parliamentary and judicial control, the lack of an effective 'foreign policy constitution' can undermine also the 'domestic policy constitution' and its general constitutional restraints on the taxing, regulatory and spending powers of governments. The regional EC integration law was uniquely successful in securing peace, economic welfare and individual liberty among the EC Member States through 'supranational' legal and institutional guarantees of rule of law, 'market freedoms', non-discriminatory competition and judicial protection of individual rights. But most governments seem to believe that the 'constitutional approach' of EC law cannot be extended to the *foreign policy powers* of the EC nor beyond the regional context of European integration.

The 1994 Agreement Establishing the World Trade Organization (WTO) is the most ambitious attempt in history at promoting welfare-increasing policies through international guarantees of freedom, non-discrimination and rule of law in the ever

* Professor of law at the University of St. Gallen, visiting professor at the Graduate Institute of International Studies at Geneva, and legal advisor in the GATT/WTO 1981-1995.

more important field of worldwide economic relations. In many respects, such as the protection of individual rights (e.g., of access to courts and intellectual property rights) and the establishment of a mandatory global dispute settlement system, it goes beyond the postwar 'UN Constitution' for the conduct of foreign policies. Its 'integration' of international rules on trade in goods, services, trade-related investment measures, environmental measures and intellectual property rights, reinforced by the WTO's 'Trade Policy Review Mechanism' and integrated dispute settlement system, is also more ambitious than the stillborn 1948 Havana Charter for an International Trade Organization (save for the Havana Charter rules on restrictive business practices and intergovernmental commodity agreements). It introduces a new kind of worldwide integration law with far-reaching implications for other existing international organizations, such as the UN Conference on Trade and Development and the World Intellectual Property Organization.

This contribution begins with a brief review of the difficulties of 'constitutionalizing' foreign policies in national and international law (Chapter I) and of the 'constitutional' problems of the world trading system (Chapter II), which make its reform such a hard task. Chapters III and IV analyse the contents of the 1994 Uruguay Round Agreements, their 'constitutional functions' and their underlying 'public choice strategies', which made it possible to conclude the Uruguay Round successfully. The paper ends with a brief outlook at the WTO agenda for future negotiations. The methods and value premises of this paper – i.e. liberal constitutional theory, 'public choice' theory and economic analysis of law – are explained in Chapter II.C in the hope of stimulating a broader discussion on the need for a more realistic theory of international relations, of international law and of international organizations.

I. The Long and Winding Road towards 'International Constitutionalism': From Florence to Geneva via Bretton Woods, San Francisco and Luxembourg

A. National Constitutionalism

Constitutionalism was preceded by a long history of *political ethics*, whose evolution can be subdivided into personal ethics, focusing on the virtues of the rulers (e.g., Plato's philosopher kings), and institutional ethics, searching for rules and institutions in order to limit abuses of government powers and protect the liberty of citizens through the rule of law. Greek, Roman, medieval and other philosophers since the Age of Enlightenment, proceeding from the Aristotelian belief that the 'rule of law' can better enable man to realize his natural aspiration for social life than Plato's preference for the 'rule of man', developed comprehensive theories on the supremacy of law for both the 'rulers' and the 'ruled'. The more sceptical they were about man's egoistic nature and the assumption of 'benevolent governments',

the more they emphasized the need for a 'mixed political order' with monocratic, oligocratic and/or democratic elements and 'checks and balances' (e.g., between the King, the Upper House of Lords and Lower House of Commons in England after the Bill of Rights of 1689). Donato Gianotti's book on the 'Florentine Republic',¹ written after the fall of the last Florentine Republic (1530), seems to have been the first complete draft for a comprehensive constitutional reform of a concrete political order after Plato's incomplete *Nomoi* (347 B.C.) for the foundation of a new city and T. Morus' *Utopia* (1516).

Gianotti was also the first author who emphasized the need for 'separation of powers', based on the distinction of four state functions (elections, foreign and security policy, legislation, judicial review) and three decision-making phases (initiation of proposals, deliberation and decision, execution) in the 'mixed state'.² In contrast to John Milton's distinction between two government functions (law making, law executing), John Locke's distinction between three functions (legislation, execution, foreign policy) and the prevailing theory (notably by Montesquieu, Madison and Kant) on the separation of legislative, executive and judicial government powers, Gianotti's classification was more differentiated and more realistic. Sharing the pessimism about man's nature of Machiavelli (who was his predecessor in the position of secretary to the Florentine Republic's 'Council of Ten'), Gianotti's proposals for a stable 'mixed government' recognized the need for separating also the right of initiative for government decisions from the decision-making power and for regulating specifically foreign policy and defence powers. He avoided thereby the inadequacies of the 'three-functions-theory' on the separation of legislative, executive and judicial state functions, such as Montesquieu's unrealistic perception of 'foreign policy' as the 'execution of international law' by the 'Executive', which led to an unclear distribution of foreign policy powers in the US Constitution of 1787 and in many subsequent national constitutions. The right of initiative of the EC Commission and the mandate of the 'European Council (to) provide the Union with the necessary impetus for its development and ... define the general political guidelines thereof' (Article D of the 1992 Maastricht Treaty) reflect this insight that government has always been more than a mere 'Executive', just as parliament has always been more than a mere 'Legislature'.

Written constitutions as a contractual means by which citizens secured their freedom through long-term basic rules of a higher legal rank, and constitutionally limited democracies based on recognition of inalienable fundamental rights and representative government, emerged only in the 18th century in North America and Europe. But the constitutional ideals of 'a government of laws, not of men', and of 'horizontal' and 'vertical' separation of powers (e.g., through judicial protection of individual rights), were never effectively applied to the conduct of *foreign policies* and *international* relations. Up to World War II, most national constitutions

¹ D. Gianotti, *Repubblica Fiorentina*, A critical edition and introduction by G. Silvano (1990).

² See Riklin, 'Donato Gianotti – ein verkannter Vordenker der Gewaltenteilung aus der Zeit der Florentiner Renaissance', *Zeitschrift für Neuere Rechtsgeschichte* (1992) 129 seq.

remained characterized by an *introverted* focus on *domestic policy* issues and included only few references to *foreign policy* issues, such as declarations of war, treaty-making powers and treaty-making procedures. The task of 'nation-building' and the admissibility of war under classical international law contributed to a 'defensive' constitutional attitude *vis-à-vis* third countries and to the long-standing doctrine of the alleged incompatibility between the requirements of foreign policy and the ideals of rule of law and democratic decision-making.

The constitutional protection of fundamental rights was primarily concerned with the moral and political freedom of the individual and, notably within federal states, with the liberalization of trade protectionism *within* states, for instance among the Member States of the American, German and Swiss (Con)Federations. It was only in the 20th century that the ever more active use by (federal) governments of their power 'to regulate commerce with foreign Nations, and among the several States',³ and the increasing awareness of the importance of economic liberty as a condition for the exercise of many other liberties, led to concerns over constitutional safeguards against abuses of the economic regulatory powers of governments. But these concerns focused again on the 'domestic policy constitution'. Notably in Anglo-American constitutional thinking, the prevailing view continued to be that the citizens do *not* enjoy constitutional rights to trade with foreign nations because

When the people granted Congress the power to 'regulate Commerce with foreign Nations' ... they thereupon relinquished at least whatever rights they, as individuals, may have had to insist upon the importation of any product.⁴

Only a few constitutions of small trading nations like Switzerland, and a few postwar constitutions like the German Basic Law, seem to include constitutional guarantees of freedom of trade which, at least in principle, apply symmetrically to both domestic and foreign trade. But, for a number of reasons, even these national constitutional guarantees never provided an effective 'foreign policy constitution'. For instance, the constitutional guarantees of freedom of trade and industry (Article 31) and of low import and export duties (Article 29) in the Swiss Constitution of 1874 were progressively undermined by interpreting Article 29 as not prohibiting non-tariff trade barriers, by constitutional amendments providing for comprehensive discretionary regulatory powers, and by the lack of judicial review over federal legislation and over most foreign trade restrictions. To date, most national constitutions appear not to have dealt effectively with their task to protect the 'domestic policy constitution' from being undermined by abuses of 'foreign policy' powers, for instance by import restrictions which tax and restrict domestic citizens and redistribute income ('protection rents') among domestic groups in a welfare-

3 Article I, Section 8, clause 3 of the US Constitution.

4 US Court of Appeals for the Federal Circuit, *Arjay Associates Inc. v. Bush*, 891 F2d 891, 898 (Fed.Cir. 1989). For a criticism of this case-law see Petersmann, 'National Constitutions and International Economic Law', in M. Hilf, E.-U. Petersmann (eds), *National Constitutions and International Economic Law* (1993) 3-52, at 14 seq.

reducing manner. In globally integrated economies, 'domestic' and 'foreign' policies are often no longer separable, and citizens value the 'transnational' exercise of their liberties no less than purely domestic activities. National constitutions remain therefore incomplete without effective constitutional constraints on foreign policy powers.

B. International Constitutionalism

It was early recognized, for instance in Immanuel Kant's proposals of 1795 for an international treaty on 'perpetual peace' among republican states with representative constitutional government, that peace and rule of law at the international level depend on respect for the 'rights and duties of their citizens' in domestic laws.⁵ The parallels between the international law doctrine of 'fundamental rights and duties of states' and the constitutional law doctrine of fundamental rights and duties of citizens were also noted early (e.g., in the writings of international lawyers like *Pufendorf* and *de Vattel*). Thus, following the adoption of the 'Déclaration des droits de l'homme et du citoyen' by the French National Convention in 1789, a supplementary 'Déclaration du droit des gens' was considered, though not approved, by the French National Convention in 1793 and 1795; proceeding from the inalienability of the sovereignty of each nation and from the need to subordinate the interest of the individual nation to the general interest of the human race, it laid down basic rights and duties of states in 20 articles. But neither the theory of the 'fundamental rights and duties of states' nor Kant's plan for an international 'federation of free states' were aimed at a supranational 'international constitutional law' and hardly influenced the power-oriented state practice up to World War I.⁶

The 'constitutional functions' of international guarantees of freedom and non-discrimination for limiting abuses of national regulatory powers, and the importance of international organizations for the effectiveness of international rules and for a 'vertical separation of powers', were only recognized in the light of the traumatic experience of World War II and of the preceding 'law of the jungle' in international

5 Kant's booklet on 'Perpetual Peace', presented in 1795 as a draft treaty consisting of 9 articles with a supplement and an annex, differed from earlier projects (e.g., by Abbé de Saint Pierre in 1713) by linking the reforms of international law proposed in Kant's 6 'preliminary articles' to reforms of *domestic* constitutional laws proposed in Kant's 3 'definitive articles' (Article I: 'The civil constitution of each state shall be republican'; Article II: 'The law of nations shall be founded on a federation of free states'; Article III: 'The rights of men, as citizens of the world, shall be limited to the conditions of universal hospitality'). As shown by Kant's detailed commentary on the draft treaty, the underlying assumption was that representative constitutional government, separation of powers, protection of individual rights and a 'covenant of peace' among independent republican states would promote a gradual convergence of national interests and the 'primacy of domestic policy' also in *international* relations. See M.C. Jacob (ed.), *Peace Projects of the Eighteenth Century* (1974).

6 See Petersmann, 'Rights and Duties of States and Rights and Duties of their Citizens', in U. Beierlin, M. Bothe, E.-U. Petersmann (eds), *Festschrift für Professor R. Bernhardt* (1995) 1087-1128.

economic affairs. That 'the federal principle of organisation may indeed prove the best solution of some of the world's most difficult problems', provided its application does not replicate at the international level the 'constitutional failures' of nation states, was emphasized in F.A. Hayek's 1944 best-seller *The Road to Serfdom*:

When we want to prevent people from killing each other we are not content to issue a declaration that killing is undesirable, but we give an authority power to prevent it. In the same way there can be no international law without the power to enforce it. The obstacle to the creation of such an international power was very largely the idea that it need command all the practically unlimited powers which the modern state possesses. But with the division of power under the federal system this is by no means necessary. This division of power would inevitably act at the same time also as a limitation of the power of the whole as well as of the individual state.⁷

More specifically, regarding the problem of economic regulation,

We cannot hope for order or lasting peace after this war if states, large or small, regain unfettered sovereignty in the economic sphere. But this does not mean that a new super-state must be given powers which we have not learnt to use intelligently even on a national scale... What we need and can hope to achieve is not more power in the hands of irresponsible international economic authorities, but, on the contrary, a superior political power which can hold the economic interests in check... The need is for an international political authority which, without power to direct the different people what they must do, must be able to restrain them from action which will damage others ... even more than in the national sphere, it is essential that these powers of the international authority should be strictly circumscribed by the Rule of Law... An international authority which effectively limits the powers of the state over the individual will be one of the best safeguards of peace. The international Rule of Law must become a safeguard as much against the tyranny of the state over the individual as against the tyranny of the new super-state over the national communities.⁸

This 'constitutional insight' – that governments risk to become prisoners of the 'sirene-like' pressures of organized interest groups unless they follow the wisdom of Ulysses (when his boat approached the island of the Sirenes) and tie their hands to the mast of international guarantees of freedom and non-discrimination – underlied many international postwar agreements such as: the legal and institutional guarantees in the 'United Nations Law'⁹ for the respect of the 'sovereign equality of states' and of the human rights of their citizens; the legal requirements in the 1944 Agreement establishing the International Monetary Fund (IMF) for freedom of payments, stable and non-discriminatory exchange rates and convertible currencies; and the legal guarantees in the 1947 General Agreement on Tariffs and Trade (GATT) for non-discriminatory competition and the use of transparent, welfare-increasing trade policy instruments. The 'constitutional functions' of these and other

7 F.A. Hayek, *The Road to Serfdom* (1944) (reprint 1979), at 173.

8 Hayek, *supra* note 7, at 172, 175.

9 See Schachter, 'United Nations Law', *AJIL* (1994) 1-23.

guarantees of freedom, non-discrimination and rule of law for limiting abuses of national foreign policy powers, and for extending the national guarantees of freedom, non-discrimination and rule of law to transnational relations,¹⁰ are particularly visible in Western Europe. Here, the requirement in Article 3 of the 1949 Statute of the Council of Europe – that ‘every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms’ – has become a common ‘constitutional minimum standard’ and a condition of membership in the European Union and in its ‘Europe Agreements’ with Eastern European countries. While, in the worldwide UN law and ‘Bretton Woods law’, the scope for judicial review of the validity of acts by UN bodies remains very limited¹¹ and less than a third of the UN member states have accepted the mandatory jurisdiction of the International Court of Justice, EC law and the European Convention on Human Rights provide for obligatory judicial review by international courts and for direct access of European citizens to the EC Court of Justice and the European Court of Human Rights.

Yet, it remains noteworthy that this judicial protection of individual rights in European relations was often introduced by *the courts*, for instance in response to complaints by EC citizens, and often against protectionist resistance by the EC Council and national governments.¹² Thus, it was thanks to the EC Court of Justice and to the judicial protection of individual rights by national courts, that the EC Treaty’s prohibitions of tariffs and non-tariff trade barriers were construed as directly enforceable ‘market freedoms’ and individual rights of EC citizens. And it was largely in response to the ‘basic rights jurisprudence’ of the German Constitutional Court in the 1970s, that fundamental rights of the EC citizens were recognized and judicially protected as unwritten guarantees of EC law. In both EC law and the European Convention on Human Rights, it was a common experience that the effectiveness of the international guarantees of freedom and non-discrimination was greatly enhanced by enabling the citizens to directly invoke and enforce these guarantees through independent courts. The 1993 ‘Maastricht judgment’ by the German Constitutional Court, in which the Court emphasized the ‘limits ... imposed, by the principle of democracy, on an extension of the functions and powers of the European Communities’ as long as the parliamentary and democratic foundations of the European Union are not further extended concurrently with integration, may prompt the EC to strengthen also the *collective democratic rights* of EC citizens in EC law. As a result of this judicial interpretation of EC law as a constitution, the century-old tradition of power-oriented *foreign* policies among European states was progressively transformed, pursuant to the Kantian ideal, into

10 See E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991), at 221 seq.

11 See Watson, ‘Constitutionalism, Judicial Review and the World Court’, 34 *Harv. Int’l L.J.* (1993) 1-44.

12 See Burley, Mattli, ‘Europe before the Court: A Political Theory of Legal Integration’, 47 *International Organizations* (1993) 41-76.

rule-oriented *domestic* issues to be decided by the courts on the basis of the equal 'market freedoms' and other basic rights of EC citizens.

The 1947 General Agreement on Tariffs and Trade (GATT) was the first historical attempt at limiting welfare-reducing 'beggar-thy-neighbour policies', which had triggered a worldwide recession during the 1930s leading to World War II, through worldwide multilateral guarantees of freedom of trade, non-discrimination, use of welfare-increasing policy instruments, rule of law and peaceful settlement of disputes without unilateral reprisals. GATT law includes many precise, unconditional and justiciable rules and explicitly requires the availability of domestic judicial review. Yet, most governments and domestic courts continue to view trade policy as part of *foreign policy* and insist, in their *domestic* legislation and in its judicial interpretation, on the need for discretionary powers to restrict trade regardless of the self-imposed international GATT obligations. The EC Council Decision of 22 December 1994 on the conclusion of the Uruguay Round Agreements establishing the World Trade Organization (WTO) illustrates this attitude in the following paragraph:

Whereas, by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts.¹³

C. The Need for Strengthening the 'Foreign Policy Constitution'

WTO law – like GATT law – includes many precise, unconditional and justiciable guarantees of freedom, non-discrimination, rule of law, private intellectual property rights and judicial review. Yet, the attempt by governments, even in constitutional democracies like those of the EC states and the USA, to limit the 'domestic law effects' of their self-imposed international guarantees of freedom and non-discrimination illustrates that the foreign policy concern over lack of reciprocity and over inequality of domestic enforcement procedures is considered more important than the 'general interest' of their citizens in making their 'WTO market freedoms' more effective through the 'direct applicability' and judicial protection of WTO law. This 'primacy of foreign policy' over the individual rights of the citizens reflects a power-oriented perception of government. The 1993 and 1994 GATT dispute settlement reports on the inconsistency of the EC's import restrictions on bananas with GATT Articles I to III, and the continuing disregard by the EC of these dispute settlement findings, show that also the EC institutions assert a Community power to

13 Official Journal of the EC L 336/2 of 23 December 1994. The Uruguay Round Schedule of Specific Services Commitments by the 'European Communities and their Member States' likewise specifies that 'the rights and obligations arising from the GATS, including the schedule of commitments, shall have no self-executing effect and thus confer no rights directly to individual natural persons or juridical persons' (cf. Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Vol. 28, GATT 1994, at 23557).

tax and restrict EC citizens in manifest violation of their international GATT obligations.

The EC's 'banana protectionism' – which, according to a recent estimate by the World Bank, costs EC consumers \$2.3 billion a year and distorts EC competition (leading to numerous bankruptcies e.g., in Germany) for the benefit of a handful of multinational banana firms¹⁴ – reflects a political weakness of the EC's 'foreign policy constitution': governments are not effectively constrained to pursuing their legitimate task of protecting the general interests of the citizens. Neither 'separation of powers', for instance through parliamentary legislation and judicial review, nor the principle of 'primacy of international law over secondary EC law', which underlies Articles 228 to 234 of the EC Treaty¹⁵ and requires both the EC and its Member States to act in conformity with self-imposed international treaty obligations, are effectively guaranteed in the EC's external relations. Even though the GATT obligations are 'binding on the institutions of the Community and on Member States' (Articles 228:7, 234 EC Treaty) and were ratified also by *national parliaments* in EC member countries, the 'GATT case-law' of the EC Court of Justice remains characterized by a long tradition of ignoring even precise and unconditional GATT rules and GATT dispute settlement findings against the EC.¹⁶

The most recent example of this 'judicial protectionism' is the Court's judgment of 5 October 1994 on Germany's complaint that the EC Council's 'banana regulation' No. 404/93 was inconsistent with GATT Articles I to III, as previously determined in two independent GATT dispute settlement reports. The Court concluded from the existence of GATT's safeguard clause (Article XIX) and GATT's dispute settlement system (Article XXIII) 'that the GATT rules are not unconditional' and 'preclude the Court from taking provisions of GATT into

- 14 See Borell, 'Banarama', Policy Research Working Paper 1386, *World Bank* (1994). The study says that, out of the \$2.3bn annual protection costs in artificially inflated prices, only \$300 million benefit ACP producers, while most of the extra cost is in monopoly profits for European companies marketing bananas. According to the study, the EC's banana system severely distorts competition, encourages black marketeering, restricts the growth of the EU banana market, discriminates against efficient producers and robs inefficient ones of incentives to raise productivity and cut costs.
- 15 See Petersmann, 'Commentary on Article 234 of the EEC Treaty', in H. Groeben, J. Thiesing, C. Ehlermann (eds), *Kommentar zum EWG-Vertrag* (1991) 5726 seq.
- 16 For a critical survey of the Court's 'GATT case-law' see Petersmann, 'Application of GATT by the Court of Justice of the European Communities', 20 *CML Rev.* (1983) 397-437. The Court's rare references to GATT rules in the interpretation of EC Regulations explicitly referring to GATT law, such as Regulation No. 2641/84 on the strengthening on the common commercial policy (see Case 70/87, *Fediol v. Commission*, [1989] ECR 1781) and Regulation No. 2423/88 on protection against dumped imports (see Case C-69/89, *Nakajima v. Council*, [1991] ECR 2069), continue to be exceptional in view of the many cases (like the 'banana judgment' of 5 October 1994) where the Court construes EC foreign trade law without taking into account the EC's GATT obligations. Moreover, the EC Court's review of e.g., anti-dumping and other foreign trade measures tends to focus on the observance of procedural requirements (such as: accurate statement of the facts and of the reasoning? manifest error of factual appraisal?) and to avoid the intricacies of substantive international and European foreign trade law (e.g., in the Court's examination of dumping findings and whether there was a 'misuse of powers').

consideration to assess the lawfulness of a regulation in an action by a Member State under the first paragraph of Article 173 of the Treaty'.¹⁷ No GATT contracting party, and no learned publication on GATT law, have ever advanced such an interpretation, which is also contradicted by the fact that GATT rules have been recognized as justiciable during 45 years of GATT dispute settlement practice as well as in the domestic laws of several countries. The 'banana judgment' leaves it essentially to the EC Council whether it wants to comply with, or disregard, the GATT and WTO guarantees of freedom and non-discrimination, and whether it wants to respect international treaty obligations of EC Member States ratified by their *national* parliaments, or disregard the parliamentary decisions and engage the international state responsibility of EC Member States for the violation of GATT rules by the EC. Paradoxically, only *third* GATT contracting parties may invoke the GATT/WTO dispute settlement procedures to enforce the EC's GATT and WTO obligations through legally binding third party adjudication, whereas the EC Member States have no equivalent right to sue in the GATT/WTO or before the EC Court of Justice. The strange result is that EC consumers may no longer rely on their own governments in order to benefit from the 'GATT/WTO market freedoms', but may depend on the invocation of the WTO dispute settlement mechanism by third countries.

How can the inadequate 'foreign policy constitutions' of states be strengthened? Will the *national constitutional courts* in EC Member States challenge protectionist EC restrictions if they manifestly violate the EC's GATT and WTO obligations ratified also by *national parliaments*?¹⁸ For a number of reasons, *autonomous* unilateral reforms of the 'foreign policy constitutions' of states and of the EC are unlikely to find the necessary domestic political support.¹⁹ Only reciprocal multilateral agreements on worldwide reforms tend to attract the necessary political support by export industries for 'constitutionalizing' discretionary foreign policy powers.²⁰ This is confirmed by the experience in national and international law that liberal trade could be secured – both *within* federal states (such as the USA,

- 17 Case C-280/93, *Germany v. Council of the European Union*, judgment of 5 October 1994, at paras. 109, 110. The case has not yet been reported in the EC Court Reports but was published in ILM (1995), at 154 seq., together with the preceding GATT Panel Report on the EEC's Import Regime for Bananas, at 180 seq.
- 18 See the decision by the German Constitutional Court of 25 January 1995 (reported in *Europäische Zeitschrift für Wirtschaftsrecht* (1995) 126f), according to which German courts may grant interim relief in the application of the EC's contested banana market regulation if it risks to cause the bankruptcy of German importers and if, without interim relief, the right of German citizens to the protection of their private property (Article 14 of the German Basic Law) and to effective judicial protection (Article 19:4 Basic Law) could be impaired by unacceptable, disproportionate damage which could not be repaired by a later court decision. Following this Constitutional Court decision, the competent administrative court decided on 9 February 1995 to grant interim relief by ordering an increase in the import quota of the plaintiff by 2,500 tonnes (Verwaltungsgerichtshof Hessen, 8 TG 292/95).
- 19 Cf. Petersmann, 'How Can the European Union be Constitutionalized? The European Parliament's 1994 Proposal for a "Constitution for the European Union"', *Aussenwirtschaft (Swiss Review of International Economic Relations)* (1995) 170-219.
- 20 For an explanation of this conclusion see also Petersmann, *supra* note 4, at 46 seq.

Switzerland and Germany) as well as at the international level within the EC and among GATT member countries – only by means of constitutional or *reciprocal international* legal restraints on discretionary trade policy powers.²¹ The 1994 WTO Agreement is a landmark achievement in this respect.

II. Constitutional Problems of International Trade Law and Policy

The evolution of both national laws and international law shows a common trend towards three basic kinds of rules and of social order:

- *general rules* are a necessary precondition for decentralized ‘*spontaneous order*’ among individuals as well as among states (e.g., freedoms and property rights enabling a spontaneous international division of labour based on private commercial law, as it existed already in the Middle Ages in the trade relations among the Italian city republics and among the cities belonging to the Hanseatic League); but they also give rise to ‘spontaneous disorder’ (such as environmental pollution);
- ‘*result-oriented*’ rules and *national as well as international organizations* are therefore needed to correct ‘market failures’ and achieve non-economic political goals (e.g., ‘collective security’ and the supply of other ‘public goods’);
- *constitutional rules* are necessary to protect the equal rights of states and their citizens and to contain abuses of government powers through a ‘*constitutional order*’ based on a coherent set of long-term national and international rules of a higher legal rank (e.g., guarantees of freedom, non-discrimination, separation of power and rule of law in national constitutions, EC law, UN law and GATT law).

The parallels in the historical evolution of these different kinds of national and international rules are no coincidence but are due to the similarity of the ‘constitutional problems’ of national and international societies. For instance:

- In both national and international law there is a need for rules to transform the self-interested utility-maximization by individuals and governments, and the resultant ubiquity of ‘market failures’ and ‘government failures’, into mutually beneficial cooperation.
- And in both national and international law, the asymmetries in information and in the political influence of interest groups – such as the lower information costs, organization costs and larger resources of concentrated ‘rent-seeking producer interests’ compared to the dispersed ‘general interests’ of consumers and taxpayers in liberal trade – lead to ‘protectionist biases’ in the exercise of discretionary regulatory powers of governments.
- Finally, in view of the worldwide trend towards democracy and market economies, it is also important to note that constitutional democracy and market economics proceed from the same premises: that individuals are the only sources

21 For a comprehensive comparative legal analysis see E.-U. Petersmann, *supra* note 10.

of values; that conflicts among separate individual values should be reduced to the maximum extent possible; that the satisfaction of diverse individual preferences (e.g., through spontaneous coordination of demand and supply in competitive markets) carries therefore positive normative weight, and the object of politics should be the furtherance of the separate individual preferences; and that effective legal and political equality of the citizens, as the operative principle of democracy and of undistorted competition, can be secured only if the scope for collective political majority decisions is limited by constitutional boundaries. Yet, the definition of the constitutional limits for the collective supply of 'public goods' remains a value decision, dependent also on the relative productivity and welfare of a society, on which individual voters may disagree.

There is today universal agreement among economists that liberal trade increases the welfare of domestic consumers (e.g., their choice and purchasing power to buy more, better or less expensive goods from abroad), forces producers to make a more productive use of domestic resources, creates new and more stable employment opportunities in the export sector, and enhances macro-economic gains from trade (such as price stability, technological progress and competition as a decentralized information, allocation and antitrust mechanism). The modern economic theories on 'property rights', 'public choice' and 'constitutional economics' further concur that private rights, and their judicial protection, are the most effective decentralized incentive and enforcement mechanism to ensure that legal guarantees of freedom and non-discrimination will be actually observed by governments, and that discretionary government powers will not be abused for the benefit of 'rent-seeking' interest groups.²² The worldwide trend towards deregulation and democracy reflects also an increasing political consensus that economic liberty presents a constitutional value in itself, regardless of any economic or other utilitarian justification, and is a condition for the exercise of many other liberties. Thus, the EC Court of Justice has held that

the principle of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of law of which the Court ensures observance.²³

Article 5 of the 1989 Lomé Convention between the EC and the 69 African, Caribbean and Pacific Countries emphasizes the indivisibility of economic and other freedoms in the following terms:

The rights in question are all human rights, the various categories thereof being indivisible and interrelated, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights.

22 For a survey of these theories, and on the need for an 'economic analysis of law', see Petersmann, *supra* note 10, e.g., at 24 seq., 73 seq., 112 seq.

23 Case 240/83, *ADBHU*, [1985] ECR 531, at 548.

Why then has it been so difficult to reach agreement among 124 governments and the EC on the liberalization of trade in goods and services through the 1994 Uruguay Round Agreement establishing the WTO? Why have the two previous attempts at establishing a worldwide trade organization – the 1948 Havana Charter for an International Trade Organization and the 1955 Agreement on the Organization for Trade Cooperation – failed?²⁴ Why do governments need international trade agreements at all if economists rightly agree that *unilateral* trade liberalization also tends to increase the productivity and economic welfare of trading countries?

A. The Need for Regulating ‘Market Failures’: The Constitutional Problem of the ‘Optimal Level’ of Legal Regulation

Standard economics proceeds from the assumption that the individual is the best judge of his own welfare and, in a world with limited resources in relation to human wants, will tend to act as a rational maximizer of his self-interests. Voluntary trade transactions will therefore come about only if both the seller and the purchaser consider the exchange of goods or services to be mutually beneficial. The reason for their differing valuation of the traded goods or services is due to their differing specialization, comparative advantages, preferences and ‘opportunity costs’. Even though the economic explanation of the ‘absolute advantages’ (A. Smith) and ‘comparative advantages’ (D. Ricardo) underlying international trade dates back only to the 18th century, the mutually beneficial nature of voluntary trade transactions has prompted traders, producers and consumers ever since to engage in mutually profitable trade transactions. Similarly, private commercial law emerged spontaneously more than 3,000 years ago because contract law, the exchange of property rights and legal methods of dispute settlement enable traders to reduce their transaction costs in a mutually beneficial manner. One of the major discoveries of Adam Smith’s ‘Inquiry into the Nature and Causes of the Wealth of Nations’ (1776) was that the economic welfare of England was mainly due to its legal guarantees of individual freedoms, property rights and self-interested private market competition under the rule of law:

That security which the laws in Great Britain give to every man that he shall enjoy the fruits of his own labour, is alone sufficient to make any country flourish, notwithstanding ... twenty other absurd regulations of commerce... The natural effort of every individual to better his condition, when suffered to exert itself with freedom and security, is so powerful a principle that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity, but of surmounting a hundred

24 On the lack of ratification of the ITO and OTC Agreements by the USA, and the constitutional defects of GATT, see, e.g., J. Jackson, *Restructuring the GATT System* (1990), Chapter 2.

impertinent obstructions with which the folly of human laws too often incumbers its operations.²⁵

Economists have long since recognized the existence of ‘market failures’ and ‘public goods’ which may call for governmental interventions. For example:

- If *private anti-competitive business practices*, such as price-fixing cartels and other abuses of ‘market power’ (e.g., in case of monopolies or asymmetries in information), distort market prices so that they no longer reflect the marginal benefits and costs of producers and consumers, the micro-economic assumptions of welfare-maximizing competition may no longer apply.²⁶
- Competitive distortions and inefficient over-production or under-production of private goods may likewise occur if one individual’s actions make others worse off (*negative externalities* such as environmental pollution) or better off (*positive externalities* e.g., in case of environmental protection), and if a decentralized ‘internalization’ of such ‘external effects’ is impeded by transaction costs or by other obstacles to market exchanges (e.g., inadequate assignment of property rights).
- Private markets do not ensure ‘social justice’ and the supply of other *public goods*. Especially if the latter cannot be adequately produced by private markets because of their ‘non-excludability’ (i.e. non-paying individuals cannot be prevented from enjoying the benefits of the good), government intervention may be warranted.

This need for government intervention raises a number of constitutional problems. Which policy instruments should governments use? At what level of legal regulation should they intervene? How can abuses of government powers be avoided? The economic theory of ‘optimal intervention’²⁷ emphasizes the need for ranking the alternative governmental policy instruments according to their efficiency. In order to avoid governmental ‘by-product distortions’, market failures should be corrected directly at their source. For instance, ‘many public goods and externalities problems are actually property rights problems’ which may be corrected most efficiently by the reassignment and judicial protection of property rights.²⁸ Domestic anti-competitive business practices or environmental pollution may be corrected most efficiently through *domestic* non-discriminatory competition rules (e.g., a prohibition of cartels) and environmental rules (e.g., a tax, production or product standard based on the ‘polluter-pays principle’). A production subsidy may be the

25 A. Smith, *An Inquiry into the Nature and the Causes of the Wealth of Nations* (reprint Liberty Classics 1976), Book IV, Chapter V, at 540.

26 Micro-economics often assumes that (1) buyers and sellers are so numerous that none can individually affect the price (perfect competition); hence (2) market prices act as an incentive for the efficient allocation of production factors and coordinate supply and demand in a manner satisfying consumer preferences; (3) welfare can therefore be measured in terms of real income and the utility individuals derive therefrom, such as consumption of a larger variety of cheap quality goods at lower prices and the opportunity of redistributing part of the additional income (gains from trade) in order to compensate the losers of trade.

27 For a summary and survey of the literature see Petersmann, *supra* note 10, at 57 seq.

28 Cowen, Introduction to T. Cowen (ed.), *The Theory of Market Failure* (1988), at 20.

efficient instrument for correcting a 'production distortion' (e.g., in case of 'infant industries' with positive externalities), a consumption tax may be the optimal instrument for correcting 'consumption distortions' (e.g., in case of socially harmful products), taxes and income subsidies are the optimal instruments for income redistribution policies. Only in the rare case of 'trade distortions' at the trade level (rather than at the production or consumption level) may trade policy border measures be optimal.

Modern trade theory concludes from this that 'free trade remains the optimal policy in those many cases where the market failure arises *domestically* and is, therefore, appropriately corrected through domestic policy intervention targeted at the source of the failure'.²⁹ From a *national* perspective, liberal trade is likely to induce the most productive use of domestic resources and to maximize national welfare regardless of whether other countries follow free trade or not. Unilateral free trade plus domestic intervention may cease to be the optimal policy only if the distortion is foreign, not domestic, notably:

- (1) if import protection (or the threat of it) is necessary to pry open foreign markets and, as stated already by Adam Smith, 'the recovery of a great foreign market will ... more than compensate the transitory inconvenience of paying dearer during a short time for some sorts of goods';³⁰ or
- (2) if monopoly power plus 'optimal tariffs' or 'rent-shifting' can extract greater gains from trade by improving the terms of trade at the expense of other countries (provided governments are able to 'pick out the winners' and such 'beggar-thy-neighbour policies' do not provoke mutually welfare-reducing retaliation by the exploited countries).

But, given the likelihood that special-interests will distort the discretionary government measures and 'strategic trade restrictions' will trigger mutually impoverishing trade retaliation, government intervention may often produce worse outcomes than the imperfect markets they seek to fix. If import protection is indeed justifiable, production subsidies or non-discriminatory import tariffs are less distortive than quantitative import or export restrictions.

GATT/WTO law cannot be understood without these economic theories underlying it. Why does GATT law rank the alternative trade policy instruments in the manner indicated in *Table 1*?

29 Bhagwati, 'Fair Trade, Reciprocity and Harmonization: The New Challenge to the Theory and Policy of Free Trade', in A.V. Deardorff, R.M. Stern (eds), *Analytical and Negotiating Issues in the Global Trading System* (1994), at 547 seq., 549.

30 A. Smith, *supra* note 25, at 468, who rightly added: 'When there is no probability that any such repeal can be procured, it seems a bad method of compensating the injury done to certain classes of our people, to do another injury ourselves, not only to those classes, but to almost all the other classes of them'. Bhagwati, *supra* note 29, lists a number of reasons (at 553ff) why the closing of one's own market in order to pry open others is likely to be welfare-reducing.

Table 1: The Public Choice of Trade Policy Instruments

Instruments of Import Protection	Economic Ranking (Efficiency)	Political Ranking (Parliamentary Control)	Legal Ranking (GATT)
Border adjustment measures for non-discriminatory internal taxes and regulations	Optimal instrument for correcting <i>domestic</i> distortions	Non-discriminatory measures subject to legislation	Allowed (note to Art. III GATT) and not subject to countermeasures
Production subsidy	First best trade policy instrument (production distortion)	Direct budgetary transfers subject to legislation	Allowed but possibly 'actionable' and 'countervailable' (Arts. VI, XVI:1, XXIII GATT and 1994 Subsidy Code)
Import tariff	Second best trade policy instrument (production and consumption distortion)	Transparent taxes, government revenue and protection rents subject to legislation	Allowed subject to tariff bindings (Arts. II, XXVIII) and safeguard clauses (e.g. Arts. VI, XIX)
Import restrictions – global quota – country quotas	Third best trade policy instrument (additional distortions of price competition; private protection rents <i>in lieu</i> of tariff revenue; legal insecurity)	Less transparent, administrative distribution of market shares and protection rents to importers and foreign exporters	Prohibited subject to GATT's safeguard clauses (e.g. Arts. XI, XII, XVIII-XXI) and non-discrimination requirements (e.g. Arts. XIII, XX)
Voluntary export restraints (VER)	Fourth best trade policy instrument (additional transfers of quota rents abroad, additional legal insecurity)	Non-transparent transfers of protection rents at home and abroad without parliamentary and judicial control	Prohibited (Art. XIII GATT) with only temporary exceptions (1994 Safeguards and Textiles Agreements)

What criteria does GATT law employ to rank its alternative trade policy instruments? Why does it allow border adjustment measures for non-discriminatory internal taxes and product standards, but not for production or labour standards (except prison work) if they are unrelated to the product qualities? Why does the WTO Subsidy Agreement allow production subsidies and environmental subsidies but not export subsidies or 'import substitution subsidies'? Why does the WTO Agreement on Agriculture require 'export subsidy reduction commitments' and 'domestic support reduction commitments' but allows 'green box policies' with a minimal impact on trade (such as income support 'decoupled' from production assistance, cf. Article 6)? The future development of GATT/WTO law will continue to be shaped by the economic objective of limiting abuses of trade policy instruments (e.g., anti-dumping duties) in favour of optimal *domestic policy instruments* (e.g., competition rules). For instance, the introduction of a new 'necessity requirement' for non-discriminatory domestic regulations of trade in goods (cf. Article 2 of the 1994 Agreement on Technical Barriers to Trade = TBT) and trade in services (cf. Article VI of the General Agreement on Trade in Services = GATS) reflects the economic insight that, following the increasing legal limitations on discriminatory trade policy *border measures*, WTO law must provide for additional legal disciplines also on unnecessarily trade-restrictive *domestic policy instruments*.

The economic principle of 'optimal interventions directly at the source of market distortions', which underlies many GATT provisions, serves functions similar to those of the 'subsidiarity principle' in EC law or the 'rectification at source' and 'polluter-pays' principles in environmental law. For instance, the declared objective of the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS) is to secure 'adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights' in the *domestic laws* of member countries so as to 'reduce distortions and impediments to international trade' (Preamble), as they result e.g., from international trade in counterfeit goods and unilateral trade sanctions in response to foreign violations of intellectual property rights. The numerous environment-related provisions in the WTO Agreement³¹ likewise focus on *domestic policy instruments* (like technical regulations, sanitary and phytosanitary standards, environmental subsidies) rather than discriminatory trade policy border measures. Likewise, one of the major reasons behind the recent proposals for strengthening *domestic competition rules* in WTO member countries is the concern that e.g., *per-se*-prohibitions of horizontal 'hard core cartels' with an international dimension (such as price fixing, output restraints, market sharing and bid-rigging) in the *domestic laws* of WTO member countries would be a more efficient and more effective policy approach than the alternative 'extra-territorial'

31 They are reproduced in Annex II of E.-U. Petersmann, *International and European Trade and Environmental Law after the Uruguay Round* (1995).

application of EC and US competition and unfair trade laws to anti-competitive practices abroad.³²

Perhaps the greatest challenge to the future of the GATT/WTO world trade and legal system arises from the following two 'constitutional questions'. To what extent should the GATT and GATS principles of 'national sovereignty' and 'competition among regulatory systems' (which underlie GATT Article III and GATS Article VI) be maintained? To what extent should the WTO aim at further harmonization or mutual recognition of technical regulations and standards (as envisaged e.g., in Article 2 of the TBT Agreement and Article VII GATS) so as to reduce transaction costs and promote 'level playing-fields'? The experience of EC integration suggests that, on the worldwide level of WTO law even more than on the regional EC level, mankind is not rich enough to ignore economic efficiency and the resultant need for adjusting 'optimal interventions' to the particular circumstances, divergent preferences and opportunity costs of individual countries.

B. The Need for Regulating 'Government Failures': 'Constitutional Functions' of GATT/WTO Law

If the 'public interest hypothesis' of traditional lawyers and welfare economists were true and governments could act like 'benevolent dictators' maximizing the 'general interest' of their citizens, unilateral free trade should prevail and a liberal international trade order should develop spontaneously. But empirical evidence shows that most governments lack political support for unilateral liberalization, and appreciate the political advantages of unilateral protectionism (e.g., as a means of avoiding unpopular adjustment costs and of distributing 'protection rents' in exchange for political support). Modern 'public choice theories' list a number of reasons why unilateral domestic trade policy-making processes have 'protectionist biases'.³³ For instance:

- As most citizens earn their income in one area but spend it in many areas, it is rational for them to remain uninformed on many consumer issues ('rational ignorance') and to invest 'information costs' and 'organization costs' to exert political influence in their role as income receivers (producers) rather than in their role as income spenders (consumers).³⁴ It follows that, while trade theory focuses on consumer interests, trade policy and foreign trade laws (e.g., the 'safeguard clauses' in GATT Articles VI, XVIII and XIX on the protection of import-competing producers against 'injurious imports') tend to be influenced much more by producer interests.

32 See, e.g., Petersmann, 'Proposals for Negotiating International Competition Rules in the GATT-WTO World Trade and Legal System', in H. Hauser, E.-U. Petersmann (eds), *International Competition Rules in the GATT/WTO System, Aussenwirtschaft (Swiss Review of International Economic Relations)* (1994) 169-424, at 231 seq.

33 For a summary of the 'public choice analysis' of trade protectionism and a survey of the literature see Petersmann, *supra* note 10, at 112 seq.

34 See, e.g., A. Downs, *An Economic Theory of Democracy* (1957).

- Small groups representing concentrated producer interests are easier to organize and politically more influential than large groups representing dispersed 'general interests' (e.g., of consumers and tax-payers) because 'lobbying for protection rents' offers producers much higher financial rewards at lower organization costs, information costs and private adjustment costs compared to 'lobbying for liberal trade' by consumers.³⁵
- Periodically elected governments depend on political support and, in order to survive, must maximize their 'political support function'. Trade liberalization tends to be opposed by import-competing producers who have to bear the adjustment costs. This political opposition can often be overcome only through reciprocal trade liberalization agreements which, in contrast to unilateral liberalization, offer export industries secure export opportunities abroad and, hence, incentives for supporting reciprocal liberalization and for opposing protectionist pressures at home. Reciprocal trade liberalization agreements have not only a 'domestic policy function' for helping governments to overcome the asymmetries in domestic policy-making processes and for helping export industries to overcome their political weakness in influencing the trade policy decisions of *foreign* governments; they also have a much stronger 'domestic policy foundation' due to their political support by export industries confronting protectionist pressures at home.³⁶
- Trade bureaucracies may likewise pursue self-interests in accommodating protectionist pressure groups in exchange for political support, increased regulatory powers, additional staff and better career prospects.³⁷

In view of these asymmetries in decision-making processes about trade policy, trade protectionism represents not only a 'government failure' in the 'political market', similar to 'market failures' in private markets, but also a 'constitutional failure'. Due to inadequate constitutional safeguards, governments cannot pursue national consumer welfare as the dominant trade policy objective. Import restrictions not only operate by taxing *domestic* traders and consumers in a welfare-reducing manner. They also limit the liberties and property rights of domestic citizens and redistribute their income in favour of protectionist pressure groups without effective parliamentary and judicial control. Moreover, trade policy measures (such as 'voluntary export restraints' and anti-dumping measures) can serve as a substitute for prohibited domestic policy measures (such as cartels and subsidies) and thereby undermine the effectiveness of the 'domestic policy constitution' (e.g., the competition and subsidy rules of the EC Treaty). Both national constitutions and the EC's 'treaty constitution' remain therefore incomplete without a constitutional theory of foreign policy and its legal control. Due to their inadequate constitutional constraints, discretionary foreign policy powers are therefore among the most dangerous regulatory powers of governments.

35 See, e.g., M. Olson, *The Logic of Collective Action* (1965).

36 See, e.g., Hauser, 'Foreign Trade Policy and the Function of Rules for Trade Policy-Making', in D. Dicke, E.-U. Petersmann (eds), *Foreign Trade in the Present and in a New International Economic Order* (1988) 18-38.

37 See, e.g., P. Dunleavy, *Democracy, Bureaucracy and Public Choice* (1992).

If discretionary regulatory powers act as an incentive for power-oriented 'rent-seeking', and if the same asymmetries in decision-making processes about trade policy, which favour trade protectionism, also favour the maintenance of discretionary trade policy powers, how can this 'rent-seeking trap' and 'constitutional dilemma' of discretionary foreign policies be overcome? Constitutional theory proceeds from the insight that the 'anarchy' of conflicting short-term self-interests among individuals and among governments in 'pre-constitutional societies' needs to be restrained by long-term 'constitutional rules' of a higher legal rank, whose prospective, general and permanent nature acts as an incentive for individuals to concentrate on their common long-term interests (the 'public interest') rather than on the short-term distributional implications of the rules. Such 'constitutional choices' are facilitated if they are to be taken behind a 'veil of uncertainty' (J. Buchanan), as existed after World War II, because the redistributive effects of general long-term rules are then more difficult to identify, and general constitutional rules induce people to accept general criteria of equal treatment, due process and fairness. Global economic 'package deal negotiations', such as those in the successive 'GATT Rounds' and notably the 'Uruguay Round', create a similar 'veil of ignorance' (J. Rawls) of governments regarding their future positions. Moreover, as indicated above, the reciprocity principle underlying such negotiations acts as a powerful incentive for export industries to reduce their political weakness in influencing *foreign* governments by pressing their own governments to accept reciprocal guarantees of market access, non-discrimination and rule of law.

It is for these reasons that, paradoxically, general long-term guarantees of a higher legal rank for freedom, non-discrimination, undistorted competition, rule of law and peaceful settlement of disputes in international economic relations are to be found in international trade agreements such as GATT (see *Table 2*), but hardly ever in national constitutions. The 1994 WTO Agreement has strengthened these 'constitutional functions' of GATT law in many respects. Thus, the various WTO agreements on trade in goods – such as the Anti-dumping Agreement, the Subsidies Agreement, the Safeguards Agreement, the Agreements on TBT and on Sanitary and Phytosanitary Standards (SPS), the Agreements on Import Licensing, Customs Valuation and 'Preshipment Inspection', and also the sectoral trade agreements on agriculture, textiles and clothing – all aim at limiting protectionist abuses.

Table 2: Functions and Principles of GATT Law

GATT: as a Framework Agreement (constitutional functions: 'Code of Conduct')	Trade Organization (administrative and dispute settlement functions)	and Forum of Negotiations (legislative functions)
1. The Principle of National Sovereignty (e.g. Arts. II, III, VI, XVI, XVII-XXI, XXVIII bis) 2. The Principle of Market Opening (e.g. Arts. II, III, XI, XV, XXVIII, XXVIII bis) 3. The Principle of Non-Discrimination (e.g. Arts. I, III, XIII, XVII-XX) 4. The Principle of Undistorted Competition (e.g. Arts. VI, XVI, XVII, XXIII) 5. Rule of Law and Rule-Oriented Dispute Settlement without Unilateral Reprisals (e.g. Arts. X, XIII:3.b, XXIII) 6. Non-Reciprocal and Preferential Treatment of Less Developed Countries (e.g. Arts. XVIII, XXXVI-XXXVIII, 'enabling clause')	1. CONTRACTING PARTIES (Art. XXV, plenary assembly) 2. GATT Council (executive and dispute settlement body, 'Trade Policy Review Mechanism') 3. GATT Secretariat 4. Functional Committees (e.g. permanent Committees on Trade and Development, Balance-of-Payments, Tariff Concessions, Safeguards, Budget and Administration) 5. Working Parties and Technical Groups (e.g. temporary Accession Working Parties and Article XXIV Working Parties, Technical Group on Non-Tariff Measures) 6. Article XXIII Dispute Settlement Panels, Code Panels and Textiles Surveillance Body 7. Committees and Councils under GATT Codes and other GATT Agreements (e.g. Textiles Committee, Code Committees)	1. 1947 Geneva Round on tariff reductions (23 countries, 45,000 tariff concessions) 2. 1949 Ancey Round (33 countries, 5,000 tariff concessions, accession negotiations) 3. 1950/51 Torquay Round (34 countries, 8,700 tariff concessions, accession negotiations) 4. 1955/56 Geneva Round (35 countries, modest tariff reductions, GATT Amendments including Art. XXVIIIbis) 5. 1960/61 Dillon Round (42 countries and EC, 4,400 tariff reductions, Short-Term Cotton Arrangement) 6. 1964/67 Kennedy Round (72 countries and EC, 35% average tariff cuts for 60,000 industrial products, sectoral negotiations, Anti-dumping Code) 7. 1973/79 Tokyo Round (85 countries and EC, across-the-board tariff reductions by 1/3, 12 Agreements on NTBs, Dispute Settlement Understanding) 8. 1986/93 Uruguay Round (124 countries and EC, Agreement on WTO integrating some 30 Agreements on the GATT, GATT Codes, TRIPS and GATS)

The GATS Agreement extends, at least in part, guarantees of market access, non-discrimination, transparency and rule of law to the ever more important field of international trade in services, including the supply of services through foreign direct investments and cross-border movements of natural persons. The WTO Agreement on TRIPS is the most ambitious attempt in history so far to strengthen the worldwide protection of private intellectual property rights. And the WTO 'Understanding on Rules and Procedures Governing the Settlement of Disputes' has established the most comprehensive mandatory dispute settlement system for international economic relations, with almost global membership and prohibitions of unilateral reprisals.

C. GATT and the WTO as Institutional Frameworks for Overcoming the 'Prisoners' Dilemma' and 'Constitutional Dilemma' of International Cooperation

Since ancient times, international relations tend to be conceived as power politics where, according to Thucydides' account of the words of the Athenians to the Melians during the Peloponnesian war, the 'strong do what they can and the weak suffer what they must'.³⁸ Modern 'realist theories' (see Table 3) still emphasize that – in contrast to domestic politics, which takes place in a context of shared values, legal order and hierarchic government structures – international relations are characterized by the lack of these elements and are dominated by states maximizing their 'national interest' in an unstable decentralized system based on hegemonic power politics and self-help. From such a 'realist' perspective, international values, rules and organizations have marginal significance at best, and international anarchy and 'relative gains concerns' profoundly inhibit the willingness of states to cooperate even when they have common interests. According to realists, international trade policy, GATT law and the various 'GATT Rounds' are also best explained by the national interests of the powerful trading countries, and by their concerns about cheating and about relative achievements of gains.³⁹

38 Thucydides, *The Peloponnesian War* (ca. 400 B.C.), Book V, Section 89.

39 See, e.g., J.M. Grieco, *Cooperation among Nations – Europe, America and Non-Tariff Barriers to Trade* (1990), who concludes 'that realism is superior to neoliberalism in explaining ... US-EC relations in the Tokyo Round regime on NTBs, and their impact of the effectiveness of that regime during the 1980s' (at 12). For instance, the Tokyo Round 'codes varied in effectiveness and ... this variance was largely a function of the level of US-EC cooperation' (at 26). R. Gilpin, *US Power and the Multinational Corporation: The Political Economy of Foreign Direct Investment* (1975), notes: 'The essential fact of politics is that power is always relative: one state's gain in power is by necessity another's loss. Thus, even though two states may be gaining absolutely in wealth, in political terms it is the effect of these gains on relative power positions which is of primary importance' (at 34).

Table 3: Premises of Major International Relations Theories

<p>'Realist' theories ('Third Images' focusing on the state-system)</p>	<p>Premises: (1) States are key actors in world affairs. (2) They act as unitary-rational maximizers of national interests. (3) International anarchy (i.e. national self-help due to lack of centralized authority) is the principal force conditioning the actions of states. (4) States are therefore preoccupied with their security, independence and relative power ('high politics', security dilemma). (5) They often fail to cooperate even when they have common interests (hegemonic cycles of expansion, recession or balance of power; 'defensive positionalism').</p>
<p>Neoliberal 'Regime theories' focusing on international rules and organizations for overcoming the deficiency of the self-help system</p>	<p>Premises: International rules, procedures and institutions ('regimes') can help states to overcome the systemic 'prisoners' dilemma' and 'free-rider dilemma' of international relations among sovereign self-interested states 'after hegemony' through (1) formation of 'clubs' with advanced-country participants, (2) monitoring of rule-compliance (as a disincentive for 'cheating'), (3) institutionalized fora for long-term cooperation ('game iteration' and 'tit-for-tat strategies'), (4) rule-oriented reduction of international transaction cost and (5) sanctions towards 'free-riders'.</p>
<p>Functionalism and Neo-Functionalism</p>	<p>Premises: Functional integration of 'low politics' based on self-interests of subnational and supranational actors enables 'attitude change' ('deeds, not words', participation of citizens, depoliticization). It can expand indirectly to areas of 'high politics' due to transnational interest groups, functional interdependences ('spill-over'), advantages of international cooperation, and transfer of powers to international organizations ('form follows function', 'networks of pooled sovereignty', political 'push' and 'pull-over' through intergovernmental package deals and supranational organizations).</p>
<p>'Public choice theories' ('First and second images' focusing on individual actions, interest group politics and governments)</p>	<p>Premises: Methodological individualism (there is no 'national interest'; private and public choices are made by individuals which tend to maximize their self-interests; individual preferences differ). Methodological pluralism (i.e. political processes are determined by incentives for individuals, interest groups, bureaucracies etc.; 'rent-seeking' and redistributive effects of policies are important incentives). Asymmetries in the political influence of group interests favour 'government failures' (similar to 'market failures' in private markets). Importance of small groups for the supply of 'public goods'. Domestic politics, 'rent-seeking' and non-state actors are determinants also of <i>foreign</i> policies (e.g. success of 'market integration', failures of 'policy integration' in EC).</p>
<p>Constitutional theories ('First, second and third images')</p>	<p>Premises: Individual liberty/dignity and legal equality as highest sources of values. Need for protecting individual political equality through constitutional constraints on collective democratic procedures. Necessity of general, long-term 'constitutional rules' of a higher legal rank for the protection of fundamental individual rights and for limiting abuses of powers in 'post-constitutional policy processes'. Inalienable human rights, rule of law, separation of powers (notably judicial protection of individual rights and of their supremacy over government powers) and 'constitutionally limited democracy' as bases for constitutional reforms. Decentralized spontaneous coordination and satisfaction of individual preferences as constitutional values.</p>

Neoliberal 'regime theories' (see Table 3) note that, contrary to the 'realist' predictions, the rise of new trading powers (such as the EC and Japan) and the erosion of the political hegemony of the USA did not lead to a breakdown of international economic cooperation or of the GATT. They compare international trade diplomacy with a 'prisoners' dilemma'⁴⁰: governments act as if only *reciprocal* trade liberalization would improve national welfare and as if, without international coordination, unilateral protectionism and 'cheating' (e.g., by circumventing GATT rules) would be preferable despite their welfare-reducing effects. Regime theories rightly stress that international rules, institutions, 'regimes'⁴¹ and 'game iteration' (e.g., in the periodic 'GATT Rounds') can help to overcome the 'prisoners' dilemma', and to promote 'cooperation without hegemony' among 'rational egoists',⁴² by reducing uncertainty and asymmetries in information, inducing states to keep their promises and cooperate on a conditional basis so long as partners do, and by monitoring rule-compliance. Cheating may be attractive in a single play of 'prisoners' dilemma' if each player believes that cheating can maximize his own reward. But the periodic GATT Rounds, GATT's 'Trade Policy Review Mechanism' and the GATT dispute settlement system increase the costs of rule-infringements and induce countries to focus on the long-term advantages of reciprocal rule-compliance.⁴³

Functional integration theory (see Table 3) shares the belief that international rules and organizations are necessary for overcoming the anarchy of the international 'self-help system', and can induce egoists to cooperate even in the absence of a hegemonic power. Functionalism emphasizes the importance of

- 40 The game of the Prisoners' Dilemma (PD) is used in order to exemplify why cooperation is often difficult to achieve without adequate information and confidence even though all players would benefit from such cooperation. The PD relates to the tale of two guilty prisoners suspected of a major crime. If the public prosecutor has only enough evidence to convict them of a misdemeanor, each prisoner will benefit if neither confesses the crime. To elicit confessions, the public prosecutor can create the PD by separating the prisoners (i.e. preventing information and cooperation among them) and offering each the following deal: if either prisoner confesses while the other does not, all charges against the confessor will be dropped, while the non-confessor will receive the maximum possible sentence. Game theory shows that these incentives will typically induce confession by both prisoners, resulting in high prison sentences which could have been avoided by cooperation and silence. For an explanation of why 'the law of international trade functions to help public officials resolve this PD-like conflict in favor of the more desirable long-term outcome by changing the payoffs for decisions on protection' (at 521) see Abbott, 'The Trading Nation's Dilemma: The Functions of the Law of International Trade', *Harv. Int'l L.J.* (1985) 501-532.
- 41 They are generally defined as 'sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations' (R. Keohane, *After Hegemony. Cooperation and Discord in the World Political Economy* (1984) at 57).
- 42 R. Keohane, *supra* note 41, at 10 and 78, who also notes: 'International regimes are valuable to governments not because they enforce binding rules on others (they do not), but because they render it possible for governments to enter into mutually beneficial agreements with one another. They *empower* governments rather than shackling them' (at 13).
- 43 For an application of 'regime theory' to GATT see Finlayson, Zacher, 'The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions', *International Organization* (1981) 273-314.

transnational economic and social cooperation among sub-national and supranational actors ('low politics') for promoting an 'attitude change' and dynamic 'spill-overs' into interdependent areas of cooperation. The success of the new trading powers, Germany and Japan, after the failure of their political-military strategies of territorial expansion during World War II, is seen as evidence that a 'new trading world of international relations' offers the possibility of escaping from the aggressive zero-sum thinking of the 'Westphalian system' and to enhance national welfare and peaceful cooperation through 'non-territorial trading strategies'.⁴⁴ Not only functional market integration in the framework of the EC rules and institutions, but also trade and economic integration in the worldwide GATT framework seem to have brought about an 'attitude change' (reflected e.g., in the mandatory global WTO dispute settlement system and in its prohibitions of unilateral reprisals) and 'spill-overs' into new areas of global cooperation (reflected e.g., in the GATS and TRIPS Agreements).

The various theoretical approaches to the analysis of international trade relations offer a number of insights for a better understanding of the conditions under which international organizations can achieve their 'legislative', 'executive' and 'dispute settlement functions': the failure of the 1948 Havana Charter for an International Trade Organization and of the 1955 Agreement on an Organization for Trade Cooperation, after the USA had declined to ratify these agreements, confirms the 'realist' insight that the collective good of liberal world trade rules and institutions may not be produced, or may be underproduced, without hegemonic leadership. Also the Uruguay Round Agreements would not have come about without the 'leadership' by the USA, the EC and certain 'alliances' among negotiating countries (such as the 'Cairns Group' of agricultural export countries), or if the 'aggressive unilateralism' of US trade policy during the 1980s⁴⁵ had not convinced less-developed countries of the advantages of multilaterally agreed legal disciplines (e.g., for the protection of intellectual property rights and for international dispute settlement mechanisms) compared to the alternative of unilateral power politics.

The WTO Agreement also confirms the neoliberal insight that it is possible to go 'beyond anarchy', and even beyond the 'UN system', if the lack of information, communication and trust – which underlies the prisoners' dilemma and the 'free-riding dilemma' of international cooperation – can be overcome through reciprocal 'global package deals', multilateral rules and institutions, monitoring and game iteration. For instance, the 'mediating role' of the GATT Secretariat was crucial for bringing about the final consensus on the Uruguay Round results. And the GATT dispute settlement system will remain crucial for the necessary monitoring of rule-compliance during the 'post-constitutional' phase of implementing the GATT/WTO obligations. The 'single undertaking method' of the WTO Agreement – which

44 See R. Rosecrance, *The Rise of the Trading State. Commerce and Conquest in the Modern World* (1986).

45 See J. Bhagwati, H.T. Patrick (eds), *Aggressive Unilateralism. America's 301 Trade Policy and the World Trading System* (1991).

requires full membership of all WTO members in all 'multilateral trade agreements' listed in the WTO Agreement (Annexes 1-3) and acceptance of a 'GATT schedule of concessions' as well as of a 'GATS schedule of concessions' by each member country (cf. Articles XI, XII, XIV of the WTO Agreement) – has finally succeeded in putting an end to the previously fragmented 'GATT à la carte' system and to the previous 'free-riding' notably by less-developed GATT member countries, many of which had never undertaken substantial trade liberalization commitments.

Public choice theory (see Table 3) explains why 'constitutional rules', once agreed upon, risk to be undermined in the 'post-constitutional' policy processes by 'rent-seeking' interest groups, bureaucrats and politicians. The successive expansion of the Short-Term Cotton Textiles Arrangement of 1962 into a Long-Term Arrangement (1963) and into ever more comprehensive Textiles and Multifibre Arrangements (since 1974), or the secretive management of the various Anti-dumping Agreements by the anti-dumping bureaucracies assembled in GATT's Anti-dumping Committee, are illustrative of the risk that asymmetries in decision-making processes about trade policy may favour 'protectionist collusion' also in international organizations at the expense of the citizens and of parliamentary and judicial control at the national level.⁴⁶ Separation and limitation of powers and other constitutional restraints on decision-making processes are therefore no less needed at the level of international organizations than at the state level.

From such a *constitutional perspective* (see Table 3), the WTO dispute settlement system and the various guarantees in WTO law of access to domestic courts discretely enhance 'separation of powers' between international and domestic rule-making, administrations and (quasi)judicial dispute settlement mechanisms. Of course, the regular adoption and implementation of most dispute settlement 'rulings' under GATT Article XXIII:2 was often not due to the 'sanctioning powers' of the GATT, but to the insight of the offending country that its compliance with GATT rules and with the GATT dispute settlement system are in its own self-interest and *strengthen* governments not only against protectionist pressures at home but also against power politics by any of the 128 GATT contracting parties. The interrelationships between the international and domestic decision-making and dispute settlement systems, the 'constitutional functions' of the WTO Agreement, and the 'right to countermeasures' under the WTO dispute settlement system against offending member countries reinforce rule of law, individual rights (notably intellectual property rights) and transparency in domestic trade policy-making processes. Because they serve functions similar to domestic constitutional rules and

46 For a critical assessment of the traditional justifications of the establishment of international organizations (e.g., to avoid 'international externalities' leading to underproduction of international public goods or to overexploitation of common resources; to exploit international economies of scale in the international supply of national public goods; and to overcome 'prisoner dilemmas' of non-cooperative behaviour), and of abuses of the regulatory powers of international organizations (e.g., due to inadequate 'principal-agent control', insufficient representation of consumer interests, bureaucratic rent-seeking), see R. Vaubel, T.D. Willet (eds), *The Political Economy of International Organizations. A Public Choice Approach* (1991).

strongly influence domestic policy-making processes, they should no longer be neglected by 'realist' and other political science analyses.

III. The 1994 Agreement Establishing the WTO: Towards a New Global Integration Law

A. The Bretton Woods System after 50 Years: Need for Reforms

The architects of the postwar 'UN system' had foreseen 'various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health and related fields' (Article 57 UN Charter), which were to be brought into relationship with the UN in accordance with Article 63 of the UN Charter: the International Monetary Fund (IMF); the World Bank; the International Trade Organization (ITO); the International Labour Organization (ILO); various specialized agencies for international services, such as the Universal Postal Union, the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO) and the International Telecommunication Union (ITU); and other specialized agencies like the Food and Agricultural Organization (FAO), the World Health Organization (WHO) and the UN Educational, Scientific and Cultural Organization (UNESCO).

The 'Bretton Woods structure' of IMF, World Bank and ITO was to be the core of the postwar international economic order. It was designed to prevent the 'constitutional failures' of the prewar system, such as the absence of multilateral monetary, trade and financial rules to guide international economic policies after World War I and to avoid the 'beggar-thy-neighbour policies' and disastrous depression of the 1930s. The IMF, as a sort of central bank overseeing national monetary and financial policies, and the World Bank as a lending institution for the financing of development projects, were explicitly required by their statutes 'to facilitate the expansion and balanced growth of international trade' (Article I IMF and World Bank Agreements, respectively). But it was the ITO Charter, whose rules for goods, services, restrictive business practices, international commodity agreements, employment, economic development and reconstruction were to provide a worldwide 'integration law' for the coordination of the 'real' economic activities and policies. The non-ratification of the Havana Charter, of which only Chapter IV ('Commercial Policy') entered into law as part of the 1947 General Agreement on Tariffs and Trade (GATT), entailed an inadequate coordination of the international regulation of transnational movements of goods, services, persons, capital and payments in the postwar international economic law and order. For instance, while international trade in industrial goods was progressively liberalized, international maritime, air transport and telecommunications services remained

subject to tight regulation in most countries by means of monopolies, market-sharing and cartel arrangements.

The institutional structure of the Bretton Woods system, even though 'revolutionary' if compared to the prewar economic disorder, turned out to be insufficient for containing protectionist pressures and ensuring adjustment to the increasing globalization of the world economy. Most international organizations serve three basic functions: *first*, as multilateral agreements on the rights and obligations of Member States, they define the basic 'rules of the game' and a 'Code of Conduct' for government policies with transnational effects. *Second*, as institutional frameworks, they set up international organizations with executive functions (usually including powers to adopt 'secondary' implementing regulations and decisions) and dispute settlement functions. *Third*, as fora for periodic negotiations on additional rules, they serve 'legislative functions' for the periodic adjustment and progressive development of the 'primary' treaty law. Thus, similar to the GATT, the IMF Agreement serves 'constitutional functions' for the conduct of national monetary policies, 'executive functions' in the administration of the Fund and IMF Agreement, and 'rule-making functions' in serving as a forum for the negotiation of e.g., the so far three formal amendments of the IMF Agreement and the 'secondary law' of the IMF.⁴⁷ Even though legally and institutionally separate, the administration of GATT and IMF rules (notably regarding import restrictions for balance-of-payments reasons) is coordinated in practice.⁴⁸ Due to the pragmatic adjustment and progressive development of the GATT and IMF Agreements, the GATT and IMF succeeded in coping with unforeseen changes and laid the basis for a historically unprecedented expansion of trade and economic growth up to the early 1970s. Economists widely agree that much of this success is to be attributed to the legal-institutional order based on the Bretton Woods institutions and the GATT.⁴⁹

But during the 1970s and the 1980s, the legal-institutional inadequacies of the international monetary and trade system became increasingly visible: the breakdown of the IMF's par value system of fixed, but adjustable exchange rates and of the dollar-based gold-exchange standard since 1971; inadequate rules for foreign direct investments, multinational enterprises and restrictive business practices, leading to calls for a 'New International Economic Order' since the 1970s; the debt crisis of the 1980s; non-participation ('free-riding') by many less-developed countries in the

47 The general decisions, interpretations and resolutions of the Executive Board and Board of Governors of the IMF are regularly published in Selected Decisions and Selected Documents of the IMF, 18th Issue, IMF 1993.

48 See, e.g., Roessler, 'The Relationship between the World Trade Order and the International Monetary System', and the 'Comment' by Girard, in E-U. Petersmann, M. Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations. Legal and Economic Problems* (2nd ed., 1991) 361-394; Petersmann, 'Trade Restrictions for Balance-of-Payments Purposes and the GATT', in D. Dicke (ed.), *Foreign Debts in the Present and a New International Economic Order* (1986) 181-213.

49 See, e.g., Eichengreen, Kenen, 'Managing the World Economy under the Bretton Woods System: An Overview', in P. Kenen (ed.), *Managing the World Economy Fifty Years after Bretton Woods* (1994), at 3 seq.

1979 Tokyo Round Agreements and increasing trade protectionism in important sectors (agriculture, textiles, steel), often by means of 'grey area trade policy instruments' which undermined the GATT legal disciplines; recourse to 'aggressive unilateralism' in response to the perceived 'unfairness' of foreign practices (such as inadequate protection of intellectual property rights), or in order to promote a 'level playing-field'; global environmental pollution; the need to integrate more than a billion Chinese producers and consumers into the world economy, and for adjusting the market-based GATT and IMF rules to the deregulation and 'democratization' of former communist countries in the 1990s e.g., by more effective disciplines on state trading, monopolies and foreign exchange restrictions. The very broad coverage of the Uruguay Round negotiations 1986-1994,⁵⁰ and the increase in GATT membership during the Uruguay Round from 91 (June 1986) up to 128 member countries (1994) – with an additional 20 countries, including China and Russia, negotiating their admission to the GATT/WTO system – reflected not only the 'globalization' of the world economy, which has made 'central planning' increasingly unmanageable. It also reflected the worldwide recognition by governments that they need more effective multilateral liberal trade rules and institutions for carrying out the necessary adjustment processes at home so as to guarantee their industries the availability of imported goods and services, better access to foreign markets and more security of trade-related investments.

B. The 1994 Agreement Establishing the WTO as a 'Global Integration Agreement'

The 1994 WTO Agreement, adopted by 124 countries and the EC on 15 April 1994 and put into force on 1 January 1995, is not only the longest agreement ever concluded (comprising more than 25,000 pages). It is also the most important worldwide agreement since the UN Charter of 1945. It completes the original design of the Bretton Woods system, and reduces the existing fragmentation of international economic law, by a 'global integration law' for international movements of goods, services, persons, investments and payments. It thereby lays the legal foundation for a new global economic order with far-reaching implications for other international organizations and for the domestic legal systems of WTO member countries. If the current membership negotiations by over 20 countries are successfully concluded, the WTO will cover virtually the whole of world trade in goods and services, which was estimated to have approached some \$5 trillion in 1994. Through the WTO Agreement and the more than 100 country schedules of market access commitments, world income is expected to rise by over \$500 billion annually by the year 2005, and annual world trade is expected to be a quarter higher by the same year than it would otherwise have been.

50 See, e.g., Petersmann, 'The Uruguay Round Negotiations 1986-1991', in Petersmann, *Hilf, supra* note 48, at 501-577.

The 1994 Agreement establishing the WTO comprises a preamble and 16 Articles regulating the scope and functions of the WTO, its institutional structure, legal status and relations with other organizations, decision-making procedures and membership. Its legal complexity derives from the additional 29 Agreements and Understandings listed in the 4 Annexes to the WTO Agreement,⁵¹ and from its inclusion into the 'Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations', which was adopted by 124 governments and the EC on 15 April 1994 and includes 28 further Ministerial Decisions, Declarations and one Understanding related to the Uruguay Round Agreements.

The 4 Annexes include the following 29 Agreements and Understandings:

- Annex 1A: Multilateral Agreements on Trade in Goods
 - General Agreement on Tariffs and Trade 1994, supplemented by 6 Understandings on Articles II:1(b), XII, XVII, XVIII, XXIV, XXV and XXVIII and by the 'Marrakesh Protocol to the GATT 1994',
 - Agreement on Agriculture,
 - Agreement on the Application of Sanitary and Phytosanitary Measures,
 - Agreement on Textiles and Clothing,
 - Agreement on Technical Barriers to Trade,
 - Agreement on Trade-Related Investment Measures,
 - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,
 - Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994,
 - Agreement on Preshipment Inspection,
 - Agreement on Rules of Origin,
 - Agreement on Import Licensing Procedures,
 - Agreement on Subsidies and Countervailing Measures,
 - Agreement on Safeguards;
- Annex 1B: General Agreement on Trade in Services and Annexes
- Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights
- Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes
- Annex 3: Trade Policy Review Mechanism
- Annex 4: Plurilateral Trade Agreements
 - Agreement on Trade in Civil Aircraft,

51 See *The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts*, GATT 1994. The more than 100 tariff schedules on trade in goods were published by the WTO in 27 volumes. The GATS and the Schedules of Services Commitments were published in 3 additional volumes. See *Uruguay Round of Multilateral Trade Negotiations, Legal Instruments Embodying the Results of the Uruguay Round*, Vols. 1-31, GATT 1994.

- Agreement on Government Procurement,
- International Dairy Agreement, and
- International Bovine Meat Agreement.

1. The 'Single Undertaking Approach' as an Instrument to Contain 'Free-Riding'

The novel objective of integrating all these agreements into one single legal framework is highlighted in the Preamble:

Resolved ... 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.

The reference in the Preamble to the aim of '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', likewise reflects the comprehensive 'integration goals' of the WTO Agreement. Legally, the 'single undertaking approach' is made effective through Article II:2 and 3:

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members.
3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as 'Plurilateral Trade Agreements') are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

The institutional consequence of this is made explicit in Article II:1:

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

The single undertaking approach is further extended by Article XI:1, according to which 'original membership' is limited to the 'contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and *for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS*' (emphasis added). This additional condition of WTO membership, which also applies to accessions (Article XII), was agreed upon only at a late stage in the Uruguay Round negotiations in order to remedy two structural weaknesses of the old 'GATT à la carte' system, namely (1) non-participation by more than two-thirds of GATT contracting parties in the 1979 Tokyo Round Agreements and (2) avoidance of

substantive trade liberalization commitments by most less-developed countries. 'Free-riding', which was widespread under the 'GATT à la carte' system because non-signatories of the Tokyo Round Agreements benefited from them due to GATT's most-favoured-nation obligation and due to the frequent practical need to apply import regulations uniformly, has thus been significantly reduced by the single undertaking approach and membership requirements of WTO law.

2. Termination of 'GATT 1947' as an Incentive for Joining the WTO

In contrast to the old GATT, which lacked explicit institutional provisions because it had been conceived as a provisional agreement to be integrated into the 1948 Havana Charter (cf. Article XXIX),⁵² the legal status of the WTO as an international organization with legal personality is clearly established (Articles I, VII). According to Article II:4,

[t]he General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as 'GATT 1994') is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947 ..., as subsequently rectified, amended or modified (hereinafter referred to as 'GATT 1947').

This method of making the new 'GATT 1994' legally distinct from the old 'GATT 1947' was part of the strategy to exclude 'free-riding' and to replace the old GATT by a new WTO. In a Decision adopted at the 'Implementation Conference' on 8 December 1994, it was agreed that

the stability of multilateral trade relations would ... be furthered if the GATT 1947 and the WTO Agreement were to co-exist for a limited period of time;
... during that period of co-existence, a contracting party which has become a Member of the WTO should not be under a legal obligation to extend the benefits accruing solely under the WTO Agreement to contracting parties that have not yet become WTO members and should have the right to act in accordance with the WTO Agreement notwithstanding its obligations under the GATT 1947;
... The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year.⁵³

This termination of the GATT 1947, and the GATT 'waivers' granted in this Decision enabling GATT member countries to limit the benefits under the WTO Agreement to WTO members, entail another threat against 'free-riders': the

52 On the establishment of all necessary GATT organs in GATT practice, the pragmatic servicing of the GATT by the staff of the Interim Commission for the International Trade Organization (ICITO) established in 1948 to prepare the entry into force of the ITO Charter, and the evolution of GATT into an international organization with comprehensive decision-making and treaty-making powers see Jackson, *supra* note 24.

53 Decision of 8 December 1994 adopted by the Preparatory Committee for the WTO and the *Contracting Parties* to GATT 1947, Doc. PC/12, L/7583.

contracting parties of GATT 1947 are faced with the choice of either joining the WTO Agreement or of finding themselves outside the world trading system without legally secure access to foreign markets.

3. Institutions and Decision-making Powers for Overcoming the 'Prisoners' Dilemma' of International Cooperation

The institutions and decision-making powers of the WTO reflect the goal of inducing countries to take a broader 'systemic view' of their 'general interests' and to avoid mutually harmful, non-cooperative behaviour (see above Section II.C). Article III defines five functions of the WTO: as a 'framework for the implementation, administration and operation' of the WTO Agreement; a 'forum for negotiations among its Members concerning their multilateral trade relations'; an integrated dispute settlement system for clarifying and enforcing the rules; a 'Trade Policy Review Mechanism' for promoting transparency, a better understanding of trade policies of Member States, and rule-compliance; and as an institution for 'achieving greater coherence in global economic policy-making' in cooperation with the IMF and the World Bank Group. Article V requires the WTO to make appropriate arrangements for effective cooperation with other intergovernmental and non-governmental organizations that have responsibilities related to those of the WTO. The 'constitutional functions' of the WTO Agreement are reflected in the rule that, 'in the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict' (Article XVI:3). Similar to the legal primacy of the UN Charter over other international agreements by UN member countries (cf. Article 103 of the UN Charter), the WTO Agreement takes precedence over the Multilateral Trade Agreements and, as recognized e.g., in Article 4:5 of the Dispute Settlement Understanding, over other international trade agreements of WTO member countries.

The institutional structure is composed of a *Ministerial Conference* with 'the authority to take decisions on all matters under any of the Multilateral Trade Agreements' (Article IV:1) so as to ensure the overall consistency of decision-making in the WTO; a *General Council* which, in the intervals between meetings of the Ministerial Conference, shall conduct the functions of the Ministerial Conference and discharge also the responsibilities of the *Dispute Settlement Body* (DSB) and of the *Trade Policy Review Mechanism* (Article IV:2-4); a *Council for Trade in Goods* shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A; the *Council for Trade in Services* shall oversee the functioning of the GATS; and the *Council for TRIPS* shall oversee the functioning of the TRIPS Agreement. Each Council shall establish subsidiary bodies as required. As under the old GATT, there is also a *Committee on Trade and Development*, a *Committee on Balance-of-Payments Restrictions*, and a *Committee on Budget and Administration*. The bodies provided for under the Plurilateral Trade Agreements shall operate

within the institutional framework of the WTO and shall keep the General Council informed of their activities on a regular basis. The WTO Director-General and the WTO Secretariat perform simultaneously the duties of the Director-General and Secretariat of GATT 1947.

The WTO shall continue the *practice* of decision-making by consensus followed under GATT 1947 (Article IX:1). But where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. *Consensus as a rule*, rather than as a *practice*, is prescribed for the addition of further 'Plurilateral Trade Agreements' to Annex 4, for amendments of the dispute settlement rules (Article X:8) and for decision-making by the DSB (cf. Article 2:4 DSU) subject to the proviso that e.g., 'a panel shall be established' (cf. Article 6:1 DSU), and panel or Appellate Body reports 'shall be adopted by the DSB', unless the DSB decides by 'negative consensus' *not* to take such decisions (cf. Articles 16,17 of the DSU). Each WTO member shall have one vote except for the EC, which shall have a number of votes equal to the number of its member states which are WTO members (Article IX:1). The requirements for majority voting differ depending on whether decisions are taken e.g., by the Ministerial Conference and the General Council (Article IX:1), and whether they concern 'interpretations of this Agreement and of the Multilateral Trade Agreements' (Article IX:2), 'waivers' (Article IX:3-5), amendments (Article X), accession by 'any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements' (Article XII), or the WTO dispute settlement mechanism. The general principle underlying these rules is that the WTO does not have the power to impose new trade policy obligations. Each WTO member also remains free to decide not to apply the WTO Agreement to a new member e.g., if it has been admitted by a majority decision (cf. Article XIII).

The aim to maintain continuity in the development of GATT law is reflected in the requirement that, except as otherwise provided, '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' (Article XVI:1). But, compared to the principle of decision-making 'by a majority of the votes cast' in GATT Article XXV, the majority requirements (e.g., for interpretations and waivers) have been tightened in the WTO Agreement so as to better accommodate concerns (notably by the USA) to protect national sovereignty and prevent imbalances in the rights and obligations. Amendments therefore require either acceptance by all members (Article X:2) or, if acceptance by two thirds of the members is sufficient, shall take effect only for the members that have accepted them unless otherwise provided (cf. Article X:3-5). The experience with GATT 1947, which was formally amended the last time in 1966 to introduce Part IV on 'Trade and Development', suggests that the future development of WTO law may likewise be based on the negotiation of additional GATT and GATS commitments and supplementary 'Plurilateral Trade Agreements' rather than on formal

amendments of the WTO Agreement. But a 'building block approach' of negotiating additional 'Plurilateral Trade Agreements' (e.g., on investment, competition and environmental rules), beginning with a limited number of 'like-minded countries', could again lead to a 'WTO à la carte' system. This could then prompt WTO countries to repeat the 'Uruguay Round approach' and replace the WTO Agreement by a new agreement.

C. The Multilateral Agreements on Trade in Goods

Annex 1A begins with a 'general interpretative note' to the effect that,

in the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A ..., the provision of the other agreement shall prevail to the extent of the conflict.

The legal hierarchy following from this note and from Article XVI:3 of the WTO Agreement is that, in case of a conflict, the provisions of the WTO Agreement prevail over those of the Multilateral Trade Agreements, and those of the Multilateral Trade Agreements other than the GATT 1994 prevail over those of GATT 1994.

The GATT 1994 is based on the provisions of GATT 1947 'as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement'. Yet, even though the WTO Agreement does not formally amend the GATT, the legal substance of GATT 1994 differs from that of GATT 1947 in many respects for a number of reasons:

- a) The 1947 'Protocol of Provisional Application' of GATT 1947, and its general 'grandfather clause', are not applicable to GATT 1994.
- b) According to Annex 1A, GATT 1994 consists also of all protocols and decisions adopted by the GATT Contracting Parties and entered into force prior to 1 January 1995, including the GATT dispute settlement rulings and decisions under Article XXIII:2.
- c) Annex 1A also incorporates the 6 Uruguay Round Understandings on Articles II:1(b), XII, XVII, XVIII, XXIV, XXV:5 and XXVIII into 'GATT 1994'. The Understanding on the Interpretation of Article II:1(b) improves the transparency of the legal rights and obligations under Article II:1(b) by introducing a new requirement that 'the nature and level of any 'other duties or charges' levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply' in respect of all tariff bindings. The Understanding on Articles XII and XVIII:B confirms, *inter alia*, that members shall give preference to 'price-based measures' which have the least disruptive effect on trade (like import surcharges and import deposits, rather than quantitative restrictions), and that 'notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied in excess of

the duties inscribed in the schedule of a Member' (paragraph 2). The Understanding on Article XVII provides for increased transparency and surveillance of 'state-trading enterprises' through strengthened notification and review procedures. The Understanding on the Interpretation of Article XXIV clarifies and reinforces the criteria and procedures for the review of new or enlarged customs unions or free trade areas, and for the observance of GATT rules by regional and local governments. The Understanding on the Interpretation of Article XXVIII specifies, *inter alia*, the procedures for the negotiation of compensation when tariff bindings are modified or withdrawn; it also creates new negotiating rights for the country for which the product in question accounts for the highest proportion of its exports.

- d) The Marrakesh Protocol to the GATT 1994 is made part of GATT 1994. It lays down rules on the contents and implementation of the 'Schedules to the GATT 1994', which are annexed to this Protocol. Each Schedule lists tariff concessions on a most-favoured-nation basis (Part I), preferential tariffs (Part II, if applicable), concessions on non-tariff measures (Part III) and commitments limiting domestic support and export subsidies (Part IV).
- e) The remaining 12 Multilateral Trade Agreements interpret, modify and supplement GATT 1994 in various respects.
 - The *Agreement on Agriculture* provides for commitments in the area of market access, domestic support and export competition with due regard to non-trade concerns, such as food security and the need to protect the environment. In the area of market access, non-tariff border measures are to be replaced by tariffs ('tariffication') which are to be reduced by an average 36% over six years in the case of developed countries and 24% over ten years in the case of developing countries, subject to 'special safeguard provisions' (Article 5) and 'special treatment' provisions (e.g., Article 15). The 'domestic support reduction commitments' shall apply to all domestic support measures in favour of agricultural producers with the exception of domestic measures that have, at most, a minimal impact on trade ('green box' policies, such as income support 'decoupled' from production and environmental assistance, cf. Article 6). The 'export subsidy reduction commitments' require members to reduce the value of export subsidies to a level of 36% below the 1986-1990 base period level over a six-year implementation period (cf. Article 9). A 'peace clause' (Article 13) limits, for a period of nine years, recourse to countervailing duties and dispute settlement remedies with respect to domestic support and export subsidies maintained in conformity with the *Agreement on Agriculture*.
 - The *Agreement on Sanitary and Phytosanitary Measures* explicitly recognizes the right to apply food safety, animal and plant health regulations to the extent they are necessary to protect human, animal or plant life or health and do not unjustifiably discriminate between member countries. It encourages the use of international standards and acceptance of equivalent foreign standards. But it allows higher national standards if they are based on scientific justification or on consistent risk decisions with appropriate risk assessments and are not unnecessarily trade-restrictive.

- The *Agreement on Textiles and Clothing* sets out provisions for the integration of the textiles and clothing sector into the GATT 1994 so that trade in these products will be governed by the general GATT rules by the year 2005. During the transition period, the bilateral quotas negotiated under the Multifibre Agreement are to be phased out progressively.
- The *Agreement on Technical Barriers to Trade* seeks to ensure that mandatory technical product regulations or their related processes and production methods, non-mandatory standards for processing and production methods, as well as testing and certification procedures do not create unnecessary obstacles to trade. For this purpose, 'technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create' (Article 2). Members are encouraged to use relevant international standards, to participate in international efforts aimed at harmonizing technical regulations, and to accept as equivalent technical regulations of other countries. However, they retain the right to establish higher or lower national standards, at levels they consider necessary, for instance for the protection of human, animal or plant life, health, or the environment.
- The *Agreement on Trade-Related Investment Measures (TRIMS)* gives more precision to the obligation not to 'apply any TRIM that is inconsistent with the provisions of Article III or Article XI of the GATT 1994' (Article 2), such as 'local content requirements', 'trade balancing requirements' and other TRIMS listed in the Annex to the Agreement.
- The *Agreement on Implementation of Article VI (Anti-Dumping)* includes more detailed and more specific rules on e.g., determinations of dumping, injury, domestic industry, initiation of anti-dumping proceedings, anti-dumping investigations, provisional anti-dumping measures, price undertakings, imposition and collection of anti-dumping duties, judicial review at the domestic level and dispute settlement proceedings in the WTO. Some of the rules (e.g., on average-to-average price comparisons) are likely to have a liberalizing effect, others (e.g., on the initiation of investigations at the request of employees of domestic producers) a restrictive effect. The Agreement does not deal with a number of controversial anti-dumping practices (such as rules on the 'origin' of dumped imports, 'anti-circumvention duties', disregard of changed circumstances between the investigation period and the decision on anti-dumping remedies) and leaves room for divergent practices on many issues (such as the differing duty assessment systems, the 'lesser duty rule', 'public interest clauses', the choice of alternative price undertakings). As it is an 'agreement to disagree' in respect of the fundamental objectives and principles of anti-dumping actions, disputes over anti-dumping measures may become the most difficult test cases for the proper functioning of the WTO's new dispute settlement system.
- The *Agreement on Implementation of Article VII (Customs Valuation)* is largely identical to the 1979 Agreement on Implementation of Article VII. It has been clarified by two Decisions, adopted on 15 December 1993, regarding cases where customs administrations have reasons to doubt the truth or

accuracy of the declared customs value, and provisions relating to minimum values and imports by sole agents, sole distributors and sole concessionaires.

- The *Agreement on Preshipment Inspection* sets out 'obligations of user members' (Article 2) as well as 'obligations of exporter members' (Article 3) for 'preshipment inspection activities' (PSI), which are defined as 'all activities relating to the verification of the quality, the quantity, the price, including currency exchange rate and financial terms, and/or the customs classification of goods to be exported to the territory of the user Member' (Article 1). The obligations supplement those of the GATT and include non-discrimination, transparency, protection of confidential business information, specific guidelines for conducting price verifications, the avoidance of conflicts of interests and procedures for the settlement of disputes between exporters and PSI agencies.
- The *Agreement on Rules of Origin* supplements the existing GATT rules by new 'disciplines to govern the application of rules of origin' (Articles 2, 3). It provides for a work programme for the harmonization of non-preferential rules of origin (Article 9) as well as a 'common declaration with regard to preferential rules of origin' (Annex II).
- The *Agreement on Import Licensing Procedures* clarifies and strengthens the disciplines on the use of 'automatic' as well as 'non-automatic' import licensing, for instance by additional requirements to reduce their trade-restrictive effects and increase their transparency.
- The *Agreement on Subsidies and Countervailing Measures*, after defining the legal terms 'subsidy' and 'specificity', establishes three categories of 'prohibited subsidies' (i.e. export subsidies and import-substitution subsidies), 'actionable subsidies' and 'non-actionable subsidies', and regulates the permitted countervailing measures and international dispute settlement proceedings. But this new 'traffic light concept' leaves member countries room for divergent approaches in the application of anti-subsidy measures (e.g., 'thank-you-note approach' if the consumer benefits from subsidized imports outweigh the losses of the import-competing industry; 'anti-distortion approach' focusing on the existence of competitive distortions; 'anti-injury approach' focusing on the causation of injury to import-competing producers, possibly linked to a 'lesser duty rule' if a countervailing duty at less than the full 'subsidy margin' suffices to prevent the injury). The 'peace clause' (Article 13) in the Agreement on Agriculture, the new category of 'non-actionable subsidies' in Article 8 of the Subsidy Agreement, and the exemption of general 'regulatory subsidies' (such as a generally available low environmental standard) from the concept of 'specific subsidies' of the Subsidy Agreement are likely to reduce the number of international disputes in this field. The task of dispute settlement panels will also be greatly facilitated by the new definition of a 'subsidy' (Articles 1), of its 'specificity' (Article 2) and by the presumptions of 'serious prejudice' (e.g., for subsidies exceeding 5% of the unit value of a product). But e.g., the definition of 'energy, fuels and oil used in the production process' as 'inputs physically incorporated' (see Annex II to the Subsidy Agreement) could also raise very

controversial new disputes about the GATT-consistency of energy taxes imposed on the energy content of imported products.

- The *Agreement on Safeguards* prescribes new investigation procedures and additional legal disciplines for safeguard measures under GATT Article XIX (e.g., new time-limits for all safeguard actions, additional rules on the allocation of quotas among supplying countries and on trade compensation). It explicitly prohibits 'grey area measures', such as voluntary export restraints (VERs), orderly marketing arrangements or similar measures on the export or import side, and requires the progressive phase-out of any such existing measures. These reforms are likely to increase transparency and legal security in international trade. But it remains to be seen whether the prohibition of VERs can actually be implemented since, if both the exporting and the importing country agree, there may be no incentive for challenging a VER in a WTO dispute settlement proceeding. It is to be regretted in this respect that the Safeguards Agreement, unlike the Anti-dumping and Subsidy Agreements, does not provide for a complaints procedure for private petitioners. Another concern is that the 'selectivity' permitted for the 'modulation of quotas' (cf. Article 5) legalizes certain discriminatory trade distortions. Article 11 allows the administration of import quotas by the exporting country and, thereby, the transfer of 'quota rents' to the exporting firms or exporting country (e.g., in case of auctioning of export quotas) as a sort of compensation for the safeguard measure.
- f) All these Multilateral Trade Agreements pursue the same objectives as the GATT: to liberalize international trade, reduce transaction costs and limit protectionist abuses of trade policy powers. Many of the regulated trade policy instruments are interdependent: for instance, anti-dumping duties, countervailing duties, alternative 'price undertakings' or quantitative 'voluntary export restraints', safeguard measures under Article XIX administered on the import or export side, technical regulations, conformity assessment procedures and rules of origin may serve as alternatives for protecting domestic producers. Due to these interdependencies, the explicit prohibition – in Article 11 of the Safeguards Agreement – of 'any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side' is likely to increase pressures to resort to alternative anti-dumping measures. And the increased legal disciplines on import relief measures may increase pressures to use rules of origins and 'technical regulations' as substitutes for import relief measures. The comprehensive regulation of these interdependent policy instruments in the mutually complementary Multilateral Trade Agreements, and their integration into one single legal and institutional framework with an 'integrated' dispute settlement mechanism, make it possible to take account of these interrelationships and to construe these agreements in a mutually consistent manner.

In contrast to the 1979 Tokyo Round Agreements, the Multilateral Trade Agreements are binding on *all* GATT 1994 member countries and are thus tantamount to a progressive development of GATT law. This may even entail implicit amendments of GATT rules, for instance as a result of the 'necessity

requirements' for technical regulations, standards and (phyto)sanitary measures under the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Standards (SPS), which limit the traditional regulatory freedom under GATT Article III in a manner similar to the EC Court's 'Cassis-de-Dijon' case-law (subject to the absence of a 'proportionality requirement' in the TBT and SPS Agreements).

D. The General Agreement on Trade in Services (GATS)

The GATS represents an unprecedented attempt at global liberalization and rule-making no less significant than the creation of GATT itself in 1947. It provides for a new set of multilateral rules for the fastest-growing sectors of world trade and creates a framework for a continuous process of liberalization of services trade. Over 20% of world trade and more than 60% of world production are for the first time brought under worldwide multilateral legal disciplines. Because many services are intangible and non-storable, trade barriers tend to take the form of prohibitions, quantitative restrictions, monopolies, other internal government regulations (e.g., for consumer protection, prudential supervision of banking and insurance services) or professional self-regulation rather than import tariffs. While GATT negotiations on the liberalization of merchandise trade tend to focus on tariff bindings and the value of bilateral trade flows between 'principal suppliers', the GATS focuses on (a) general framework rules; (b) specific market access and national treatment commitments listed in each member's Schedule of Concessions; (c) commitments to negotiate additional general rules and engage in periodic negotiations on the progressive liberalization of trade in services; and (d) sector-specific additional rules and annexes. The GATS rests therefore essentially on four pillars:

1. The GATS as a Framework Agreement

The GATS is, first of all, a framework agreement with general principles and rules that apply across the board to all WTO member countries, to any service in any sector, and to all measures affecting trade in services, except services supplied in the exercise of governmental authority neither on a commercial basis nor in competition with other service suppliers (cf. Article I:3). The GATS covers all 4 modes of supply of services:

- cross-border supply from the territory of one member into the territory of any other member (e.g., through telecommunications, mail, transmission of a computer diskette, transports without physical movement of the suppliers or consumers);
- provision in the territory of one member to the service consumer of any other member (e.g., tourism and consultant services involving movement of the consumer to the country of the supplier);

- services sold by a service supplier of one member through commercial presence in the territory of any other member (e.g., local banking or insurance services by foreign direct investments authorized for the purpose of supplying services);
- services by a service supplier of one member through presence of natural self-employed or dependent persons of a member in the territory of any other member (e.g., construction services involving the temporary movement of construction workers or architects).

Some of the basic provisions – for instance on most-favoured-nation (MFN) treatment, transparency, admissibility of preferential integration agreements, domestic regulation, judicial review, monopolies, restrictions to safeguard the balance of payments, general exceptions and security exceptions, dispute settlement and enforcement – are modelled on the corresponding principles of GATT law. But the MFN obligations (Article II) may be limited by a *negative list* of ‘Article II exemptions’, which may be listed only upon entry into force of the GATS and ‘in principle’ for a maximum period of 10 years, so as to promote reciprocity and prevent free-riding.⁵⁴ The MFN obligations are applicable irrespective of whether specific commitments are undertaken. National treatment obligations, by contrast, apply only to services included in schedules of concessions and subject to any conditions and qualifications set out therein (Article XVII). Moreover, several other general rules (e.g., the notification requirement in Article III:3, Article VI:1 on domestic regulation, Article XI on payments and transfers) apply only to the extent to which specific commitments are undertaken in the schedules of concessions (*positive list approach*). The framework rules of the GATS are incomplete in many respects and are supplemented by undertakings to negotiate additional rules e.g., on non-discriminatory emergency safeguard measures (Article X), government procurement (Article XIII) and subsidies (Article XV).

2. The GATS Schedules of Specific Commitments

A *second* layer of legal regulation consists of the national schedules of ‘market access commitments’, ‘national treatment commitments’ and other ‘additional commitments’, as well as the national lists of temporary most-favoured-nation exemptions. Unlike international trade in goods, international services trade is regulated primarily by *domestic* regulations rather than by border measures. This is due to the fact that many international services are traded not through the supply of services from one country to the territory of another, but within the territory of one country to the consumers of another country (e.g., tourism) or through the presence of foreign natural service suppliers (e.g., foreign construction workers, consultants) or foreign service providing entities abroad (e.g., supply of banking services through

54 Over 60 GATS members submitted MFN exemptions especially regarding audio-visual services, financial services and transportation. While exemptions in the audio-visual area (e.g., by the European Union for its television directive) tend to be justified by cultural objectives, exemptions for financial and transport services tend to be motivated by reciprocity concerns.

foreign banks or subsidiaries). This close interrelationship between international movements of services, persons and capital, and the absence in GATS law of general prohibitions of non-tariff trade barriers (similar to Article XI of GATT) and of discriminatory internal regulations (similar to Article III of GATT), make the international regulation and liberalization of services much more complex compared to trade in goods.

The GATS provides not only for '*market access commitments*' which prohibit six kinds of *quantitative limitations* defined in Article XVI: on the number of service suppliers; on the total value of service transactions; on the total number of service operations or on the total quantity of service output; on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ; measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment. GATS members shall also undertake *national treatment commitments* (Article XVII) and *additional commitments* (Article XVIII, e.g., regarding qualifications and standards) so as to reduce market access barriers due to *qualitative restrictions*. Thus, in the sectors inscribed in its schedule and subject to any conditions and qualifications set out therein, each member shall accord to services and service suppliers of any other member, in respect of all measures affecting the supply of services, treatment no less favourable than that which it accords to its own (like) services and service suppliers; according to Article XVII:3, 'formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member'. For instance, a formally identical requirement for domestic and foreign insurance firms to hold their reserves locally would entail a severe discrimination against the local supply of insurance services by foreign suppliers.

Like the MFN obligations under Article II of GATS, which are subject to a *negative list* of 'Article II exemptions', the *national treatment commitments* under Article XVII are less comprehensive than those of GATT law because they apply only to services included in the schedule of the member country concerned (*positive list* approach) and only subject to listed qualifications. As market access commitments prohibit only the 6 types of quantitative restrictions specified in Article XVI, the large number of unrestricted alternative kinds of market access barriers and the absence of a prohibition of 'measures having an equivalent effect' may give rise to frequent recourse to dispute settlement proceedings under the GATS. The same may be true for the interpretation of the 'specific commitments' and limitations listed in the schedules and for the possibility, under Article VI of the GATS, to challenge whether the administration of domestic regulations is 'reasonable, objective and impartial', or whether 'measures relating to qualification

requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services’.

3. *Progressive Liberalization through Periodic ‘GATS Rounds’*

The framework rules and specific commitments are supplemented by a general obligation of members to ‘enter into successive rounds of negotiations’ on the progressive liberalization of international trade in services aimed at ‘an overall balance of rights and obligations’ of participants (Article XIX). While the GATS represents a landmark achievement in legal terms, the actual trade liberalization and mutual exchanges of concessions achieved so far remain very limited; most ‘specific commitments’ bound in the schedules of member countries are of a ‘standstill’ nature binding the ‘status quo’.⁵⁵ As no general ‘formula approach’ was used for the negotiation of *specific commitments*, notably developing countries – even though they do not benefit under the GATS from a ‘special and differential treatment’ similar to Part IV of GATT – have undertaken few liberalization commitments and seem to have legally *bound* less than 3% of their services sectors.

The WTO member countries therefore decided to continue multilateral negotiations on the liberalization of financial services, maritime transport services and basic telecommunications beyond 1994. The *positive list* (or ‘*bottom-up*’) *approach* of the GATS (comparable to Article II of GATT) is likely to render progressive liberalization more difficult than if a *negative list* (or ‘*top-down*’) *approach* (as applied in the OECD Codes of Liberalization), together with a limited number of permitted instruments of protection (such as production subsidies) and negative ‘reservation lists’, had been employed. In most of the altogether 155 services (sub)sectors classified as a basis for the negotiations,⁵⁶ the full liberalization of international services trade – based on MFN treatment without ‘Article II exemptions’, market access commitments, national treatment commitments, ‘additional commitments’ and non-discriminatory domestic regulations consistent with the necessity requirements of Article VI – will be achieved only in the next century, if at all.

55 In its ‘Explanatory Memorandum’ on the EC’s ‘Uruguay Round Implementing Legislation’ (Doc. COM (94) 414 final of 5 October 1994), the EC Commission stated in respect of the services negotiations: ‘The Community approach in this area of negotiations was a function of progress in the creation of the Single Market, and consisted of translating its internal achievements in this field to the multilateral stage. The commitments into which it has entered do not exceed the obligations already imposed by the creation of the Single Market, and consequently do not entail any changes to current Community legislation’ (at 7). The same seems to be true for many other WTO member countries, cf.: Hoekman, ‘Tentative First Steps: An Assessment of the Uruguay Round Agreement on Services’, in ‘The Uruguay Round and the Developing Economies’, *World Bank* (1995).

56 The ‘GNS Classification List’ is based on the following 12 main categories of services: business services; communication services; construction and related engineering services; distribution services; educational services; environmental services; financial services; health related and social services; tourism and travel related services; recreational, cultural and sporting services; transport services; other services not included elsewhere.

4. Sector-specific Annexes and Understandings

A fourth layer of legal regulation are the sectoral annexes to the GATS, as well as the 1994 'Understanding on Commitments in Financial Services', which address the special situations of individual services sectors, such as financial services, telecommunications, air transport services, maritime transport services and movement of natural persons supplying services. For instance, the 'Annex on Financial Services' lays down the right of parties to take prudential measures, including for the protection of investors, deposit holders and policy holders, and to ensure the integrity and stability of the financial system. The 'Understanding on Commitments in Financial Services', which resulted from an initiative by OECD countries in order to push further liberalization with respect to financial services, proposes an alternative approach to scheduling specific commitments on financial services based on an explicit standstill obligation and on minimum market access obligations (e.g., for monopolies, government procurement, 'new' financial services, cross-border trade by non-resident suppliers, right of establishment, temporary entry of intra-company transferees, non-discrimination and national treatment), to which members may lodge limitations (*top-down approach*).

The 'Annex on Telecommunications' requires, *inter alia*, that access to and use of public telecommunications services and networks be accorded to another party, on reasonable and non-discriminatory terms, to permit the supply of a service included in its Schedule. The additional 'Annex on Negotiations on Basic Telecommunications' exempts from the MFN obligation – until the conclusion of the ongoing negotiations – the whole sector of basic telecommunications in view of the public monopolies (e.g., for telephone services) existing in many countries. The 'Annex on Air Transport Services' excludes from the agreement's coverage 'traffic rights, however granted' (largely bilateral air-service agreements conferring landing rights) and 'services directly related to the exercise of traffic rights', except for aircraft repair and maintenance services, the selling and marketing of air transport services, and computer reservation system services. Rules and procedures for the liberalization of other services sectors are included in Ministerial Decisions adopted at the conclusion of the Uruguay Round negotiations. For instance, the priorities for the liberalization of professional services, which are particularly affected by Article VI (domestic regulation) and Article VII (mutual recognition) of the GATS, are set out in a Ministerial Decision of 15 December 1993, which forms part of the 'Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations'.⁵⁷

57 The 'Final Act' and all the Ministerial Decisions adopted on 15 December 1993 and at the Marrakesh conference in April 1994 are reproduced in *The Results of the Uruguay Round, supra* note 51).

E. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

There is broad agreement today that both under-protection of intellectual property rights (IPRs), leading e.g., to replacement of international trade by local 'piracy' products, and their over-protection may lead to trade barriers and trade distortions. The TRIPS Agreement in Annex 1C of the WTO Agreement provides for 'adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights', 'effective and appropriate means for the enforcement of trade-related intellectual property rights', and 'effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments' (Preamble). The legal principles underlying the TRIPS Agreement are in part based on those of GATT law (e.g., the national treatment and most-favoured-nation treatment requirements in Articles 3 and 4). But the explicit recognition 'that intellectual property rights are private rights' (Preamble), the legal requirement of compliance with existing intellectual property conventions (Article 2), the various competition rules on prevention of abuses of IPRs by right-holders (e.g., Articles 8, 40), and the relatively high minimum standards for the protection and enforcement of copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs and undisclosed information illustrate that the TRIPS Agreement introduces many new legal principles into the multilateral trading system based on GATT.⁵⁸

The World Intellectual Property Organization (WIPO), whose origins go back to the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works, has promoted the conclusion and centralized administration of a large number of multilateral treaties providing for the substantive protection of industrial property, for the acquisition of industrial property protection in several countries, the international classification of IPRs, and for the protection of copyrights and neighbouring rights.⁵⁹ By its rule-making, registration and technical assistance activities, WIPO has contributed to the strengthening, harmonization, simplification and to reduced costs of IPR protection. Yet, many industrialized countries criticized the WIPO conventions e.g., for their lack of adequate minimum standards, limited membership and inadequate dispute settlement and enforcement mechanisms. The fact that e.g., important countries (like India) were not members of the Paris Convention, or did not grant patent protection in important economic sectors (e.g., for pharmaceuticals

58 For a more detailed analysis see, e.g., E-U. Petersmann, F.M. Abbott (Rapporteurs), First Report of the ILA Committee on International Trade Law to the Buenos Aires Conference of the International Law Association, August 1994, in *Report of the 66th Conference, ILA 1995*; Bronckers, 'The Impact of TRIPS: Intellectual Property Protection in Developing Countries', 31 *CML Rev.* (1994) 1245-1282; *The Outcome of the Uruguay Round: An Initial Assessment*, UNCTAD 1994.

59 For a survey see, e.g., World Intellectual Property Organization. General Information, WIPO 1994; Background Reading Material on Intellectual Property, WIPO 1988.

in Brazil), or did not effectively enforce their IPR laws (e.g., in Indonesia and Thailand), prompted notably the USA and the EC to make use of their domestic 'unfair trade laws' in order to put pressure on these countries to strengthen their IPR protection.⁶⁰ The global linkage of the TRIPS Agreement to the other Uruguay Round Agreements achieved what WIPO has never achieved, namely stricter worldwide minimum standards (e.g., for trade secrets, computer programmes) and more effective dispute settlement and enforcement mechanisms for IPRs that go far beyond those in the various WIPO conventions. It is for this reason that the formal linkage between multilateral trade rules and relevant intellectual property agreements is sometimes viewed as a model for similar future agreements, for instance on 'trade-related environmental measures' and 'trade-related anticompetitive practices'.

Even though the developmental and redistributive effects of the TRIPS Agreement are impossible to predict at this point of time, there remains a strong need to ensure that the TRIPS Agreement contributes to – rather than impedes – the development of less-developed countries and the flow of additional capital and technology to these countries. For instance, since more than 95% of all patents are owned by proprietors located in developed countries and industrial property rights can be abused to support monopolies and distort competition, there is a need to complement the TRIPS Agreement by safeguards against trade distortions and abuses that may be detrimental to developing countries, especially if they do not yet have competition laws. The TRIPS Agreement leaves unaddressed the important trade-related issues of the 'territoriality' and 'exhaustion' of IPRs.⁶¹ As IPRs are granted nationally and are limited territorially, 'national exhaustion' tends to be the rule except for the EC, where the EC Court of Justice has made it impossible for IPR holders to oppose the import and sale in a particular EC Member State of products which were lawfully put on the market in another Member State with the consent of the IPR holder. Less-developed countries may have a similar interest in promoting liberal trade and 'parallel imports' of patented products by prescribing 'worldwide exhaustion' so as to avoid becoming 'high-price islands'.⁶²

60 See, e.g., Castillo de la Torre, 'The EEC New Instrument of Trade Policy: Some Comments in the Light of the Latest Developments', 30 *CML Rev.* (1993) 687-719, who describes 6 complaints under the EC Regulation No. 2641/84 on the strengthening of the common commercial policy, of which 4 related to alleged infringements of IPRs of EC citizens in Indonesia, Thailand, Jordan and the USA.

61 An IPR is 'exhausted' when the holder of the right licenses its use by foreign producers and may no longer control the use which the licensee makes of it. For example, the question is raised whether the licensee of technology may legitimately be prevented from exporting the end-product incorporating such technology so as to compete with its licensor. Whether and when IPRs are to be considered exhausted affects the interests of licensors, licensees and consumers, as well as the technology transfer processes by enhancing or restricting the uses to which transferred technology may be put.

62 See Bronckers, *supra* note 58, at 1266 seq., who notes that Benelux and German trademark law still provide for 'worldwide exhaustion'.

IV. The WTO's Dispute Settlement System, Trade Policy Review Mechanism and Policy Coordination with the IMF and the World Bank Group

It has already been shown above (in Sections II.C and III.B) that the Uruguay Round negotiations and the WTO Agreement made use of a number of new 'strategic devices' designed to overcome the 'prisoners' dilemma' and 'rent-seeking trap' of the 'GATT à la carte' system and to contain government failures more effectively: the 'issue linkages' and 'global package deal' during the Uruguay Round negotiations, 'mediated' in important parts by the GATT Secretariat (which supplied e.g., the 'secretaries' and 'background papers' for the 15 Negotiating Groups) and by its Director-General; the 'single undertaking approach' of the WTO Agreement; the additional membership requirement of a GATT and a GATS Schedule of Concessions; the replacement of the GATT (as an international organization) by the new WTO; the only limited coexistence of the GATT 1994 and GATT 1947; the decision to terminate the GATT 1947 by the end of 1995 or 1996 at the latest; the comprehensive decision-making powers of the WTO's Ministerial Conference and General Council on all matters under any of the Multilateral Trade Agreements, including their power to exclude members that do not accept certain amendments adopted by majority vote; the publication, notification and other transparency requirements of WTO law designed to make trade policies more transparent and predictable; and the 'non-application clause' in Article XIII of the WTO Agreement enabling individual WTO members not to apply the WTO Agreement vis-à-vis a new member country.

The WTO Agreement has also significantly strengthened and extended the *dispute settlement functions*, *surveillance functions*, *enforcement functions* and *policy-coordination functions* of the GATT/WTO. This will further contribute to reducing the information, confidence and 'free-riding problems' of international cooperation, which so often lead to a '*prisoners' dilemma*' of mutually harmful non-cooperative behaviour. The 'Understanding on Rules and Procedures Governing the Settlement of Disputes' in Annex 2 of the WTO Agreement, and the 'Trade Policy Review Mechanism' in Annex 3, provide for a new dispute settlement system and trade policy review mechanism applicable to *all* multilateral trade agreements. Their *integrated nature* will reinforce the legal and institutional integration of WTO law.

A. The WTO's Dispute Settlement Understanding (DSU)

The WTO differs from all other worldwide organizations by its mandatory and effective system for the legally binding settlement of disputes among its members.⁶³ The new DSU builds upon the existing GATT dispute settlement rules. But it

63 For a comparative analysis see Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948', 31 *CML Rev.* (1994) 1157-1244.

introduces also a number of innovations to ensure that WTO dispute settlement proceedings lead to a legally binding ruling by the Dispute Settlement Body (DSB) within 9 months after the establishment of a panel or, in case of an appeal to the new Appellate Body, within 12 months.

1. An Integrated Dispute Settlement System

The 'GATT 1947' system allowed complainants to choose between the GATT dispute settlement procedures under GATT Article XXIII and the special dispute settlement procedures of the Tokyo Round Agreements. By contrast, the DSU is a single 'integrated dispute settlement system': it applies to the WTO Agreement, all annexed 'multilateral trade agreements' and 'plurilateral trade agreements' as well as to the DSU itself. The DSU is administered by the General Council of the WTO, which 'shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Understanding on Rules and Procedures Governing the Settlement of Disputes' (Article IV:3 WTO Agreement). The DSB exercises the dispute settlement authority not only of the General Council but also of the special Committees under the covered agreements, and can ensure consistency in the interpretation of WTO law. The legal and institutional unity of the integrated DSU avoids not only the problems of 'forum shopping' and 'rule shopping' under the old GATT dispute settlement system. The broader jurisdiction and legal specialization of the DSB also enhance a 'rule-oriented' approach to the dispute settlement system and counteract the 'politicization' of the specialized dispute settlement proceedings under the GATT Anti-dumping and Subsidy Codes, where e.g., the 'users' of anti-dumping laws (notably the USA) often blocked the adoption of dispute settlement findings against them.⁶⁴ The integrated dispute settlement system enables WTO members to base their complaints on any of the covered agreements. It also permits 'cross-retaliation' if the DSB authorizes countermeasures and if suspension of obligations in the same sector is not practicable.

2. A Mandatory Rule-oriented Dispute Settlement System

The DSU emphasizes its rule-oriented function by recognizing, *inter alia*, that 'it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. The requirement – that 'all solutions to matters formally raised under the consultation and dispute

64 On these difficulties and the past GATT experience that e.g., panel reports on anti-dumping issues were regularly adopted when submitted to the general GATT Council under Article XXIII of GATT, but were often 'blocked' when submitted to the Anti-dumping Committee under the special dispute settlement system of the Anti-dumping Code, see Petersmann, 'International Competition Rules for the GATT-WTO World Trade and Legal System', *JWT* (1993) 35, 67 seq.

settlement rules and procedures of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements' – confirms that arbitration awards and bilaterally agreed dispute settlements must also remain consistent with the multilateral WTO law. The mandatory nature of the WTO dispute settlement system is clearly stated in Article 23 of the DSU:

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they *shall* have recourse to, and abide by, the rules and procedures of this Understanding.

It is further strengthened by the 'compulsory jurisdiction' of the DSB and by the 'automatic establishment' of panels and the 'automatic adoption' of panel and Appellate Body reports, unless the DSB decides by 'negative consensus' not to adopt the report (what the plaintiff can prevent unless he is satisfied by the dispute settlement and prefers to avoid adoption of a 'bad precedent'). The strict time-limits for the establishment of dispute settlement panels – for the completion of the panel proceeding within normally 6 months, and for the adoption of the panel report by the DSB within 60 days after the issuance of a panel report – ensure the speedy conclusion of panel proceedings.

3. A New Appellate Review System

The most far-reaching 'judicialization' of the GATT dispute settlement system results from the setting-up of an independent 'Standing Appellate Body', whose appellate report 'shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within thirty days following its issuance to the Members'. Under the 'old GATT', most panel reports were adopted by consensus, and 'blocking' of their adoption remained an exception in view of the risk of tit-for-tat refusals and the self-interest of countries in a functioning dispute settlement system. The Appellate Body review was established as a complement to the 'automaticity' of the WTO dispute settlement system. But this substitution of the 'legal filter' of Appellate Body review for the previous 'political filter' of adoption of panel reports by 'positive consensus' raises questions about the proper function of the Appellate Body which have not been answered in the DSU. Should the Appellate Body limit the 'right to review' in order to prevent every panel report from being appealed? Would this be consistent with the DSU, which does not provide for an admission procedure (e.g., similar to the discretionary remedy of *certiorari* in the US Supreme Court)? Could a limitation of the appellate review be achieved through restrictive 'standards of review' (e.g., similar to the 'clearly erroneous test' and 'abuse of discretion test' of US appeal courts) or through the 'working procedures' of the Appellate Body? Or would regular appeals prompt the plaintiffs, as at the EC Court of First Instance where less

than 30% of the judgments tend to be appealed, to no longer appeal every panel report once the case-law of the Appellate Body is firmly established? Would a *de novo review* of all legal arguments strengthen the 'judicialization' of the WTO dispute settlement system and, in the long run, lead to the complete replacement of panel proceedings by a standing WTO Court? Should the Appellate Body, whose jurisdiction is limited by the DSU to 'issues of law covered in the panel report and legal interpretations developed by the panel', exercise 'self-restraint' (similar to a French 'cour de cassation') and, based on a 'freezing of the record', concentrate on systemic legal problems and the overall consistency of the panel case-law (rather than on a *de novo review* of all legal arguments by the plaintiff in the actual case)? How can the Appellate Body ensure consistency and the highest legal quality of appellate reports if the DSU requires that only 3 out of the 7 Appellate Body members 'shall serve on any one case', without provision for recourse to a plenary body if one 'chamber of 3' wants to apply different standards of review or otherwise deviate from previous case-law?⁶⁵ Can the Appellate Body remand the case to the GATT panel, e.g., if procedural mistakes might have led to an incomplete determination of the relevant facts and legal arguments, or would a remand be inconsistent with the strict time-limits of the DSU?

4. Prohibition of Unilateral Reprisals

The primary obligation to withdraw illegal measures, the only subsidiary nature of compensation pending the withdrawal of illegal measures, and the legal inadmissibility of unilateral reprisals without prior authorization by the DSB are explicitly confirmed in the DSU. Article 23 even requires members 'not (to) make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding'. Members 'shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding'. The WTO legal and dispute settlement system will thus further limit the scope for unilateral power politics.

65 Answers to these and other questions regarding the legitimate functions of the Appellate Body should take into account the practical experience e.g., with appeals to the EC Court of Justice (cf. e.g., L. Neville Brown, T. Kennedy, *The Court of Justice of the European Communities* (4th ed., 1994), at 90-93) and with the 'ICSID Annulment Tribunal' (cf. Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal', *ICSID Foreign Investment Law Journal* (1993) 21-56).

B. The Trade Policy Review Mechanism (TPRM)

The General Council shall also 'convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the Trade Policy Review Mechanism in Annex 3' (Article IV:4 WTO Agreement). The declared purpose of the Trade Policy Review Mechanism is 'to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trade system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members' (Section A). Since its establishment in 1989, the regular review and surveillance of national and EC trade laws and policies for the Trade Policy Review⁶⁶ have enhanced the transparency and GATT-consistency of trade policy measures and have effectively supplemented the enforcement and surveillance mechanisms under the GATT dispute settlement system. The explicit statement in the TPRM Understanding – that 'it is not intended to serve as a basis for the enforcement of specific obligations under the Agreement or for dispute settlement procedures, or to impose new policy commitments on Members' – underlines this complementary function of the TPRM for 'dispute avoidance'. As many substantive WTO rules are supplemented by safeguard and renegotiation provisions which enable governments to take into account political needs, the real issue behind many disputes among WTO member countries is not the right to protect a particular sector, but whether trade protection can be granted by the chosen instrument and without compensating the trading partners for the withdrawal of reciprocal market access commitments. The discussions in the context of the TPRM often indicate which trade policy measures are viewed as acceptable and which ones are likely to be challenged in dispute settlement proceedings.

C. Need for Better Policy-Coordination between the WTO and other International Organizations

The WTO Agreement is a rule-oriented liberal response to the globalization and increasing deregulation of the world economy and to the resultant need of enterprises and governments to make market access and trade-related investments legally more secure. Similar legal and institutional reforms are needed in other worldwide and regional economic organizations. The WTO should use its mandate to 'make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO', and to 'make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the

66 The over 120 secretariat and government reports prepared so far are published, along with the minutes of the TPRM meetings, by the GATT/WTO Secretariat and offer a unique source of information on the trade policy systems of GATT/WTO member countries.

WTO' (Article V), for promoting the necessary restructuring and better consistency of the law and practice of international economic organizations. For instance:

1. The Bretton Woods Institutions

The importance of monetary stability for the efficiency of market forces, and of freedom of payments and currency convertibility for international trade and investments, was the major reason why the IMF was established prior to the GATT. Article I of the IMF Agreement and Article I of the World Bank Agreement explicitly declare the promotion of 'balanced growth of international trade' as their institutional purpose. The close interrelationship between monetary and trade policy instruments is regulated in Articles XII, XIV, XV and XVIII:B of GATT 1994 and in Article XII of the GATS, which call on the WTO to seek cooperation with the IMF with a view to pursuing a coordinated policy with regard to exchange questions and to consult fully with the IMF when considering problems concerning monetary reserves, balances of payments or foreign exchange arrangements.⁶⁷ GATT contracting parties 'shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund' (Article XV:4).

The 1994 Final Act Embodying the Results of the Uruguay Round includes a Ministerial 'Declaration on the Relationship of the WTO with the IMF', according to which the relationship of the WTO with the IMF, with regard to the areas covered by the Multilateral Trade Agreements, will be based on the provisions that have governed the relationship of GATT 1947 with the IMF. Another Ministerial 'Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking' refers, *inter alia*, to 'the role of the World Bank and the IMF in supporting adjustment to trade liberalization' and invites 'the Director-General of the WTO to review with the Managing Director of the International Monetary Fund and the President of the World Bank the implications of the WTO's responsibilities for its cooperation with the Bretton Woods institutions, as well as the forms such cooperation might take, with a view to achieving greater coherence in global economic policymaking'. The specifics of such cooperation within the Bretton Woods structure of IMF, World Bank and WTO still need to be elaborated. But it seems obvious that such cooperation e.g., in conducting reviews of country policies, in assisting structural adjustment to trade liberalization, in promoting further liberalization of financial services and capital movements, or in servicing high level economic policy coordination (e.g., in the 'Group of 7') would offer important efficiency gains.

67 Other references to the IMF in GATT 1994 are to be found in Articles II:6(a) and (b), VII:4(a) and (c), and in the Notes to Articles VIII:1, XII:4(b) and XVI:B contained in Annex I to GATT 1994.

2. Other UN Institutions, Specialized Agencies and Multilateral Agreements

The WTO Agreement includes numerous other references to the World Bank (cf. GATS, Annex on Telecommunications, paragraph 6,a); the Food and Agricultural Organization (cf. Article X:4,b Agreement on Agriculture); the Codex Alimentarius Commission which implements the joint FAO/WHO Food Standards Programme (cf. Articles 3:4, 12:3,5 SPS Agreement); the International Office of Epizootics and International Plant Protection Convention (cf. Articles 3:4, 12:3,5 SPS Agreement); the International Wheat Council (cf. Article 10:4,c Agreement on Agriculture); the Customs Cooperation Council (e.g., Article XVIII:2 and Annex II of the Agreement on Implementation of Article VII, Articles 4:4, 9:1,2 of the Agreement on Rules of Origin); the International Telecommunication Union (ITU) and the UN Development Programme (cf. GATS, Annex on Telecommunications); WIPO (e.g., Articles 5, 63:2 and 68 of the TRIPS Agreement); and also to non-governmental international organizations like the International Organization for Standardization and the International Electrotechnical Commission (cf. GATS, Annex on Telecommunications, and Annexes 1 and 3 to the Agreement on Technical Barriers).

Other international organizations will also be relevant for the future activities of the WTO. For instance, the UN Conference on Trade and Development (UNCTAD), which is an organ of the UN General Assembly for the integrated treatment of development and interrelated issues (including trade, commodities, finance, investment, services and technology, environment and 'sustainable development'), has promoted over the years a large number of international agreements (such as commodity agreements, the 1974 UN Convention on Liner Conferences) and arrangements (such as the 1971 Generalized System of Preferences, the 1980 UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices) with a bearing on many subject matters covered in the WTO Agreement and WTO work programme. The International Trade Center (ITC) – established in 1964 by GATT to provide trade information and trade promotion programmes to less-developed countries and, since 1968, co-sponsored by GATT and UNCTAD as a 'joint subsidiary organ of the GATT and the UN' – could serve as an example for the pooling of WTO and UN resources and for their cooperation in other areas of the WTO work programme.

In particular, the liberalization of international services in the framework of the GATS will have far-reaching repercussions on other international organizations in this field. Article XXVI of GATS requests the General Council to make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services. A multilateral liberalization in the context of the GATS of

the 'freedoms of the air',⁶⁸ for instance, would have far-reaching repercussions on the International Civil Aviation Organization (ICAO) and the private International Air Transport Association (IATA), which have for decades promoted a global web of more than 1,200 bilateral market-sharing agreements, cartel arrangements, national monopolies, trade-distorting subsidies and other restrictions in international air transport.⁶⁹ Similarly, a multilateral liberalization in the context of the GATS of international shipping services would require changes in the activities of the International Maritime Organization (IMO) and in UNCTAD's support of the UN Convention on Liner Conferences, which have promoted bilateral market-sharing agreements, cartel arrangements, shipping monopolies, and other market access restrictions and market distortions in international shipping services. Multilateral liberalization and deregulation of public telecommunications transport networks and services may require cooperation with the ITU.

The implementation of the TRIPS Agreement will require cooperation with various international organizations dealing with intellectual property rights. There is an obvious need for cooperating with WIPO, e.g., on the possible establishment of a common register containing national laws and regulations regarding TRIPS, a coordinated notification system and procedures promoting a mutually consistent interpretation and application of the TRIPS Agreement and WIPO conventions. But there may also be a need for cooperation with other international organizations active in this field. Like UNCTAD, the UN Educational, Scientific and Cultural Organization (UNESCO), a UN Specialized Agency, participated as an observer in the Uruguay Round negotiations in view of UNESCO's activities regarding e.g., the administration of the 1970 Universal Copyright Convention, the 1961 Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and UNESCO's promotion of copyright laws and infrastructures in developing countries. The World Health Organization (WHO), another UN Specialized Agency, is active, *inter alia*, in the protection of pharmaceutical inventions and the use of trademarks on pharmaceuticals. The UN Industrial Development Organization (UNIDO), also a Specialized Agency of the UN, promotes industrialization in developing countries and provides them with direct access to technological, managerial and financial resources in industrialized countries.

This brief survey of international organizations active in the field of WTO jurisdiction illustrates the global implications of the implementation of the WTO Agreement for the necessary further restructuring of the legal-institutional framework of the world economy.

68 Article I of the 1944 International Air Transport Agreement defines the classical 'five freedoms of the air', only two of which are protected multilaterally in the 1944 Convention on International Civil Aviation.

69 See, e.g., Hedlund, 'Toward Open Skies: Liberalizing Trade in International Airline Services', 3 *Minnesota Journal of Global Trade* (1994) 259-299.

V. The WTO as a Forum for further Negotiations

International organizations, like the IMF, GATT and the WTO, also serve as a forum of negotiations and of collective rule-making. The WTO serves as a negotiating forum not only for future 'GATT Rounds' on the multilateral liberalization of trade in goods, but also for future 'GATS Rounds' on the progressive liberalization of international services trade through 'successive rounds of negotiations...with a view to achieving a progressively higher level of liberalization' (Article XIX GATS). Articles X, XIII and XV of the GATS explicitly call for future negotiations on additional disciplines for safeguard measures, government procurement and trade-distorting subsidies. Notwithstanding the formal conclusion of the Uruguay Round of multilateral trade negotiations on 15 April 1994, it was decided to continue negotiations on the liberalization of international services in the framework of 4 Negotiating Groups on Basic Telecommunications, on Maritime Transport Services, on Movement of Natural Persons and on Financial Services with a view to achieving additional liberalization commitments in 1995/96. After the entry into force of the WTO Agreement on 1 January 1995, a new Working Party on Professional Services was established to prepare negotiations on the liberalization of professional services (e.g., in the accountancy sector).

Various other multilateral and plurilateral trade agreements also envisage future negotiations on additional rules and trade liberalization. For instance, according to Article 9 of the Agreement on TRIMS, the 'Council for Trade in Goods shall review the operation of this Agreement and, as appropriate, propose to the Ministerial Conference amendments to its text' and 'consider whether it should be complemented with provisions on investment policy and competition policy'. The TRIPS Agreement includes provisions committing member countries, *inter alia*, 'to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23' (Article 24) and to periodically review the TRIPS Agreement 'in the light of any relevant new developments which might warrant modification or amendment of this Agreement' (Article 71). Article 9 of the Agreement on Rules of Origin sets out a work programme for the harmonization of rules of origin to be completed by 1998. The Plurilateral Trade Agreements on Government Procurement and on Trade in Civil Aircraft envisage negotiations on further trade liberalization and additional legal disciplines. The Ministerial Decision of 14 April 1994 on 'Trade and Environment' decided on a comprehensive work programme, to be undertaken by the WTO Committee on Trade and Environment, 'to identify the relationship between trade measures and environmental measures, in order to promote sustainable development', and 'to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required'.⁷⁰

70 See *The Results of the Uruguay Round*, *supra* note 51, at 470.

At the last Trade Negotiations Committee meeting at ministerial level on 15 April 1994 at Marrakesh, the Chairman summarized the various additional proposals for the future work programme of the WTO as follows:

In the statements which they made in the course of this meeting, Ministers representing a number of participating delegations stressed the importance they attach to their requests for an examination of the relationship between the trading system and internationally recognized labour standards, the relationship between immigration policies and international trade, trade and competition policy, including rules on export financing and restrictive business practices, trade and investment, regionalism, the interaction between trade policies and policies relating to financial and monetary matters, including debt, and commodity markets, international trade and company law, the establishment of a mechanism for compensation for the erosion of preferences, the link between trade, development, political stability and the alleviation of poverty, and unilateral or extraterritorial trade measures.⁷¹

The Preparatory Committee for the WTO took up this matter at its first meeting on 29 April 1994 but forwarded it to the WTO's General Council for further action.⁷² At its first meeting on 31 January 1995, the WTO's General Council accepted Singapore's invitation to host the first WTO Ministerial Conference scheduled for late 1996. One major task of this Ministerial Conference will be to decide on the agenda for future negotiations in the WTO. The following four 'new subjects' are most frequently proposed for future negotiations in the WTO.

A. A More Comprehensive WTO Agreement on Trade-Related Investment Measures (TRIMS) and Foreign Direct Investment (FDI)?

Negotiations on a multilateral agreement on FDI, either in the OECD or in the WTO, have been proposed by both the European Union and the USA. They are also likely to find strong political support in business circles. Proponents of this proposal advance, in particular, the following arguments⁷³:

- The annual average growth rate of about 30% of FDI outflows over the period 1983-1990, more than three times the annual growth rate of world exports, reflects the increasing 'globalization' of international production and trade. Theoretically, goods and FDI can be substitutes for each other, i.e. goods can be delivered to the same market by means of both trade and FDI. But there seems to be a positive correlation between trade and investment flows over time, for instance because complementary FDI's (e.g., maintenance facilities) can increase the attractiveness of exports ('establishment trade') and can generate new trade (e.g., new imports from the source country, new exports to third countries). The liberalization of investment regimes in developing countries has led to a

71 Documents MTN.TNC/MIN(94)/6 of 15 April 1994; MTN.TNC/45(MIN), at 12.

72 See the final 'Report to the WTO' by the Preparatory Committee, PC/R of 31 December 1994, para. 82.

73 Cf. e.g., 'Trade and Investment. Discussion paper', EC Commission 1994; Low, Subramanian, 'TRIMs in the Uruguay Round: An Unfinished Business?', *World Bank* (1995).

vigorous expansion of investment flows to these countries (nearly 55% of total FDI in 1993) and to their more favourable attitude towards FDI and multilateral investment rules.

- Replacing the present network of more than 500 differing Bilateral Investment Treaties (BITs) and non-binding OECD guidelines by a more transparent, multilateral agreement with uniform investment and dispute settlement rules would increase legal security and the welfare gains of international economic specialization. It would reduce the risk of distortive government discriminations, wasteful investment incentives or abuses of a dominant position by investors.
- The GATS, TRIMS and TRIPS Agreements already regulate trade-related investment measures and FDI. They could be rendered more effective by a WTO Agreement on FDI, which could supplement the ‘positive list approach’ of the GATS by general obligations regarding MFN for foreign investors and host countries, effective national treatment, transparency, investment protection, movement of persons, transfer of funds, public procurement practices and dispute settlement. A WTO Agreement on FDI could make use of the existing dispute settlement and surveillance systems of the WTO and could be politically more acceptable to developing countries than a perhaps more rapidly concluded OECD Agreement, in whose elaboration developing countries could not take part and whose later extension to developing countries might be more difficult.

B. A Plurilateral Agreement on Competition and Trade (PACT) in the WTO?

There have also been an increasing number of proposals for negotiating a ‘PACT’ in the framework of the WTO so as to render both trade and competition rules more effective.⁷⁴ There are essentially six arguments in support of these proposals:

- International competition rules can help to keep markets open by preventing private market access barriers (such as government-supported cartels and monopolies), which can serve as a substitute for liberalized tariffs and non-tariff trade barriers and thereby undermine GATT and GATS market access commitments.
- The negotiations on the WTO membership of China, Russia and other former state-trading countries have revealed an increasing need for supplementing the ineffective GATT and GATS disciplines for ‘state-trading enterprises’ or other enterprises with ‘exclusive or special privileges’ (Article XVII GATT) by competition rules, because the ‘privatization’ of such enterprises and the tariff bindings of these countries may not ensure non-discriminatory competition.
- The unilateral ‘extraterritorial’ application of EC and US competition laws is leading to an increasing number of ‘competition policy conflicts’ (e.g., in case of mutually conflicting decisions on mergers, concentrations and abuses of dominant market power affecting several markets, international discovery efforts

⁷⁴ For a survey of these proposals see Hauser, Petersmann (eds), *supra* note 32; F.M. Scherer, *Competition Policies for an Integrated World Economy* (1994); ‘Competition Policy: Strengthening International Cooperation and Rules’, Expert Group Report (with additional papers by U. Immenga, F. Jenny and E-U. Petersmann in the Annexes), EC Commission 1995.

abroad), which could be avoided or reduced through international information and cooperation procedures, 'negative' and 'positive comity' rules and substantive international minimum standards for domestic competition laws.

- Domestic competition laws (e.g., their exemptions for export cartels) and trade laws (notably on anti-dumping measures) suffer from protectionist 'producer biases' and mutual inconsistencies (e.g., regarding international price discrimination allowed under EC and US competition laws but punished under their anti-dumping laws). These are easier to reform by means of *reciprocal international prohibitions* (e.g., of export cartels) and competition rules focusing on consumer interests.
- Compared to the current situation where some countries either do not have competition laws or do not effectively enforce them, and other countries threaten to apply their antitrust laws and 'unfair trade' laws unilaterally to *foreign* private market access barriers outside their territorial jurisdiction, a WTO competition agreement could offer *multilateral* and more effective remedies for the enforcement and surveillance of agreed international competition rules.
- GATT, GATS, the TRIMS and TRIPS Agreements already include a number of rules on anti-competitive private and governmental practices or, like Article 9 of the TRIMS Agreement, commitments to 'consider whether the Agreement should be complemented with provisions on investment policy and competition policy'. A plurilateral competition agreement in the context of the WTO could help to make the unsystematic existing competition rules in WTO law more coherent.

C. A WTO Agreement on Trade-Related Environmental Measures (TREMS)?

According to its preamble, the WTO Agreement shall serve 'the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'. The Ministerial Uruguay Round 'Decision on Trade and Environment' of 14 April 1994 emphasizes, in accordance with the principles adopted by the 1992 UN Conference on Trade and Environment, that

there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.⁷⁵

In the meetings of the GATT Group on Environmental Measures and International Trade 1992-1994 and of the WTO Committee on Trade and the Environment since 1995, there has not yet emerged a consensus on whether WTO law needs to be supplemented by additional rules or 'agreed interpretations' (e.g., of GATT Article XX) for the protection of the environment. But, similar to the incorporation of

75 See *supra* note 70.

environmental provisions into the EC Treaty, there is a case for incorporating additional environmental provisions into WTO law e.g., by means of an agreed 'Understanding on Trade and Environment'. For instance:

- Like the explicit recognition in Article 130r of the EC Treaty of the environmental principles of 'polluter-pays', 'rectification at source', 'precautionary' and 'preventive action', a WTO Understanding could incorporate the universally agreed 'UNCED principles'⁷⁶ into WTO law. This could, *inter alia*, enable WTO dispute settlement panels to interpret and apply WTO rules in conformity with universally agreed environmental principles.
- While Article 36 of the EC Treaty on the right to take trade restrictions for 'the protection of health and life of humans, animals or plants' was literally copied from Article XX GATT, WTO law does not yet include an explicit general recognition (as in Articles 100a and 130t of the EC Treaty) of the right of member countries to maintain or introduce more stringent national measures for the protection of the environment.
- The very detailed 'Community guidelines on state aid for environmental protection' of 10 March 1994⁷⁷ suggest that there may also be a need for elaborating on the few provisions on environmental subsidies in the WTO Agreements on Agriculture and on Subsidies.

There are many other legal issues (e.g., relating to the WTO-consistency of border adjustment measures for environmental taxes, packaging and recycling requirements, trade restrictions provided for in multilateral environmental agreements) which call for further clarification and could be dealt with in a future TREMS Agreement or 'Understanding'.

D. Incorporation of ILO-Labour Standards into WTO Law?

Most WTO member countries are also members of the International Labour Organization (ILO). Unlike Article 7 of the 1948 Havana Charter, which referred to the protection of labour standards by the ILO and recognized, *inter alia*, that 'unfair labour conditions, particularly in production for export, create difficulties in international trade', GATT and WTO law do not contain any express reference to workers' rights except for the right of contracting parties to take trade measures 'relating to the products of prison work' (Article XX,e of GATT). The GATT and WTO preambles mention the treaty objective of 'raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand'. But, in accordance with the economic theory of 'optimal intervention' and GATT's concern for protecting state sovereignty, the social implications of trade liberalization (e.g., adjustment to import competition, relocation of resources, redistribution of the 'gains from trade') are left to each member country and to other international organizations, such as the ILO and the World Bank Group.

76 Reproduced in Annex I to Petersmann, *International and European Trade*, *supra* note 31.

77 Reproduced in Annex VI to Petersmann, *International and European Trade*, *supra* note 31.

Prior to and during the Uruguay Round negotiations, the USA pressed for negotiations to cover workers' rights, arguing that 'abnormally low' labour standards in violation of ILO conventions could lead to 'social dumping' and 'unfair competition' justifying unilateral countermeasures. But these proposals were opposed by most other contracting parties. Developing countries, for instance, were afraid that their main comparative advantage of low labour costs could be called into question. Developed countries pointed out that trade restrictions are not an efficient instrument for correcting labour market distortions at their source and, by adding additional trade distortions, are likely to worsen real income and labour standards. And many countries questioned why the USA should insist on dealing in GATT with fundamental workers' rights guaranteed in major ILO Conventions⁷⁸ when the USA had not ratified most of these ILO Conventions.⁷⁹ To use trade restrictions merely as a foreign policy tool and sanctioning mechanism to force other countries to change their domestic policies would be a 'slippery slope argument', which could be abused for many other policy purposes and quickly undermine the rule-based multilateral trading system.

At the Marrakesh conference in April 1994, France and EC Commissioner Sir Leon Brittan supported the US request that the 'WTO must address problems such as child exploitation, forced labour or the denial to workers of free speech or free association'.⁸⁰ In November 1994, the ILO's 'Working Party on the Social Dimensions of the Liberalization of International Trade' also issued a report calling for a linkage of basic ILO labour standards to GATT/WTO law and dispute settlement procedures.⁸¹ The incorporation of a 'social clause', requiring member countries to respect certain minimum labour standards defined in universally agreed ILO Conventions, continues to be among the proposals for the future WTO work programme to be adopted at the WTO's first Ministerial Conference in December 1996 at Singapore.

E. The Basic Problem of future WTO Negotiations: How Much Harmonization? How Much 'Competition Among Regulatory Systems'?

The various proposals for additional WTO Agreements on the harmonization of investment, competition, environmental and labour laws can be seen as different aspects of the same 'integration problem': should the WTO world trade and legal

78 The US and EC proposals focus on the following five basic labour standards guaranteed in ILO Conventions: (1) freedom of association; (2) freedom to organize and bargain collectively; (3) freedom from forced or compulsory labour; (4) a minimum age for the employment of children; and (5) minimum standards in respect of conditions of work.

79 The fact that the USA had ratified only 11 out of 174 ILO Conventions in 1993 is explained by the USA with its federal system: labour standards are a matter of state jurisdiction, and states fear pre-emption of their standards if the Federal Government were to ratify ILO Conventions.

80 Sir Leon Brittan, statement on 12 April 1994, Doc. MTN.TNC/MIN(94)/ST/3.

81 The Social Dimension of the Liberalization of World Trade, GB.261/WP/SLD/1. ILO November 1994.

system continue to be based on the GATT and GATS principles of national 'policy autonomy' over non-discriminatory policy instruments (cf. GATT Article III) in order to promote 'competition among rules' as a decentralized discovery and coordination mechanism? Or should the WTO follow the example of the EC and harmonize divergent investment, competition, environmental and labour laws in order to promote a 'level playing-field' and reduce international transaction costs? Should such harmonization be carried out by reference to existing international agreements (like WIPO and ILO conventions) or by separate WTO standards? How should the different dispute settlement procedures (e.g., in the WTO, WIPO, ILO and multilateral environmental agreements) be coordinated so as to ensure mutually consistent interpretations? Do government interventions at the *international level*, where constitutional safeguards tend to be less effective than *within* constitutional democracies, risk to become 'captured' by special-interest lobbying and to produce worse outcomes than the imperfect markets they seek to fix?

The 1979 Tokyo Round Agreements and the 1994 Uruguay Round Agreements show a trend towards progressive harmonization not only of discriminatory foreign trade regulations but also of non-discriminatory internal rules. But, apart from the harmonization of intellectual property rights in the TRIPS Agreement, most of these harmonization requirements (e.g., for technical regulations and standards) are limited to prohibitions of 'unnecessary obstacles to international trade' (Article 2 TBT Agreement) and of measures with transnational 'external effects' (e.g., in case of exports of domestically prohibited goods, import embargoes to coerce other countries to change their domestic policies). Moreover, as in EC law, the harmonization is generally confined to international minimum standards and recognizes (e.g., in Article 2 TBT Agreement, Article 5 SPS Agreement) the right of individual countries to apply more stringent standards of health or environmental protection. As the gains from trade are a function of differences and of competition among countries, it remains to be determined on a case-by-case basis whether a further-reaching harmonization of non-discriminatory internal regulations will increase, or decrease, efficiency and the risks of 'government failures'. GATT's combination of strict market access rules (e.g., in Articles I-III) and flexible border adjustment and safeguard provisions promotes national policy autonomy, experimentation and mutual learning from 'trial and error'. Since 'comparative advantages' and national welfare are not given by nature but are shaped by governmental policies with dramatically different results, the WTO principle of national sovereignty over non-discriminatory policy instruments has the advantage of limiting national government failures by 'competition among rules' and by 'learning from the past'.⁸²

82 See 'Learning from the Past, Embracing the Future', *World Bank* (1994), where it is shown that income per head in East Asia had risen by some 350% since 1960, while that of Latin America is now significantly lower than it was in 1975, and Sub-Saharan Africa's income per head is back where it was in 1960. Such failures are, above all, local and national 'government failures'.