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Confidence-building for Global Challenges: The Experience of International Economic Law and Relations

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International trade regulation is one of the few areas in international economic relations and law operated on the basis of a comprehensive multilateral framework. The World Trade Organization emerged from 50 years of experience under the General Agreement on Tariffs and Trade of 1947. The body of law emerged in steps, in a bottom up process and based upon reciprocal interests. This paper describes the main features of this process. It reached beyond trade regulation and explores to what extent the experience in trade regulation could also be employed in designing an appropriate architecture in climate change mitigation and adaptation. It discusses potentials and limits to drawing from the experience of trade regulation.

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International trade regulation is one of the few areas in international economic relations and law operated on the basis of a comprehensive multilateral framework. The World Trade Organization emerged from 50 years of experience under the General Agreement on Tariffs and Trade of 1947. The body of law emerged in steps, in a bottom up process and based upon reciprocal interests. This paper describes the main features of this process. It reached beyond trade regulation and explores to what extent the experience in trade regulation could also be employed in designing an appropriate architecture in climate change mitigation and adaptation. It discusses potentials and limits to drawing from the experience of trade regulation.

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I. Introduction

Economic relations among nations are at the heart of extensive bilateral agreements and multilateral institutions. For centuries, in what is called the Westphalian State system based upon national sovereignty in the pursuit of own and shared interests, they have offered an important experience from which lessons applicable to new challenges in environmental policies and climate change in particular may be learnt.¹ This is the more relevant as climate change essentially amounts to a challenge within international economic relations. Most of the problems are economic in nature. The impact of climate change policies upon economic relations and welfare is a prime concern and will thus be embedded in the overall experience and architecture of international economic law. It cannot be dealt with separately or in isolation.

International economic law essentially deals with market access and conditions of competition on markets.² Trade and investment law and policies, labour standards and monetary issues essentially serve the goals of reducing or eliminating discrimination favouring domestic producers and products, through protectionist measures detrimental to welfare and economic growth, while respecting legitimate policy goals, such as the protection of the environment. The main interest in engaging in commitments is based upon the pursuit of enhanced market access and the establishment of stable and fair conditions of competition for domestic operators, exporters and investors alike.

International economic law covers a wide range of topics – in fact almost all of international law somehow relates to economic interests and relations among nations: commerce, investment, property, labour, monetary affairs, natural resources, including the law of the sea, and environmental law. Climate change mitigation and adaptation thus essentially forms part of international economic law. In this paper, the focus is more narrowly defined: it is limited to trade, labour, investment, financial and monetary affairs, with the main emphasis on international trade regulation. The purpose of the paper is to assess processes of policy and decision-making, dispute settlement, law enforcement and reporting – all of which contribute to verification and building trust, broadly speaking. The paper is written with a view to identifying potential avenues which, drawing upon past experience in international economic law and relations, could be taken up in the international architecture addressing climate change mitigation and adaptation.

The paper first addresses models used in building the architecture of international economic relations. It briefly expounds the main institutions. With an emphasis on international trade regulation, it discusses the functioning of the World Trade Organization (WTO), its member-

¹ See William Boyd, *Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage*, 32 *U.Pa.J.Int'lL.* 457 (2010) (offering a partial reconceptualization of the nature and possibilities of global climate governance in the post-Copenhagen era); Frank Biermann & Klaus Dingwerth, *Global Environmental Change and the Nation State*, 4 *Global Env'tl. Pol.* 1 (2004) (detailing how global environmental change challenges the traditional Westphalian system by undermining the idea of sovereignty).

² See Thomas Cottier & Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland*, Cameron May & Staempfli Publ. London and Berne, 2005.

ship, decision-making processes, dispute settlement and verification efforts. It offers a number of conclusions and possible ways forward based upon the experience and insights gained from international economic relations and law.

II. Basic Architecture

International economic relations are based upon international agreements and partly operate within the realm of international organizations. The architecture shows top down and bottom up approaches, and mixed constellations. They are being superseded today by informal groupings, such as the G-7, G-8, G-10 and G-20³ amounting to de facto governance structures seeking to set policy directions, build basic consensus and influence work undertaken in formal organizations, but not properly regulating areas on their own. They influence work and structures in international economic law, which will be briefly characterized by top-down, bottom-up and mixed constellations.

A. *Informal Groupings*

Informal groupings of States on the level of heads of states or at the ministerial level are political in nature; they do not operate on the basis of an agreed and formal international framework, at best their modus operandi is based upon informally agreed convention. The need for informal groupings of this kind mainly emerged in monetary affairs. Upon the US and others abandoning the gold standard in 1971, the International Monetary Fund (IMF) was no longer an appropriate framework for policy coordination.⁴ This was taken up by groupings essentially composed of the largest economies of the globe. They either meet on ministerial level or among Heads of States, in particular the G-7 and G-10. The financial crisis of 2007 to 2009 (today being followed by the debt crisis) and the process of shifting economic power to emerging economies triggered an expansion of this club model to include emerging economies. The G-20 today comprises countries among the top 28 largest economies (except Norway and Switzerland) representing 85% of world gross domestic product (GDP), 80% of world trade, and two-thirds of the world population. It includes 19 countries and the EU. It has met at regular intervals in Washington, London, Pittsburgh, Toronto, and Seoul, mainly while addressing the financial crisis. It will meet again in Cannes (France) in November 2011.⁵

The G-20 is dominated by finance ministers; related areas of economic relations are taken into account, but are clearly not at the forefront. Thus, we hear regular appeals to conclude the

³ See Peter I. Hajnal, *The G8 system and the G20: evolution, role and documentation*, Aldershot/Ashgate, 2007; Peter I. Hajnal, *The G7/G8 system: evolution role and documentation/with a contribution by Sian Meikle*, Aldershot/Ashgate, 2001.

⁴ See Richard Samans, Marc Uzan, and Augusto Lopez-Claros, *The international monetary system, the IMF, and the G-20: a great transformation in the making?* World Economic Forum, Basingstoke/Palgrave Macmillan, 2007.

⁵ See *The G-20: a "global economic government" in the making?* by Christoph Pohlmann et al. (eds.), Berlin: Friedrich-Ebert-Stiftung, 2010.

current Doha Development Round in the WTO, yet without showing sufficient power to deliver tangible results. Other key issues, such as climate change, have not so far been seriously addressed in this forum. It has remained on the margins. The overall impact of these groupings, in particular of the G-20 is difficult to assess. It may develop into a viable network of global governance. Equally it may wither as financial markets and currencies stabilize and if the debt crisis stabilizes. It may be replaced by a different grouping. Success would seem most likely, the more focused the brief and mandate is, while at the same time taking into account all the elements required to address complex issues. Success and impact would seem most limited the more general the agenda. Pledges made may go unheard; on the other hand, the impact on domestic policy formulation must not be underestimated. They are an important part of informal global governance and secure at least minimal effects in policy co-ordination. Such a finding is confirmed by the evolution of the European Council within the European Union. Regular meetings of Heads of State began in informal settings of policy coordination in the context of what was called political cooperation beyond economic integration and trade liberalization. Eventually, this body was formalized by the Maastricht Treaty in 1992 and today amounts to the main formal political steering body besides the specialized Council of Ministers, the Commission, the Parliament and the European Court of Justice.⁶

While the groupings without formal agreements raise issues of legitimacy, undermining in particular the United Nations, it is safe to say that a global agenda today can hardly be developed without the inclusion of heads of state of economically and geographically crucial countries. Lack of informal global governance structures, as can be observed in the field of environmental protection, inevitably reduces the weight of the policy field in comparison to those reaching the agenda of international discourse and coordination among heads of state. To the extent that informal groupings of global governance exist, efforts to bring about a proper balance among the different policy areas involved will be important in the process of preparation and representation within national delegations. Since the outcome is best if groupings meet with a specialized and well defined agenda, it is conceivable to suggest that parallel groupings on the ministerial level could assume the task of coordination of policy making in their respective fields. Thus, it has been suggested in academic discussions that upon conclusion of the Doha Agenda an Executive Committee composed of trade ministers within the WTO should be formed in order to counterbalance the predominant interests of finance ministries within the G-20.⁷

B. Top Down Architecture

Within formal international organizations, top down architecture and centralization are to be found in the IMF and the World Bank Group. Based upon respective international agreements, operations are managed by bodies representing member states within the charter of the

⁶ See European Union law by Frank Emmert (ed.), Utrecht, Eleven Publ., 2010; Governing the European Union: policy instruments in a multi-level polity by Hussein Kassim et al. (eds.) in West European politics, Abingdon, Routledge, Vol. 33, no. 1 (2010).

⁷ Debra P. Steger, The Future of the WTO: The Case for Institutional Reform, 12 J. Int'l Econ. L. 803 (2009).

organizations concerned.⁸ Management is essentially based upon programmes and operational agreements entered with Members. The IMF and the World Bank Group essentially show no legislative and rule-making activities. Compared to trade regulation, the amount of rules is minimal and has not been able to adjust to changing fundamentals. The rules of the IMF were drafted on the basis of the gold standard.⁹ They have not been properly adjusted to floating exchange rates. The United States was not interested in disciplining the USD as the main reserve currency, and other countries were equally resistant to restrictions on domestic monetary and possibly fiscal policies. Top down architectures have thus been seen to have difficulties in adjusting to new challenges. The recent changes in membership voting rights have been difficult to achieve; it will be even more difficult to change the substantive rules of the Fund in the wake of the financial crisis.¹⁰ Policy changes are likely to occur within the existing legal framework, taking up initiatives adopted within the G-20.¹¹ Equally, the World Bank group has not developed a strong legal framework shaping its policies. They are subject to changing programmes and priorities largely defined in accordance with the changing perceptions of major donor countries and shareholders.¹²

C. Bottom up Architecture

Bottom up architecture and decentralization are to be found in the field of investment protection which continues to rely upon bilateral agreements and has not formally embraced multilateralism. There are more than 2700 bilateral investment protection agreements of diverging content.¹³ They are subject to dispute settlement and arbitration; most of them are open to multilateral arbitration procedures of the International Centre for Settlement of Investment Disputes (ICSID) within the World Bank. There has been, for many years, a lack of transparency as to the existence of these agreements and to arbitration awards. The system essentially

⁸ See Andreas F. Lowenfeld, *International Economic Law*, 2nd edition (Oxford University Press, 2008), at 610-622, 644 et seqq.

⁹ See Barry Eichengreen and Marc Flandreau (eds), *The Gold Standard in Theory and History*, 2nd ed. (London: Routledge, 1997); Andreas F. Lowenfeld, *The International Monetary System: A Look Back over Seven Decades*, 13(3) *Journal of International Economic Law* 2010, 575-597.

¹⁰ Ernst Baltensperger and Thomas Cottier, *The Role of International Law in Monetary Affairs*, 13(3) *Journal of International Economic Law* 2010, 911-939.

¹¹ G-20, Leader's Statement. The Pittsburgh Summit, September 2009, available at: http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf

¹² See for general overview Katherine Marshall, *The World Bank. From Reconstruction to Development to Equity* (Routledge, 2008).

¹³ For an overview of the latest figures characterizing the decentralized landscape of international investment rules, see: UNCTAD, *UNCTAD World Investment Report 2010: Investing in a Low-Carbon Economy* (New York and Geneva: UNCTAD, 2010), 81ff, http://www.unctad.org/en/docs/wir2010_en.pdf.

reflects classical arbitration, the fundamentals of which emerged during the 19th century and which was incorporated into post-World War II bilateral investment treaties (BITs).¹⁴

Bilateral and plurilateral trade agreements form another group of bottom up architecture. Preferences and obligations are accorded in a country-specific manner, taking into account the particularities of the trading partners. These agreements have been en vogue since the end of the cold war in 1989; the world has witnessed a substantial increase in preferential trade agreements during the past thirty years. Regional initiatives involving a number of countries equally belong to this group of agreements.¹⁵ Most prominent are the current efforts within the so called Transpacific Partnership (TPP) Agreement, between the US, Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam.¹⁶ While formally independent, these agreements are, however, subject to disciplines of WTO law. They need to comply with the requirements of either a free trade zone or a customs union. They therefore may also be considered to be part of an intermediate architecture, albeit the interface of WTO law and these agreements is not sufficiently developed. Many of the preferential trade agreements do not comply with these requirements and thus have an independent life of their own.¹⁷

D. Intermediate Architecture: The WTO in particular

The main fields of international economic relations operate on the basis of a multilateral framework and established principles, but allow for mutually agreed but individualized unilateral commitments of Members and partly for variable geometry among Members. The constitutions of the International Labour Organization (ILO),¹⁸ World Intellectual Property Organization (WIPO),¹⁹ Food and Agriculture Organization of the United Nations (FAO)²⁰ or

¹⁴ Among a significant body of relevant literature, the monograph by Rudolf Dolzer and Christoph Schreuer may provide a good overview. See: Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (New York: Oxford University Press, 2008).

¹⁵ Among a significant body of relevant literature, the recent handbook by Simon Lester and Bryan Mercurio may give insights on various aspects of the topic. See: Simon Lester and Bryan Mercurio, eds., *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge: Cambridge University Press, 2009).

¹⁶ The Office of the United States Trade Representative (USTR) gives timely updates on the progress of the TPP negotiations. See the webpage of the USTR, at: <http://www.ustr.gov/tpp>.

¹⁷ For insights into the WTO-related aspects of preferential trade agreements, the WTO Regional Trade Agreements Gateway provides relevant information, see: http://www.wto.org/english/tratop_e/region_e/region_e.htm.

¹⁸ Constitution of the International Labour Organization (ILO), available at <http://www.ilo.org/ilolex/english/iloconst.htm> (accessed 28 February 2011).

¹⁹ Convention establishing the World Intellectual Property Organization, available at http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html (accessed 28 February 2011).

²⁰ Constitution of the Food and Agriculture Organization of the United Nations, available at <http://www.fao.org/docrep/x5584e/x5584e0i.htm> (accessed 28 February 2011).

the WTO²¹ offer an open framework for negotiations and decision-making. Results are partly binding for all Members alike, and partly open to variable commitments. These organizations have shown extensive output in regulatory terms. The many conventions of the ILO,²² the WTO Agreements²³ (formerly General Agreement on Tariffs and Trade (GATT)) and instruments relating to intellectual property within WIPO²⁴ were all produced within a constitutional framework, leaving sufficient flexibility in terms, albeit options to choose may be limited, in particular in the WTO.

Some organizations, such as the Organization for Economic Co-operation and Development (OECD) and United Nations Conference on Trade and Development (UNCTAD), essentially operate as think tanks, supporting efforts made in other fora with research, education and advice. They have not produced much legislation of their own, and important efforts to do so have failed over time. The main contribution of these organizations consists in developing domestic and international policy options, or model agreements or legislation, which eventually find their way into the work of other international agreements and into domestic law. For example, the policy of special and differential treatment was essentially developed in UNCTAD, while new policies of tariffication of agricultural products, replacing quantitative restrictions, or policies for combating tax evasion and offering legal assistance were developed in the OECD. Some of these organizations are within the UN system. Some are outside. The WTO, formally outside the UN, is of particular importance in this context.

1. PROGRESSIVE LIBERALIZATION AND REGULATION

Industrial import tariffs at the end of World War II amounted on average to 40% of the value of the widget (ad valorem).²⁵ Additional distortions were caused by extensive imperial tariffs within European colonial systems. Tariffs were mainly set unilaterally, as any other tax, mostly to the advantage of domestic producers. Led by the United States, and based upon a set of bilateral agreements concluded since 1934, tariffs were made the subject of international negotiations following the end of World War II. Multilateral trade negotiations after 1947 were conducted within the framework of GATT – a provisional arrangement drawn from the failed International Trade Organization (planned as the 3rd pillar of Bretton Woods). The GATT – together with the substantive principles addressed below – offered a loose framework for international negotiations on tariffs and subsequently, also for rules and non-tariff measures, i.e. technical barriers to trade, subsidies and ant-dumping measures. Importantly, many commitments within this framework were individualized and retained in schedules of concessions for goods. These efforts resulted, after some fifty years, in an average of some 4% ad valorem

²¹ Agreement Establishing the World Trade Organization, available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf (accessed 28 February 2011).

²² Available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (accessed 28 February 2011).

²³ Available at http://www.wto.org/english/docs_e/legal_e/final_e.htm (accessed 28 February 2011).

²⁴ See <http://www.wipo.int/treaties/en/> (accessed 28 February 2011).

²⁵ See Thomas Cottier & Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland*, Cameron May & Staempfli Publ. London and Berne, 2005 at 74.

tariffs for industrialized goods.²⁶ Moreover, most tariffs today are bound tariffs, i.e. they cannot be readily increased without offering compensation to the main trading partners. The same approach also applies today to services under the General Agreement on Trade in Services (GATS Agreement). Members inscribe their commitments into an individual schedule of commitments, and define conditions of market access on the basis of bilateral or sectoral negotiations.²⁷ Sectoral negotiations are generally conducted once the main trading nations in the field are on board. Yet, it is important to emphasize that sometimes, key players only follow suit. Negotiations on financial services following the completion of the Uruguay Round were undertaken without the United States, which only joined when the EU succeeded in rallying a sufficient number of important countries to join the negotiating process. During 1995, and upon entry into force of the WTO Agreements, a number of WTO Members improved their offers on financial services. The United States felt that these offers were not sufficient and made commitments for existing operations only. It also took a broad most-favoured nation (MFN) exemption with regard to new entries and operations of all financial services. With a view to safeguarding existing offers, the EU took the lead and its efforts resulted in 1995 in the Interim Agreement on Financial Services. Parties agreed to maintain their offers until 2007 despite continued minimal offers by the US at the time. The existence of the interim agreement led to a policy change in the United States. It subsequently made a substantial offer in 1997 which was, however, conditioned upon other Members further improving their offers for market access. This offer triggered further improvements on the part of others interested in US market access, and an agreement was finally reached in December 2007.²⁸ The example shows that participation of all key players is not always necessary in order to make progress. If critical mass of participation in an effort can be built, the key player may eventually be convinced and become interested in joining the process. The WTO has largely retained the philosophy of progressive liberalization of international trade commensurate with commitments which do vary from country to country. However, WTO law also developed common rules and minimal standards in the field of non-tariff barriers. Members are obliged to comply with these rules in shaping and applying their domestic regulations. The most sophisticated minimal standards can be found today in the field of intellectual property rights with the so-called Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). This agreement amounts to a substantial limitation of national sovereignty in the field.²⁹ It is no coincidence that this comprehensive set of rules has triggered much more criticism from developing countries than the much more flexible disciplines on services in GATS.

²⁶ For a detailed study of each of the rounds, see Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO*, Cambridge University Press, 2001, Chapter II: "Tariff Conferences and Rounds of Multilateral Trade Negotiations", pp. 25-78.

²⁷ See WTO Secretariat, *Guide to GATS: An Overview of Issues for Further Liberalization of Trade in Services*, 2001.

²⁸ See Sydney J. Key, *Financial Services*, in: Patrick F.J. Macrory, Arthur E. Appleton, Michael Plummer eds. *The World Trade Organization: Legal Economic and Political Analysis*, vol. I, p. 955, 960-961 (Springer 2005).

²⁹ Thomas Cottier, *The TRIPS Agreement*, in: Patrick F.J. Macrory, Arthur E. Appleton, Michael Plummer eds. *The World Trade Organization: Legal Economic and Political Analysis*, Springer 2005.

Progressive liberalization, at the same time, is combined with the application of general principles, in particular a ban on quantitative restrictions and non-discrimination, to secure equal conditions of competition. Members are obliged to grant MFN treatment, i.e. they have an obligation to extend all privileges granted to any country to all Members alike. Members are obliged to grant national treatment, i.e. to treat imported goods no less favourably than domestic goods; in services this principle only applies to the extent a product is included in the list of concessions. Members are subject to transparency requirements. This architecture operating within a constitutional framework of a multilateral agreement and having a number of defined exceptions has produced a considerable number of additional agreements and instruments over the past 50 years. Operating within so-called trade rounds, the WTO was able to take up new challenges and to produce new legal instruments with a philosophy of progressive regulation. While these agreements were voluntary under GATT, most of them today are part of a mandatory package. They entail agreements specifically relating to the operation of tariff measures, such as on rules of origin and customs valuation. Most of them were developed to address non tariff barriers, such as subsidies, anti-dumping and technical barriers to trade. These instruments began to be gradually built following the Kennedy Round (1964–67), and were revised and improved in subsequent rounds of negotiations. In the Tokyo Round 1973–79) and the Uruguay Round (1986–93), the emphasis was clearly on improving existing agreements and adding a set of new agreements relating to new issues at the time, in particular food standards, intellectual property protection and the liberalization of services and of agriculture which thus far had largely benefited from extensive exemptions to GATT disciplines.³⁰ These agreements are subject to dispute settlement and international law enforcement and have been reasonably effective among competing nations on the world markets. They are currently subject to further revision in the ongoing Doha Development Agenda negotiations of the WTO. Thus based upon a framework within international organizations, additional instruments have emerged and are being revised and amended, while new agreements and instruments are added on to the multilateral system.

2. PACKAGE DEAL

The effort to transform the GATT into the WTO, which took effect in 1995, was mainly motivated by the need to bring about a comprehensive package of a great number of different and diverging instruments. To this effect, the WTO as an international organization was properly formed. The package essentially combined the results of negotiations in goods, and in the new areas of services and intellectual property. While developed countries had a keen interest in introducing enhanced intellectual property protection and market access in services, developing countries were mainly interested in progress in liberalization of trade in textiles and agricultural products. The combination of diverging interests which on their own would stand little chance of being accepted allowed the Uruguay Round negotiations to be successfully concluded.³¹

³⁰ See generally, Thomas Cottier & Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland*, Cameron May & Staempfli Publ. London and Berne, 2005, p 72-77, and passim.

³¹ See Robert Howse (2005), 'WTO Governance and the Doha Round', *Global Economy Journal*, Vol. 5, Issue 4, Article 16; Thomas Cottier (2009), 'Preparing for Structural Reform in the WTO', *Journal of International Economic Law*, Volume 10, Issue 3. pp. 497-50.

The package deal also was motivated by past experience. The model of variable geometry of the Tokyo Round Agreements left it to Members to decide whether they wanted to join the new agreements. Many developing countries chose to abstain. This not only resulted in complex legal constellations, but tended to increase the gap between developed and developing countries. While the former were subject to the pressures of continuous and substantial trade liberalization in various sectors, the latter continued to operate on the basis of existing regimes and privileges.

The package of the Uruguay Round deal does not comprise the totality of instruments under the WTO but has a few exceptions of so called plurilateral agreements. The multilateral Agreement on Government Procurement today is the most important example for which no general obligation to participate exists. All over the world, governments are important consumers of goods and services, and often are in a position to control contractual terms and to choose suppliers. The monopoly powers lend themselves to abuse and protectionism which, in return, reduces international trade and investment. The Agreement on Government Procurement therefore sets out tendering procedures and secures transparency. It obliges, as a general principle, governments to seek public tenders and honour the most efficient offer of goods and services. While the agreement clearly seeks to improve good governance and indirectly addresses corruption, most Members of the WTO chose to abstain from multilateral disciplines in the field. Horizontal efforts to develop general disciplines on government procurement within GATT law so far have failed. Yet, additional members may join the agreement eventually. Thus, China is currently considering membership of the Government Procurement Agreement. Plurilateral agreements therefore offer the potential to gradually enhance membership and commitments over time.

3. CRITICAL MASS AND GRADUATION

The current divergence between industrialized and developing countries within the WTO has given rise to the debate in trade diplomacy and academia – in particular in light of the stalling Doha Development Round – as to whether the system should return to voluntary membership to specialized agreements, or whether a package deal and single undertaking should be retained. Since the end of the Uruguay Round, geopolitical constellations have changed towards a multipolar world which renders comprehensive package deals more difficult, if not impossible to achieve. There is a strong view advocating a doctrine of critical mass and variable geometry operating on the basis of MFN.

Critical mass is meant to involve all countries which play a significant competitive role in the trade of a particular product, e.g. defined by trade shares. Provided that a sufficient number of economically important countries participate and offer market access, others may not need to commit, but will still reap all the benefits. Since rights and obligations are subject to MFN treatment, these countries are given a free ride as a result. However, since those countries not forming part of the critical mass do not effectively compete, free-riding does not amount to a distorting problem in reality. Only once a non-member starts competing in the field, will pressures to include its trade under the disciplines of the agreement increase. Moreover, members

are able to claim nullification and impairment of benefits and to bring so called non-violation complaints as discussed below.³²

Variable geometry³³ suggests returning to optional additional instruments under the overall umbrella of the WTO. Members would be free to join or abstain. A return to variable geometry in the WTO, however, also implies that the gap between those committed and those uncommitted, as discussed above, will increase as the latter group of countries is not forced to undertake appropriate adjustment of structures and is therefore likely to fall behind compared to those which are under such pressures from international commitments. Variable geometry exists in principle within the European Union. Groups of Member States are allowed to move ahead of others, but essentially depend upon consent to do so. The monetary Union of 16 Members out of 27 is the key example. Another one is the so-called Schengen/Dublin system which removes border controls among members and coordinates asylum policies. Not all EU Members are part of it. In particular, it does not apply in the UK and Ireland. Otherwise, and generally speaking, variable geometry has rarely been used as outsiders tend to block fast track avenues for others which risk leaving them behind. It is much more common to negotiate and seek compromise and an agreement which allows all Members to participate in the end. Taking critical mass and the shortcomings of variable geometry into account, the doctrine of graduation³⁴ is currently being developed. It entails a single undertaking,³⁵ but seeks to differentiate rights and obligations on the basis of defined economic factors and indicators. Countries passing defined thresholds would then reach a stage where new obligations will kick in and take effect. Economic criteria and indicators depend upon the context, but generally include GDP, world trade shares, dependence upon international trade and size of population, or levels of innovation. It is essentially a matter of addressing and measuring the level of competitiveness of a country as a whole as well as in specific sectors. Also, it would be possible to rely upon softer factors, such as the Human Development Index. Provisions based upon graduation exist in the agreement on subsidies, addressing the ban on export subsidies. Importantly, these factors and indicators need to be defined *ex ante* in negotiations. Once a Member reaches the threshold, obligations and rights take effect and may be enforced by way of dispute settlement.

³² This is provided for under Article XXIII of the GATT (1947), which states that “If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned.”

³³ This refers to the idea that every commitment is not binding on every country; rather the extent to which a particular commitment may be binding or not is country-specific.

³⁴ The term is defined by Cottier (2006) to denote the framing of rules in a manner that accounts for different levels of social and economic development as a matter inherent to the rule itself.

³⁵ A term, in trade negotiations, that requires participants to accept or reject the outcome of multiple negotiations in a single package, rather than selecting among them. This is the principle on which negotiations take place under the GATT/WTO.

Yet, these efforts are very much only just beginning and are often resisted by developing countries. Graduation, so far, has meant them losing privileges, e.g. when graduating from a least developed to a developing country. Incentives therefore need to be revisited, and it is a matter for current research³⁶ to define appropriate thresholds, economic indicators and incentive structures which are suitable for use in a particular constellation. For example, an agreement could provide that members graduating and thus assuming additional obligations also obtain additional rights relating to market access and investment protection. This could be linked to enhanced access to the labour market and education, knowledge transfer, or recognition of diplomas and professional qualifications. It would be combined with mutual recognition of product standards. Securing legal security amounts to one of the most important aspects. It is a matter of further refining the idea of rights obtained when joining the WTO. Much more work is needed on what in my view is a promising approach. The main challenge is to address the incentive problem under the principle of MFN which does not generally allow preferential treatment except for all Members of the WTO alike. Graduation is meant to replace Special and Differential Treatment³⁷ which essentially has been operating on granting exceptions and longer time frames for implementation under Part IV of GATT introduced in 1966 following the debate on a New International Economic Order (NIEO), but which has not been able to successfully and effectively address the needs of developing countries with the exception of the General System of Preferences³⁸ under the so-called Enabling Clause.³⁹ The Enabling Clause, adopted in 1979 in response to pressures from developing countries, allows industrialized countries to offer lower tariffs to developing countries without violating MFN. The determination and selection of tariff lines, however, is unilateral, conditional, and may be withdrawn at any time. The EU, for example, operates a comprehensive zero tariff scheme for least developed countries (“everything but arms”).⁴⁰ Developing countries have been benefiting from the scheme to the extent that MFN tariffs were substantial. With decreasing tariffs, these privileges wither away – which partly explains the resistance of developing countries against agreement to MFN based tariff reductions and their seeking multilateral commitments securing the benefits under the Enabling Clause. Privileges should no longer be withdrawn unilaterally but form part of overall binding trade concessions.

³⁶ Some suggestions have been provided in this area by Stevens (2002), Keck & Low (2004) and Cottier (2006).

³⁷ This is the term for the set of GATT provisions that exempt developing countries from the strict trade rules and disciplines that apply to the developed countries.

³⁸ The General System of Preferences was effectively established in 1971 through a ten-year waiver to the MFN clause of GATT Article I and allowed developed countries to accord more favourable treatment to products originating from developing countries.

³⁹ Formally termed as ‘Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.’

⁴⁰ This is the European "EBA Regulation" ("Everything But Arms"), Regulation (EC) 416/2001 adopted in February 2001, which grants duty-free access to imports of all products from least-developed countries (LDCs), except arms and ammunition, without any quantitative restrictions (with the exception of bananas, sugar and rice for a limited period).

4. TOP DOWN AND BOTTOM UP NEGOTIATIONS

Intermediate architectures largely vary in terms of how additional instruments are developed. In UN organizations, such as WIPO, the mode has often been top down with the secretariat offering extensive drafting for consideration by Members, leaving little room for proper negotiations and member driven inputs. The ILO shows the particular feature of tripartite negotiations where governments, employers and trade unions are all involved in the process. In WIPO, draft agreements were for a long time almost exclusively prepared by the Organization and its services. In GATT, the process has always been bottom up. It has been organized and undertaken in so-called trade rounds of which, so far, eight have been completed and the ninth (the Doha Development Agenda⁴¹) has been under way since 2001.

As a first step, GATT Members negotiated the scope and terms of a trade round in an essentially political process. Once agreed, the framework offered the basis for the establishment of a negotiating structure. That structure would partly overlap with the standard committee structure of the Organizations; partly it would create new ad hoc bodies for the purpose of the negotiations addressing new topics in particular. These modalities have allowed flexible responses to an agreed agenda for trade negotiations. Proposals would all come from Members. GATT earlier, and the WTO today, have been member driven, with the Secretariat assuming a supporting role. Upon discussion, negotiating proposals may find their way into bits and pieces of drafting based upon which final agreements would emerge. The bottom up process is a particular feature of multilateral trade negotiations. Its origin is in the bilateral tariff negotiations which were used during the first rounds of GATT. Parties to the Agreement would bilaterally negotiate tariff concessions with the prime supplier or with those countries having initial negotiating rights. It was only upon completion of these negotiations that results would be made subject to MFN treatment. Eventually, members moved into multilateral negotiations by focusing on formulas for tariff cuts, no longer negotiating line by line, or by engaging in sector specific initiatives on the basis of critical mass. The same process, moving bottom up from bilateral negotiations to sector specific multilateral negotiations, is also likely to evolve in the field of services which, today, are still operating on the basis of bilateral requests and offers. All these steps are taken on the basis of consensus, which is discussed below, working through small groups which eventually are extended to include all parties in a process of consultation and negotiations.

International economic law organizations are generally shaped as international organizations without supranational powers. Among the existing organizations, the European Union, the IMF and the World Bank may be considered to have supranational powers to the extent that they can take decisions affecting members and individuals against their own will and not requiring consent. Some organizations are difficult to classify. The WTO formally is an international organization, but is equipped to impose decisions on Members in judicial dispute settlement, and economic sanctions may be imposed upon a Member. At this stage, it is important to stress that these instruments evolved over time and are based upon the desire to contain unilateral blocking and retaliatory powers of large nations, in particular the EU and the US. The dispute settlement system, which will be discussed shortly, gradually evolved from a conciliatory to a legally binding system. Except for basic provisions, it was developed on a case by case basis, bottom up.

⁴¹ See http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (accessed 28 February 2011).

In conclusion, it is safe to say that international economic law has been most successful when operating within the constitutional framework of an international organization with shared principles and procedures, while leaving ample room for variable geometry in terms of commitments commensurate with levels of social and economic development. Clearly, bottom up approaches within constitutional structures have been more successful than top down approaches seeking to define uniform and one-size-fits-all solutions. Variable geometry has been used with mixed results. Current efforts in academia focus on critical mass, seeking to include all main players while granting benefits under MFN. Efforts equally focus on graduation, seeking to develop the threshold within single agreements based upon which rights and obligations are triggered commensurate with social and economic development and competitiveness achieved. The modus operandi within an international organization is more important than whether or not it is within or outside the UN system. Also, it is not relevant whether an organization is considered international or supranational. It is more important to look at the impact and effect of decisions and the possibility to adopt sanctions against a Member whose conduct is in violation of its obligations.

III. Participation and Membership

States operate international economic relations essentially on the basis of domestic law and international agreements. International organizations are adhered to in accordance with procedures set out in their respective constitutions. It is important to note that membership of some organizations is essentially free, while for others, commitment and concessions need to be made beyond payment of membership dues and participation in the life of the organization. Most organizations do not come with a cost, and membership is easily attained and attached to UN Membership. Some organizations, such as OECD, are limited to countries that have attained certain levels of social and economic development, and membership is decided upon by the existing member states of the organization.⁴² Exceptionally, membership requires in-depth negotiations. This is the case for membership of the Bretton Woods institutions, which require financial commitments and guarantees.⁴³ It is in particular the case for the WTO.

Accession to the WTO, and formerly to GATT, is based upon a lengthy process of accession negotiations. States or separate customs territories seeking membership obtain the status of observers.⁴⁴ The process of accession entails extensive examination of the trade and economic policies of the candidate. Questions and answers form the foundation of the multilateral negotiations of the Protocol of Accession.⁴⁵ Negotiations on tariff concessions and service com-

⁴² OECD (2011), OECD Enlargement, available at http://www.oecd.org/document/42/0,3746,en_2649_201185_38598698_1_1_1_1,00.html.

⁴³ Lastra, R.M., *Legal Foundations of International Monetary Stability*, Oxford, Oxford University Press, 2006, p. 317 et seqq.

⁴⁴ Williams, Peter John (2008), *A Handbook on Accession to the WTO*, WTO Secretariat Publication, Cambridge.

⁴⁵ The applicant has to submit a memorandum on its trade regime and supporting data. Following the circulation of the Memorandum, interested WTO Members are invited to submit questions in writing. Once Members are satisfied that the Memorandum and the replies to the questions provide an adequate

mitments take place bilaterally. The results of these negotiations are eventually inserted into the schedule of concessions of the candidate.⁴⁶ In 1947, the GATT started with 23 founding Members. Today, the WTO has 153 Members and some 30 countries are in the process of negotiating membership.⁴⁷ Within a few years, the WTO will be universal in scope. The accession of China in 2001 marks the most important change to the multilateral system in recent years. It has had a profound effect both in China and in the world economy. China was willing to forgo sovereignty in order to obtain safe and secure MFN treatment and market access abroad.⁴⁸ Competing economies were interested in developing and stabilizing foreign direct investment in China and in tapping into a large labour market. Accession to the WTO is subject to consensus which allows all Members to insist on their specific demands prior to agreement to membership. This gives important powers to existing members in defining the terms of acceding ones.⁴⁹ Thus, the protocol of accession of China contains a number of requirements reinforcing the rule of law which otherwise cannot be achieved.⁵⁰ Small countries are able to settle long-standing problems with large neighbours prior to consenting to mem-

factual basis to proceed with the examination of the applicant's trade regime, a Working Group will be established to carry out this task. See Williams (2008), pp. 34-38.

⁴⁶ Bilateral negotiations are held confidentially. However, the results of all bilateral negotiations must be 'multilateralized' according to the principle of MFN. Therefore, all the agreed minutes (containing the result of bilateral negotiations between the applicant and the interested WTO Member) are sent to the WTO Secretariat which will put the best results into the final draft schedule of concessions. On the one hand, concerning the goods part of the schedule, it is relatively easy to determine the best deal as this part contains figures. On the other hand, when it comes to the comparison of service commitments, it might not always be an easy task to determine the best results. Therefore, the draft of the schedule of concessions will again be circulated to Members for a final check and, if needed, for dealing with inconsistencies during the sessions of the Working Party. See Williams (2008), pp. 40-44.

⁴⁷ WTO (2011), Members and Observers, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

⁴⁸ Wang, Yaotian, and Wang, Guiquo (2005), *China in: The World Trade Organization: Legal, Economic and Political Analysis Vol. III* (Macrory P.F.J., Appleton A.E. and Plummer M.G. (eds), New York.

⁴⁹ This may even create a certain imbalance of rights and obligations between different WTO Members entailing the risk of rendering the process of accession more difficult for other applicants, Members that were asked to pay a high price for their accession could feel tempted to ask other applicants to pay an even higher price. See Holzer (2009).

⁵⁰ In the dispute on China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (WT/DS363/R; §7.281), the panel stated:

“The preamble to the Accession Protocol refers to the fact that these terms are the result of negotiations between the WTO and China. This being so, we must be mindful of the possibility that the Accession Protocol may impose obligations on China that are not imposed on other Members under the WTO-Agreement, or are stricter than those that are applicable to other Members”.

bership. For example, Russia's neighbours are making good use of this power prior to consenting to the impending membership of the newcomer.⁵¹

International economic organizations imposing costs of entry and agreed limitations in the exercise of national sovereignty and regulatory powers are more important in real terms than those without such costs. Importantly, entry costs and limitations of sovereignty do not deter countries from applying for membership. Costs to join do not prevent universal membership to an economic organization. It depends much more upon the advantages and rights countries may draw from membership. Joining and participating in the Bretton Woods institutions of the IMF and the World Bank offer monetary safety valves and access to credit and support which are considered to outweigh conditionalities imposed on using facilities and programmes. Signing on to international labour standards assists in stabilizing domestic labour relations, containing unfair labour practices abroad and enhances the international reputation of a country. Joining the WTO offers the prospects of stable market access abroad and of containing protectionist forces at home. These advantages are considered important and worthwhile when taking into account limitations to national sovereignty and self-determination.

IV. Decision making in International Economic Relations

Decision-making in the field of international economic relations shows the wide variety of different modes to be found in international law. It reaches from unilateral action to bilateral treaty-making, to multilateral negotiations and decision-making within international organizations and their bodies.⁵² The IMF and the World Bank operate on the principle of weighted voting based upon shares allocated to members,⁵³ while other organizations are based upon the principle of one-state-one-vote. The WTO is formally known as a system of one-state-one-vote with qualified majorities or unanimity being required in specific constellations. The practice of voting in international economic relations, however, is generally based upon consensus diplomacy instead of formal voting.⁵⁴ Decisions by consensus are taken if none of the Members present in the room objects. This does not require explicit support and affirmation; it is sufficient that a Member is able to live with a particular decision. Consensus diplomacy is backed up by formal voting structures which, in return, may influence the formation of con-

⁵¹ However, it should be noted that once almost all of the interested Members have come to terms with the applicant, a Member still negotiating bilaterally might feel an increasing pressure to conclude its negotiations quickly.

⁵² See Bob Reinalda, *Decision Making within International Organizations. An Overview of Approaches and Case Studies*, 2001, available at: <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/grenoble/ws12/reinalda.pdf>.

⁵³ See Dennis Leech and Robert Leech, *Voting Power in the Bretton Woods Institutions*, University of Warwick and Birkbeck, London University, CSGR Working Paper No 154/04, November 2004; Katherine Marshall, *The World Bank. From Reconstruction to Development to Equity* (Routledge, 2008).

⁵⁴ See Thomas Cottier and Satoko Takenoshita, Decision-making and the Balance of Powers in WTO Negotiations: Towards Supplementary Weighted Voting, in Stefan Griller (ed.), *At the Crossroads: The World Trading System and the Doha Round* (Springer, 2008), 181–229.

sensus.⁵⁵ Thus, consensus building in managing the IMF and the World Bank is informed by weighted voting and the blocking powers attached to it. This explains why reallocation of voting rights was difficult to achieve, albeit formal voting is rarely used.

Consensus diplomacy has a long history. It is rooted in the requirement for agreement which may be implicit (acquiescence) or explicit. The practice of consensus offers all countries alike the power to object and thus to control decisions without the need to explicitly endorse a particular decision. It is sufficient to be able to live with it. But most importantly, it establishes an informal setting for negotiating and influencing certain decisions, depending on the power of participating countries. In the WTO, developing countries amount to some 20 entities (counting the EU as a single unit) representing 50% of world trade. If voting were to take place on the basis of one-state-one-vote, real and formal powers would no longer match, and larger countries would be tempted to informally leave the multilateral framework. In reality, the consensus requirement, while generally considered to guarantee sovereign and equal rights, is essentially to the advantage of large countries as smaller nations cannot afford to block decisions as frequently as governments of large nations. Some are more equal than others. Consensus does not replace the impact of power.⁵⁶ The need for consensus reinforces the power of smaller countries in the early stages of negotiations, in particular in shaping a negotiating agenda. It supports them on conceptual issues. The further negotiations progress, the less consensus by all Members is relevant. Most Members of the WTO would like to object to one point or another of a draft agreement, in the process of adopting a new package deal. Yet, they refrain from doing so as they are not in a position to impose their own views, depend upon a functioning multilateral system more than others, and do not wish to jeopardize advantages obtained in other areas. It is fair to say that the conclusion of the current Doha Development Agenda requires the agreement and consensus of the six major trading nations, i.e. Brazil, China, the European Union, India, Japan and the United States. If agreed, consensus encompassing all 153 Members of the Organizations can be readily built and achieved.

Consensus has been successful in bringing about new agreements, in particular in the WTO compared to efforts in other organizations operating by open voting, such as WIPO. They reflect the art of diplomacy of gradually building agreement. It is normally built by starting with a proposal to which, in successive steps, other Members are exposed and their support sought. In order to do this, needs of the Members concerned are taken into account. Up until the Uruguay Round, the critical mass for consensus essentially entailed the United States and the European Union. Once basic agreement was achieved, it could be further expanded to all of the membership, with many or fewer additional modifications. The Agreement on Agriculture is a case in point. It was based, at the time, on the bilateral deal (Cairns agreement) be-

⁵⁵ See Claus-Dieter Ehlermann and Lothar Ehring, *Are WTO Decision-Making Procedures Adequate for Making, Revising, and Implementing Worldwide and 'Plurilateral' Rules?* in: Ernst-Ulrich Petersmann (ed), *Reforming the World Trading System. Legitimacy, Efficiency, and Democratic Governance* (Oxford University Press, 2005), at 500-515.

⁵⁶ See further on consensus in the WTO: Mary E. Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Martinus Nijhoff, 2006); Jaime Tijmes-Lhl, *Consensus and majority voting in the WTO*, 8(3) *World Trade Review* 2009, 417-437.

tween the US and the EU.⁵⁷ Other agreements were constructed step by step, building consensus on the basis of building blocks. The TRIPS Agreement is perhaps the most important example here. The Agreement comprehensively addresses mandatory standards on intellectual property protection, with which Members of the WTO must comply. Employing the different traditions and domestic standards of intellectual property in industrialized countries as building blocks, common and shared international minimal standards emerged. During the Uruguay Round of multilateral trade negotiations (1986–1993) at which this Agreement came about, basic consensus between the US and the EU was required as the starting point.⁵⁸ Today, these consensus building processes entail a larger group of key players who have to reach basic agreement before the extension of agreed building blocks to other Members can take place. They now also include Brazil, India and China and Japan.

The evolution towards a multipolar world renders consensus building more difficult, and this may be one of the reasons – among the substantive ones – why the Doha Development Agenda of the WTO is difficult to complete.⁵⁹ It has certainly contributed to the extensive delay of the negotiating agenda. Trade diplomacy continues to operate on the path of consensus and does not see any need for structural change. Whether or not the Doha Development Round can be completed essentially depends upon the consensus of major industrialized and emerging economies. In academia, the need for structural change is emphasized mainly as a result of the evolution of a multipolar world. The question has been raised of whether the WTO should not develop towards a system of weighted voting which could effectively back up consensus diplomacy. The idea behind the model allocating voting rights on the basis of a number of factors, including percentage of world trade, degree of dependence on foreign trade, size of population and GDP, is to avoid the blocking of decisions by a single Member alone.⁶⁰ In practice, these ideas are still largely ignored and refuted, as consensus is considered the most suitable modality for preserving sovereign rights of Members. At the same time, it is largely ignored that the power to block consensus is essentially limited to large powers and that extensive threat of, or use of, consensus blocking by developing countries has contributed to a shift towards preferential agreements incurring additional burdens which developing countries would not be likely to incur within the multilateral system. Smaller countries therefore pay a price. And least developed countries, not of interest for preferential agreements, are the main

⁵⁷ See on negotiations of the Agreement on Agriculture: John M. Breen, *Agriculture* in Terence P. Stewart (ed.), *The GATT Uruguay Round. A Negotiating History (1986-1992)*, Volume I (Kluwer, 1993), 125-255.

⁵⁸ See on negotiations of the TRIPS Agreement: Julie Chasen Ross and Jessica A. Wasserman, in Terence P. Stewart (ed.), *The GATT Uruguay Round. A Negotiating History (1986-1992)*, Volume II (Kluwer, 1993), 2241-2335; Thomas Cottier, *The Agreement on Trade-Related Aspects of Intellectual Property Rights*, in Patrick F.J. Macrory, Arthur E. Appleton, Michael G. Plummer at 1055-1056.

⁵⁹ Kent Jones, *The Doha Blues. Institutional Crisis and Reform in the WTO* (Oxford University Press, 2010); Euan MacMillan, *Doha Decision-Making: Implications of the Consensus and Single Undertaking Principles for Developing Countries*, Commonwealth, Issue 71, 2010.

⁶⁰ See in detail the proposals for reforms of the WTO decision-making process: Thomas Cottier and Satoru Takenoshita, *Decision-making and the Balance of Powers in WTO Negotiations: Towards Supplementary Weighted Voting*, in Stefan Griller (ed.), *At the Crossroads: The World Trading System and the Doha Round* (Springer, 2008), 181–229.

losers from extensive consensus based diplomacy in the WTO. They, therefore, are clearly disincentivized from blocking consensus and are generally interested in supporting multilateral solutions.

Decision-making in the ILO is of particular interest as it is operated on the basis of a trilateral model. Negotiations take place between government, employers and trade unions. The model has produced a considerable number of conventions and standards, including core labour standards, albeit without mandatory membership. ILO conventions are adhered to by Members on an individual basis. There are no package deals, and weak levels of enforcement and monitoring further encourage Members to ratify instruments at little cost. The effectiveness of ILO instruments thus depends heavily upon the status of such agreements in domestic law. In most countries, they require implementation and are thus subject to the constraints of the domestic political process. The main impact of the international system consists in providing the opportunity for dialogue and confidence building between government, employers and employees in a comparative international setting.

V. Dispute Settlement

International economic law generally shares the weakness of international law in terms of dispute resolution and enforcement of judicial decisions by international bodies. Bilateral agreements in the field of international economic relations traditionally have not provided for legal dispute settlement. The evolution of investment protection agreements since the 1960s has been a reaction to this lack. Investors were enabled to sue states directly in investor–state arbitration. The extensive Iran-United States Claims Tribunal⁶¹ is a pertinent example. As a result of the hostage crisis (1979–1981), the Iranian revolution and the taking of US property in the country, it was agreed to set up a Court of Arbitration in the Hague to address US claims of compensation against the Iranian Government. Extensive attachment of Iranian property in the United States brought about the leverage to settle these claims in court. Hundreds of judgments have been passed. The system of protection in investment law transgresses the principles of diplomatic protection and has brought about substantial involvement of the private sector. Yet it remains an exception. Normally, dispute settlement is limited to state to state constellations, and the private sector has no direct say in it, while playing an important role in instigating claims and international disputes. The North American Free Trade Agreement (NAFTA) pioneered dispute settlement in trilateral agreements,⁶² largely based upon the model of GATT.

Most international organizations are devoid of effective dispute settlement. This is true of the IMF, World Bank, WIPO, ILO and other UN organizations. While the International Court of Justice in law has jurisdiction, it is interesting to observe that hardly any cases have been

⁶¹ See <http://www.iusct.org/> (accessed 27 February 2011).

⁶² See <http://www.nafta-sec-alena.org/en/view.aspx?x=225> (accessed 27 February 2011).

brought in the fields of international economic law beyond investment protection (Barcelona Traction,⁶³ Elsi case⁶⁴).

Dispute settlement is most advanced in the WTO. Developed bottom up since the 1950s in the GATT, it gradually emerged as the legal instrument of dispute resolution codified and further developed by the 1995 Dispute Settlement Understanding of the WTO.⁶⁵ Members are obliged to respond to complaints brought against them in consultation and subsequent legal proceedings before a panel, and upon appeal, before the Appellate Body. Findings of a panel can be refuted to the effect that they are appealed on legal issues to the Appellate Body. The losing party can lodge an appeal to the Appellate Body on questions of law, but not on contentious factual issues. The winning party generally will defend the findings of the panel, but has the possibility to lodge a cross appeal, i.e. to challenge selective findings of the panel in its own right (cross appeals). The system does not allow a Member to reject a verdict of the Appellate Body submitted to the political Dispute Settlement Body which formally has to endorse the findings of panels and the Appellate Body, except if there is consensus to the contrary (reverse consensus) necessarily also applying to the winning party. No final finding has been rejected so far in the more than 350 disputes submitted to the system since 1995.

Members are obliged to implement the findings of the report, i.e. to withdraw measures or adjust the law. They are generally supposed to adjust legislation within 18 months. Members are allowed to offer compensation instead. Compensation is not pecuniary, but entails reductions of market access restrictions, normally lowering tariffs, in order to reestablish an overall balance of reciprocal trade concessions. Today, compensation in market access is not generally of interest to the specific sector affected as it does not bring about direct relief. Moreover, it does not entail compensation for past harm. Lack of implementation triggers proceedings to bring about the withdrawal of trade concessions on the part of the winning party. If disputed, the amount of concessions in dollar equivalents per annum is defined in arbitration. Members are not entitled to suspend concessions except if authorized in accordance with the rules of the WTO.

The WTO dispute settlement has evolved during the last 15 years as the most effective and efficient system of dispute resolution available in international law. It has a high rate of compliance. In most cases, governments are able and willing to comply with the rulings, sharing a common interest in avoiding further tensions and trade restrictions. Implementation has been difficult only in a few cases which were politically sensitive and inherently involved national parliaments. For example, the European Union persistently refused to implement the findings

⁶³ ICJ, Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) New Application 1962, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=bt2&case=50&k=1a> (accessed 27 February 2011).

⁶⁴ ICJ, Case Concerning, Elettronica Sicula, SpA (ELSI), (United States of America v. Italy), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=elsi&case=76&k=d8> (accessed 27 February 2011)

⁶⁵ Available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (accessed 27 February 2011)

of the *Hormones* case,⁶⁶ or the *GMO* case,⁶⁷ while the United States persistently failed to change its laws on anti-dumping (zeroing).⁶⁸ By and large, however, WTO rulings are being respected, albeit grudgingly, even by national legislators. Thus, the US Congress changed tax legislation following the ruling in *United States – Tax Treatment for “Foreign Sales Corporations”*,⁶⁹ and removed, albeit not to the full extent, subsidies (tax breaks) granted to US companies operating abroad. The United States furthermore changed policies relating to the importation of reformulated gasoline,⁷⁰ remedying violations of national treatment, and its policies relating to imposing use of turtle saving devices in the shrimp industry of other countries.⁷¹

The WTO dispute settlement system offers equal procedural rights to all Members alike. It has been mainly used by larger countries, as these countries also have at their disposal sufficient retaliatory power due to their market size. Smaller countries, if they win a case, do not have the possibility to impose effective sanctions which could support compliance by the losing party. Efforts to bring about collective sanctions allowing for coalitions of affected smaller countries have not been properly discussed so far. Also, the system has been limited to pro-future remedies: It does not offer the basis of financial compensation and damages. In practical terms, it allows countries to violate the law without substantive costs, and to simply abolish a measure once ruled inconsistent with international law. It normally takes, despite ambitious time frames, two to three years to fully adjudicate a case in the WTO. In the field of trade remedies, i.e. safeguard measures, countervailing duties to subsidies and antidumping, the lack of retroactivity undermines the effectiveness of the WTO.

⁶⁶ See WTO, WT/DS26/AB/R-WS/DS48/AB/R, 16 January 1998, Measures Concerning Meat and Meat Products (“Hormones”), Appellate Body, available at <http://www.worldtradelaw.net/> (accessed 4 March 2011).

⁶⁷ See WTO, WT/DS291/R-WT/DS292/R-WT/DS293/R, 29 September 2006, European Communities – Measures Affecting the Approval and Marketing of Biotech Products (“GMOs”), Panel, available at <http://www.worldtradelaw.net/> (accessed 4 March 2011).

⁶⁸ See WTO, WT/DS/294/AB/R, 18 April 2006, United States, Laws, Regulations and Methodology for Calculating Dumping Margins, (“Zeroing”), Appellate Body, available at <http://www.worldtradelaw.net/> (accessed 4 March 2011); WTO, WT/DS322/AB/R, 9 January 2007, United States – Measures Relating to Zeroing and Sunset Reviews, Appellate Body, available at <http://www.worldtradelaw.net/> (accessed 4 March 2011).

⁶⁹ See WTO, WT/DS108/R, 8 October 1999, United States – Tax Treatments for “Foreign Sale Corporations”, Panel, available at <http://www.worldtradelaw.net/> (accessed 4 March 2011).

⁷⁰ See WTO, WT/DS2/AB/R, 29 April 1996, United States – Standards for Reformulated and Conventional Gasoline (“Reformulated Gasoline”), Appellate Body, available at <http://www.worldtradelaw.net/> (accessed 4 March 2011).

⁷¹ See WTO, WT/DS/58/AB/R, 12 October 1998, United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body, available at <http://www.worldtradelaw.net/> (accessed 4 March 2011).

The success of WTO dispute settlement raises issues of the balance of powers between legislative and adjudicative functions in the process and life of the WTO. It has been argued that the stalling of negotiations and active recourse to dispute settlement produced an imbalance which should be remedied.⁷² On the one hand, it has been suggested that the role of dispute settlement be reduced and adjusted to the more modest role of law-making in negotiations and traditional perceptions of state sovereignty.⁷³ On the other hand, it is argued that reform of the negotiating process is required, including weighted voting, in order to bring about proper avenues for legislative response to case law and the judicial function of the WTO.⁷⁴ The latter view is closely related to the effort to strengthen the constitutional functions of international law and to provide a framework able to cope with the challenges of a globalizing and highly interdependent world economy.

In conclusion, the WTO model of dispute settlement, emerging bottom up and case by case before it was codified, offers an important model to consider in other areas of international economic law.

VI. Monitoring and Surveillance

A. *In general*

International economic law has a variety of mechanisms to monitor the implementation of obligations, short of dispute settlement. These mechanisms essentially consist of reporting requirements, which in turn are differently shaped in terms of process and participation of third parties and international organizations. Reporting requirements are not present in all of the organizations. Bilateral investment agreements do not contain reporting requirements. Reporting is limited to services offered by OECD and UNCTAD, mainly to the benefit of the information of private investors. WIPO does not require countries to regularly report on the evolution of IPRs, while reporting is the main and practically the sole tool to monitor implementation of labour standards.⁷⁵ The same is true for the OECD with its country based reports, and country specific reports in financial institutions.⁷⁶ Reporting obliges governments

⁷² Cottier, T. "DSU reform: Resolving underlying balance-of-power issues", in: Sacerdoti, G., Yanovich, A. and Bohanes, J. (eds.), *The WTO at Ten, The Contribution of the Dispute Settlement System*, Cambridge 2006, 259-265.

⁷³ Barfield Claude E., *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, Washington: AEI Press 2001.

⁷⁴ Cottier, Thomas. and Takenoshita, Satoko. "The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response" in: *Aussenwirtschaft*, Jg. 58 (2003), Heft II (Juni); Reprint in: Matsushita, M and Dukgeun, A. (eds.), *WTO and East Asia, New Perspectives*, London 2004, 51-89, Cottier Thomas (2007), *The Challenge of WTO Law: Collected Essays*, London: Cameron May, 217.

⁷⁵ See Hughes, Steve, and Haworth, Nigel (2011), *The International Labour Organisation (ILO): coming in from the cold*, NY: Routledge.

⁷⁶ See Pagani, Fabrizio (2002), *Peer Review : A Tool for Cooperation and Change : An Analysis of an ECD Working Method*, OECD: General Secretariat, Directorate for Legal Affairs, SG/LEG(2002)1.

to assess the state of play and to coordinate work among different departments, which is useful as a fact finding exercise in its own right. Obligations in WTO are discussed below. Reporting in economic institutions is generally reliable and backed by economic factors and analysis. It enhances domestic awareness of problems, and exposes countries to scrutiny within international organizations. It offers a basis for naming and shaming policies, exerting pressures to bring about changes in policy and law. It is an important part of learning processes.

B. Trade Policy Review Mechanism

Members of the WTO are obliged to submit periodically to a review of their trade policy under the Trade Policy Review Mechanism (TPRM). The four major trading powers (US, EU, China and Japan) are reviewed every two years (alternating with an interim report). The countries ranking 5 to 20 are reviewed every four years and other countries are subject to review every six years.⁷⁷ The Trade Policy Review Body (TPRB) bases its work on a report submitted by the Member under review and a report drawn up by the WTO Secretariat under its own responsibility.⁷⁸ Member governments actively participate in preparing the latter report, but findings are under the sole responsibility of the WTO Secretariat. Draft reports are discussed by the membership of the WTO in two sessions of the TPRB with a day in between.⁷⁹ Members may ask additional questions and seek further information.⁸⁰ The reports are important sources of information, transparency and consultation.

Experience, however, shows that the schedule and pace for Trade Policy Reviews adopted at the end of the Uruguay Round is overly ambitious. The requirement to report on the four main trading nations every two years runs the risk of deterioration and routine. The large number of parallel reporting activities required by the four and six year schedules run the risk of overburdening the Secretariat and the delegations. In fact, active participation of delegations and interest in following reporting and discussions can be observed only to exist with regard to major markets while others are essentially left on their own. It is evident that less would be more, and it would be beneficial to extend the time periods to be covered by these trade policy reviews.

It is difficult to assess the effectiveness of the TPRM at the present stage. There is no data available indicating to what extent governments take up, or fail to take up, problems identified

⁷⁷ Paragraph C (ii) of the TPRM (Annex 3 to the Marrakesh Agreement Establishing the WTO).

⁷⁸ Paragraph C (v) of the TPRM.

⁷⁹ Paragraphs 8 to 15 of the Rules of Procedure for Meetings of the Trade Policy Review Body (WTO Document WT/TPR/6/Rev.2).

⁸⁰ Paragraph 15 of the Rules of Procedure for Meetings of the Trade Policy Review Body reads: "Replies by the Member under review should be distributed in writing; advance questions submitted by the two-week deadline before the start of the TPRB review should be answered in writing by the Member under review by the start of the meeting. Questions posed subsequently should be answered, to the extent possible, before the start of the second session of the meeting. Questions left unanswered at the end of the second session should be answered in writing no later than one month after the meeting with some latitude in the Chair's discretion for Members reviewing a very large number of questions".

by the TPRM, and to what extent they respond to naming and shaming in the WTO. While the Member under investigation will not openly draw attention to legal inconsistencies and difficulties in trade policy, problems identified often will be internally addressed and offer an opportunity to remedy the situation without being exposed to dispute settlement.⁸¹

Outside the WTO, reporting has been most effective in the field of labour rights.⁸² The NAFTA side agreement on labour relations (North American Agreement on Labor Cooperation, NAALC) is essentially built upon reporting and consultation among government departments, with a view to triggering mutual advice and educational processes.⁸³ Instead of taking up adversarial dispute settlement, a matter is introduced for discussion and the effort made to bring about common progress in educational programmes and efforts including industries affected. The NAALC model shows interesting features which should be further studied in the context of climate change. Unlike dispute settlement, it avoids confrontation, but reinforces cooperation towards a common goal of realizing essential labour standards in all the countries participating. By 2009, more than fifty trilateral cooperation programmes on labour were being implemented among the Parties. They included conferences, seminars, and technical cooperation and focused on labour relations, occupational safety and health, workplace ethics and work development.⁸⁴ Judicial dispute resolution (based upon the WTO model) is limited to selected areas and includes child labour, minimum wage, and health and safety issues. For other issues, resolution is essentially limited to consultation mechanisms. These entail different stages, reaching from public submission to the national offices of labour, consultations, public reporting, ministerial consultation, evaluation in a committee of experts and discussion at ministerial level.⁸⁵

VII. Multilevel Governance

International economic law, in many respects, forms part of what today is increasingly called multilayered or multilevel governance.⁸⁶ The classical function of international economic law is to contain the nation state. The role of law is to prevent, or remedy, state failure, for exam-

⁸¹ See Chaisse, Julien and Chakraborty, Debashis (2007), "Implementing WTO Rules through Negotiations and Sanction: The Role of Trade Policy Review Mechanism and Dispute Settlement System" *Pennsylvania Journal of International Economic Law* 28:1.

⁸² See Hughes, Steve, and Haworth, Nigel (2011), *The International Labour Organization (ILO): coming in from the cold*, NY: Routledge.

⁸³ See Hufbauer, Gary Clyde, and Schott, Jeffrey J. (2005), *NAFTA revisited: Achievements and challenges*, The Institute for International Economics, Washington, DC.

⁸⁴ See USTR, "NAFTA at Eight", and "NAFTA at Ten", www.ustr.gov. See Kofi Addo, Core Labour Standards and International Trade: Lessons to be learnt from the Regional Context, PhD, University of Bern 2010, p. 181 (forthcoming).

⁸⁵ Id. p. 187.

⁸⁶ See generally, [Christian Joerges](#), [Ernst-Ulrich Petersmann](#), Constitutionalism, Multilevel Trade Governance and Social Regulation, Hart, 2006.

ple discrimination against foreign products which, in the domestic political process, is brought about in response to pressure of domestic lobbies and interests. International law assumes the function of representing those not sufficiently represented in the political process. In that respect, its role is comparable to that of human rights.

In this philosophy of containment or embedded liberalism, allocation of regulatory powers to appropriate levels is key. Important lessons can be learnt from trade and tariff negotiations. Taxation is normally a matter exclusively pertaining to domestic law. It is the epitome of national sovereignty.⁸⁷ Tariffs are the only area in taxation where rates are negotiated internationally. Prior to the GATT and WTO, tariffs were essentially set unilaterally or within bilateral agreements.⁸⁸ The shift to the multilateral level in setting tariff rates in negotiations subject to MFN completely changed the political economy of tariff policy. While previously, the matter was of importance to importers and domestic producers only, it became a prime interest to exporters too as negotiations equally addressed tariff rates abroad, defining market access rights. The overall reduction of tariff rates from approximately 40% to 4% on industrial goods during the past fifty years was possible due to this effect. It would never have happened if tariffs had continued to be defined unilaterally. The example and experience of tariffs can be extrapolated to other regulatory areas, in particular addressing non-tariff barriers and services. Common minimal standards are agreed to, taking into account limitations of national sovereignty, since the commitment equally translates into enhanced market access and legal security abroad. They lock in levels of liberalization achieved and thus assume a constitutional function. Domestic legislation needs to take these commitments into account and help to prevent outright protectionist policies, often supported by lobbies and majorities, from prevailing. These commitments are necessarily located at the level of international law. They inform, monitor and control domestic law, albeit the impact of international law is subject to constitutional law doctrines and greatly varies among countries.

VIII. Conclusions

A. *Summary Findings*

International economic law, as depicted in this paper, essentially deals with market access and conditions of competition on markets. Trade and investment law and policies, labour standards and monetary issues essentially serve the goals of reducing or eliminating discrimination favouring domestic producers and products, in protectionist terms detrimental to welfare and economic growth, while respecting legitimate policy goals, such as the protection of the environment. The main interest in engaging in commitments is based upon the pursuit of enhanced market access and the establishment of stable and fair conditions of competition for domestic operators, exporters and investors alike. In order to achieve these goals, concessions are taken into account at home. Ideally, free trade and the reduction of trade barriers is a matter of self-interest, but it is rarely undertaken without external pressure and the prospect of

⁸⁷ See generally, John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge University Press, 2006.

⁸⁸ See Thomas Cottier, *The Challenge of Regionalization and Preferential Relations in World Trade Law and Policy*, *European Foreign Affairs Review*, Vol 2 (1996), 149-167, Kluwer Law International.

achieving better conditions for exports abroad. International economic law is thus essentially informed by a mercantilist philosophy of reciprocity.⁸⁹ Legally, MFN obligations exclude policies of reciprocity within given commitments and are subject to a number of exceptions. Politically, however, the balance of concessions and commitments is an essential prerequisite to the process of negotiations. Package deals only materialize if such a balance is achieved among the major trading nations.

Experience in international economic law shows that bottom-up processes, consensus building with critical mass and package deals have been most successful in bringing about new legal disciplines in the field over time. Regimes operating within the constitutional framework of an international organization, leaving space for developments to occur step by step, offer better prospects of coherence than purely bilateral avenues. Dispute settlement mechanisms play an important role in verification and enforcement of rights and obligations. Reporting is often the only means of verification where formal dispute settlement is lacking. These qualities are best developed within the WTO. Ever since the GATT was established in 1947, international trade regulation has been able to pragmatically adjust to new challenges and to develop with a view to liberalizing trade and bringing about more equal conditions of competition for imported goods and services. The structure offers a framework for a long term process. Whether the system is able to successfully develop in a multipolar world is an open question, and challenges in decision-making need to be addressed in the coming years.

B. Possible Lessons

The fundamental constellation of reciprocal and mercantilist economic and trade policies raises the question to what extent lessons can be learnt from the field for environmental law and areas subject to global commons. Climate change mitigation essentially does not respond to the incentives of reciprocity. Commitments to reduce carbon emissions by one member automatically translate into an advantage to all countries alike. They do not imply incentives for reciprocal commitments. In practical terms, free-riding is abundant.⁹⁰

The question thus arises to what extent the fundamentals of international economic law can be applied to, and translated into, environmental law dealing with global commons. To what extent are policies and rules developed under philosophies of reciprocity, give-and-take, suitable for environmental law? To what extent can the experience of international economic law, in particular trade regulation inspire a future framework for climate change mitigation and adaptation?

The philosophy of the package deal, critical mass, gradual consensus building in concentric circles, graduation and open ended negotiations within a constitutional framework subject to dispute settlement designed to serve multilevel governance offers, in my view, the best

⁸⁹ See Thomas Cottier & Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland*, Cameron May & Staempfli Publ. London and Berne, 2005 p. 367-8.

⁹⁰ Roberts and Parks argue that diffuse reciprocity to support long-term cooperation with developing countries would aggressively support Southern interests within the international economic regimes, see: Bradley C. Parks and J. Timmons Roberts, *Climate Change, Social Theory and Justice in Theory, Culture and Society* 27:134 (2010).

chances, given the past record. Static, top down approaches seeking comprehensive regulation are more difficult to achieve, and where achieved face problems of implementation and verification. Reporting, naming and shaming are particularly important to the extent that effective legal dispute resolution cannot be reached at the end of the day. It is a matter of identifying those elements which need to be addressed globally, and those which should be left decentralized and open to different modes and avenues of implementation within national or regional governments. The experience of international economic law teaches us to address the problem in terms of multilevel governance, looking at the international, regional and national system in a comprehensive manner, yet abstaining from seeking unduly centralized top down solutions.

Whether or not the model of international trade regulation can be applied to climate change mitigation and adaption depends upon the possibility of linking common goods with particular interests of states. Climate and trade regulation share a common trait that in that they are about producing an important public good. The difference is that improving the global climate does not entail specific benefits to countries and thus incentives beyond climate change need to be created in order to attract commitments and participation in a global system aiming at stabilizing the climate in the coming decades. Incentives to participate need to be developed which show clear advantages comparable to those of market access, in terms of securing benefits and legal security. Participation in a global system of carbon mitigation therefore should be linked with benefits and advantages for those participating: such benefits can be found in financial contributions and transfer of technology both in climate change mitigation and adaption. The latter, in particular, is of key importance as low carbon emitting countries are disproportionately affected by climate change and exposed to the need for adaptation in agriculture, habitation and disaster relief. Importantly, there will be an obligation of members of the multilateral system to refrain from taking unilateral trade measures against members of the system in order to offset carbon-leakage. Potential recourse to unilateral trade measures by applying increased carbon tariffs and border tax adjustment and by taking recourse to trade remedies all offer interesting incentives to join a global system the prime goal of which is to protect global commons. Trade policy, in the final analysis, offers a powerful incentive to countries to join a multilateral framework addressing carbon emission reduction and taking concerted measures relating to climate adaptation. In return, members of the multilateral framework would abstain from taking measures restricting trade and market access for products which may otherwise not measure up to the adopted technical and environmental standards.

C. Beyond Trade and Environment

The philosophy of package deals, however, begs the question whether linkages of climate change mitigation and adaptation need not be extended beyond related environmental issues, supporting climate change adaptation and trade regulation. In identifying national interests which will trigger interest in joining a multilateral system addressing carbon reduction and offering support in climate change adaptation, linkages to further policy and regulatory fields should be explored. The main concern of all countries alike in addressing international commitments is competitiveness and the impact on social and economic development. These concerns need to be taken into account and translated into ways of addressing issues beyond trade and environment. They also include areas such as education, migration, competition and investment. The challenge of climate change is unprecedented, and no field of international law, including trade, offers a sufficiently broad and complex approach based upon which the matter can be successfully taken up.

D. Possible Ways Forward

The challenge of climate change requires rethinking the functional traditions of international law and organizations. Problems can no longer be solved by working in isolated spheres addressing narrowly defined specific issues in specialized agreements. It requires a new grand bargain for which a number of key issues need to be institutionally pooled. Climate change mitigation, adaptation, trade, investment, monetary affairs, competition, migration, education and related human rights may offer a sufficiently broad critical mass to be addressed in a package deal. It needs to be perceived as a global economic problem and thus one of international economic law and policy in a broad sense.

The main challenge therefore is how these different areas can be brought together to the extent necessary and then to work with a bottom up process in international negotiations. It is suggested that it would be best to separate climate change mitigation, adaptation and communication. While the former entails a relatively small group of countries which are the main emitters, climate change adaptation requires a broader forum as many more countries are affected. Finally, climate change communication is common to both and needs to be strengthened both in mitigation and adaptation.

1. MITIGATION

Consensus should be built in concentric circles, starting with discussions and negotiations among the main carbon emitting countries. A grouping comprising the largest emitting economies needs to be formed. It should be asked whether this effort is best undertaken within the G-20, or whether a special initiative should be formed. The group would be called upon to address problems of competition and potential distortions induced by climate change mitigation policies in domestic law and how this should be addressed in international relations and law. It will require the involvement of heads of state in order to secure appropriate policy coordination among different fields. It is a matter of finding appropriate avenues to reduce carbon emission without fundamentally affecting established competitive relationships in the world economy. Discussions need to define which principles call for common standards, and which elements and instruments should be left decentralized in line with the doctrine of multi-level governance. A mechanism to account for and recognize efforts undertaken in domestic law should be developed, irrespective of international commitments.⁹¹ The same is true for commitments made in bilateral agreements. These efforts could eventually be bound and scheduled within the multilateral system in a way comparable to tariff and service commitments in the WTO. A system of credits or bonuses could be developed which countries may invoke in addressing other policy areas where they are in need of third party commitments. Contributions to the global public good need to be recognized and made more visible.

⁹¹ For example, CH₄ emission constraints could be regulated independently of CO₂, see: Marcus C Sarofim, *Climate Policy Design: Interactions among Carbon Dioxide, Methane, and Urban Air Pollution Constraints* (Massachusetts Institute of Technology, Ph. D. Thesis, 2007); C A McAlpine et al., *More than CO₂: a broader paradigm for managing climate change and variability to avoid ecosystem collapse* in *Current Opinion in Environmental Sustainability*, 2, 334-6 (2010).

2. ADAPTATION

It should be recognized that the problems arising under climate change adaptation are of a different nature. They primarily affect developing countries, while mitigation is a matter of industrialized and emerging economies. Adaptation essentially entails measures of structural adjustment, agricultural and water policies, relief and migration. They entail addressing food shortages and pricing of commodities. They should be taken up in parallel, and linkages with climate change mitigation should be made only at a later stage. Thresholds relating to carbon emission need to be developed by which future support for climate change adaptation will be linked and made conditional upon participation in an international system committed to carbon reduction. Countries below the standard should be entitled to assistance in climate change adaptation. Countries beyond the threshold will be supported provided that they join the global system to abate future carbon emissions.

3. COMMUNICATION

Finally, it is important to develop strategies of climate change communication. Proper information of the public as to the challenges ahead is a prerequisite to generate sufficient domestic support and acceptance of measures. Human rights concerns thus go beyond the right to food and shelter, and also need to include freedom of information and of expression in countries around the world. Dissemination of educational programmes and support in schooling with a view to informing and educating the public will create the necessary conditions to bring long-term voluntary contributions to the global climate as a public good of mankind.

IX. Glossary / Index

Accession to the WTO: The Act of becoming a member of the WTO; signing on to its agreements. New members have to negotiate terms both bilaterally with individual WTO Members and multilaterally so as to convert the results of the bilateral negotiations so that they apply to all WTO Members, and on required legislation and institutional reforms that are needed to meet WTO obligations. Negotiations are limited to ensuring that the acceding member can meet its membership obligations.

Ad valorem tariff: A tariff rate charged as percentage of the price or value of the goods to be exported or imported.

Bilateral Agreements: An agreement between two countries setting out the conditions under which trade between them will be conducted. See also Bilateralism.

Bilateral Investment Treaties (BITS): A name given by many countries to their investment promotion and protection agreements. See also Bilateralism.

Bilateralism: A preference for conducting trade negotiations mainly through bilateral trade negotiations. Bilateralism assumes that results are more easily obtained if only two parties are involved, partly because economic and political pressure would be less diluted.

Bound Tariff: A tariff a WTO Member undertakes not to exceed; See also Tariff binding.

Concessions: The lowering of or removal of tariffs generally at the request of another WTO Member. See also Schedule of Concessions.

Consensus: The usual method for taking decisions in the WTO. It is provided for in Article IX of the Marrakesh Agreement Establishing the World Trade Organization as a practice adopted from GATT 1947. Consensus is reached if no member present at the meeting when the decision is being taken formally objects to the proposed decision.

Customs Union: An area consisting of two or more individual economies or customs territories which remove all tariffs or apply a common tariff between or among themselves (e.g. the European Union).

Developed Countries: Usually applied to the OECD member states, conveying economically and socially advanced countries. Sometimes developed countries are collectively referred to as the `North` because most of them are located in the northern hemisphere.

Developing Countries: An imprecise term based as much on economic and social foundations as on political perceptions and aspirations. The developing country status is mainly self-declared, no objective standards exist for it compared to the developed and least developed countries.

Doha Agenda: the sum of issues arising from the Doha Ministerial Conference in November 2001. Development issues are dominant in the Agenda, and developed countries have also committed themselves to assist developing countries in capacity building initiatives.

Doha Development Round: Also the Doha Ministerial Conference; the WTO ministerial Conference held in Doha, Qatar from 9 to 13 November 2001. It resulted in a new round of multilateral trade negotiations. It is referred to as the `Development Agenda` because development and capacity building issues are predominant in the negotiations.

Enabling Clause: Is one of the outcomes of the Tokyo Round of negotiations, it allows developed WTO Members to take action favouring developing countries without according the same treatment to other members. See also Tokyo Round.

Everything But Arms: A European Union initiative for duty free and quota free access to all products except arms originating from least developed countries. It took effect from 5 March 2001 for all products including sensitive ones like sugar, rice and bananas.

FAO: Food and Agriculture Organization, established in 1945 as a specialized United Nations Organization aimed at ensuring food security, raising level of nutrition and standards of living for member states.

FDI: Foreign Direct Investment, as defined by the International Monetary Fund (IMF), is the direct investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor`s purpose being to have an effective voice in the management of the enterprise.

Free Riding: A casual term used to imply that a country which does not make any trade concessions profits nonetheless from tariff cuts and other concessions made by other countries under the most-favoured-nation principle.

Free Trade Zone: Also known as Free Trade Area. Trade within the group is duty free but members set their own tariffs on imports from non-members (e.g. NAFTA which includes the United States, Canada and Mexico). The `zones` are defined areas called export processing zones normally near transport nodal points and designated by governments for duty-free import of raw materials or manufacturing components intended for further processing or final assembly and their re-export afterwards.

G-10: G7 plus Belgium, Netherlands, Sweden and Switzerland

G-20: The Group of Twenty (G-20) Finance Ministers and Central Bank Governors was established in 1999 to bring together systemically important industrialized and developing economies to discuss key issues in the global economy. The G-20 promotes open and constructive discussion between industrial and emerging-market countries on key issues related to global economic stability. Members include: Argentina, Australia, Brazil, Canada, China, European Union, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, Republic of Korea, Turkey, United Kingdom, and United States of America

G-7: Group of seven leading industrial countries: Canada, France, Germany, Italy, Japan, United Kingdom, and United States.

G-8: G7 plus Russia.

GATS Agreement: The WTO`s General Agreement on Trade in Services.

GATT disciplines: Rules provided for under the General Agreement on Tariffs and Trade governing trade in goods by member countries. GATT has been superseded as an international organization by the WTO. An updated General Agreement is now the WTO agreement governing trade in goods. GATT 1947, the official legal term for the old (pre-1994) version of the GATT; GATT 1994, the official legal term for the new version of the General Agreement, incorporated into the WTO, and including GATT 1947. The two main principles in the GATT are those of National treatment and Most-favoured-nation treatment; collectively referred to as the principle of non-discrimination.

Generalized System of Preferences (GSP): Programmes by developed countries granting preferential tariffs to imports from developing countries.

Graduation: Removal of tariff preferences accorded to developing countries under the GSP because a country has exceeded a certain level of per capita GDP. The doctrine of graduation, instead, seeks introducing differential treatment of developing countries on the basis of economic indicators within a given agreement, allowing to phase in rights and obligations.

ILO: International Labour Organization

Kennedy Round: The sixth round of the GATT negotiations held from 1963–1967.

Least Developed Countries (LDCs): Group of countries designated as such on the basis of per capita GNP, life expectancy at birth, per capita calorie supplies, combined primary and secondary education enrolment ratio, adult literacy rate, share of manufacturing GDP, share of employment in industry, per capita electricity consumption and their export concentration ratio.

Market Access: The extent to which a good or service can compete with locally made products in another market.

Members: WTO governments (first letter capitalized, in official WTO style).

Most-Favoured Nation treatment (MFN): The principle of not discriminating between one's trading partners. Provided for under GATT Article I, GATS Article II and TRIPS Article 4).

Multilateralism: An approach to the conduct of international trade based on cooperation, equal rights and obligations, non-discrimination and the participation as equals of many countries regardless of their size or shares of international trade.

NAALC: North American Agreement on Labor Cooperation.

NAFTA: North America Free Trade Agreement; Members include the United States of America, Canada and Mexico. See also Free Trade Area.

National Treatment (NT): The principle of giving others the same treatment as one's own nationals.

Non-tariff measures: Measures not involving tariff rates, such as quotas, import licensing systems, sanitary regulations, prohibitions, etc. Same as "non-tariff barriers".

Non-violation: A situation where a party to a multilateral trade agreement under the WTO acts according to the legal provisions of the agreement but still manages to nullify and impair the rights of another party through its actions.

Nullification and impairment: Damage to a country's benefits and expectations from its WTO membership through another country's change in its trade regime or failure to carry out its WTO obligations.

OECD: Organisation for Economic Co-operation and Development. Sometimes referred to as the `rich-country club`.

Package deal: See also single undertaking.

Preferential Trade Arrangements: Arrangements under which a party agrees either unilaterally or as a result of negotiations with one or more other parties to grant preferential treatment in trade in goods or services. The rules for establishing such arrangements are subject to reasonably precise WTO rules though developing countries have more flexibilities.

Protectionism: A climate of economic policy formulation which sees merit in preventing the exposure of domestic producers to the rigours of the international market.

Protocol of Accession: The instrument which sets out terms and conditions by which a country becomes a member of the WTO; See also Protocol and Accession.

Protocol: A treaty drafted to supplement another treaty and sharing the same legally binding quality. A protocol must be consistent with its parent treaty.

Protocols: Additional agreements attached to the GATS. The Second Protocol deals with the 1995 commitments on financial services. The Third Protocol deals with movement of natural persons. The Fourth Protocol deals with telecommunications, and the Fifth Protocol deals with financial services.

Quantitative Restrictions (QRs): Specific limits on the quantity or value of goods that can be imported (or exported) during a specific time period.

Reciprocity: The practice in the WTO by which governments extend similar concessions to each other. See also concessions.

Schedule of Concessions/Commitments: List of bound tariff rates negotiated under the WTO setting out the terms, conditions and qualifications under which goods may be imported. See also concessions.

Services Commitments: Commitments or concessions made in key economic activities such as telecommunications, banking, insurance, land and water transport, entertainment, aviation and education.

Single Undertaking: A guiding principle in the framework of multilateral trade negotiations. It refers to the requirement that WTO Members must join all the agreements administered by it.

Special and Differential Treatment (S&D, SDT): Special treatment given to developing countries in WTO agreements. Such treatment can include being granted longer periods to phase in obligations and more lenient obligations.

Tariff Binding: Commitment not to increase a rate of duty beyond an agreed level. Once a rate of duty is bound, it may not be raised without compensating the affected parties.

Tariff lines: A product as defined in lists of tariff rates. Products can be sub-divided, the level of detail reflected in the number of digits in the Harmonized System (HS) code used to identify the product.

Tariffication: Procedures relating to the agricultural market-access provision in which all non-tariff measures are converted into tariffs.

Tariffs: Customs duties on merchandise imports. Levied either on an ad valorem basis (percentage of value) or on a specific basis (e.g. US\$ 7 per 100 kg). Tariffs give price advantage to similar locally-produced goods and raise revenues for the government.

Tokyo Round: The seventh round of GATT negotiations which took place between 1973 and 1979.

Trade Policy Review Body (TPRB): The general council operating under special procedures for meetings to review trade policies and practices of individual WTO Members under the TPRM.

Trade Policy Review Mechanism (TPRM): A mechanism for review of WTO Members' trade policy and practices. The mechanism was established in 1988 and aimed at the smoother functioning of the multilateral trading system. See Trade Policy Review Body.

TRIPS Agreement: The Agreement on Trade-Related Aspects of Intellectual Property Rights.

UNCTAD: United Nations Conference on Trade and Development.

Unilateral Action: See Unilateralism.

Unilateralism: The action of lowering tariffs or removing other impediments to trade unilaterally without the expectation of reciprocal action by others.

Uruguay Round: Multilateral trade negotiations launched at Punta del Este, Uruguay in September 1986 and concluded in Geneva in December 1993, Signed by Ministers in Marrakesh, Morocco, in April 1994.

WIPO: World Intellectual Property Organization. The main intergovernmental organization responsible for the protection of intellectual property rights within its member states.

WTO Ministerial Conference: A conference composed of the representatives of all WTO Members at ministerial level which is to meet at least once every two years. The conference has the authority to take decisions on all matters under the WTO jurisdiction.

WTO: World Trade Organization. Established in 1995, successor to the GATT 1947. The intergovernmental organization responsible for international relations trade amongst its Members.

Zeroing: An investigating authority usually calculates the dumping margin by finding the average of the differences between the export prices and the home market prices of the product in question. When it chooses to disregard or put a value of zero on instances when the export price is higher than the home market price, the practice is called “zeroing”. Critics claim that this practice artificially inflates dumping margins.

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