



# MAIN FEATURES OF WORLD TRADE LAW

With special focus on the TBT Agreement

A guideline

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## Imprint

Published by:                   Physikalisch-Technische Bundesanstalt  
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Layout:                        Jenko Sternberg Design GmbH  
  (www.jenko-sternberg.de),  
  Physikalisch-Technische Bundesanstalt

As of:                         April 2011

English edition published in 2012

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## A. Introduction

In addition to the International Monetary Fund (IMF) and the World Bank, the World Trade Organization (WTO) is one of the central international organizations which act economically on a global scale. The WTO was founded in Uruguay in 1995 after seven years of negotiations. The WTO has its origins in the *General Agreement on Tariffs and Trade (GATT)* that had already become effective in 1947. Since GATT's creation in 1947, world trade has grown steadily and has thus become an important factor for increasing prosperity. The large number of members – currently 153 member states – proves the vitality and attractiveness of the world trading system.

This successful development started after the catastrophe of World War II. Along with the United Nations (UN), a new international economic order was to be established in order to avoid the serious economic mistakes of the interwar years. In 1930, the USA had raised their tariffs by 60 % by signing into law the Smoot-Hawley Tariff Act. Many other nations thereupon raised their tariffs which led to a severe breakdown in world trade. This resulted in the worst global economic crisis ever and paved the way for the rise of fascism in Europe. This is why protectionist measures to insulate national markets from competition should be avoided in the future.

This script is meant to give an overview of the main features of world trade law. We start with the description of the historical development of world trade, since this may be helpful in understanding current world trade. For this reason, we will outline the economic and political bases of world trade as well as the principles of international law, which also apply to world trade law. The script's special emphasis is put on the GATT regulations and the *Agreement on Technical Barriers to Trade (TBT)*. At the same time, we will consider the role of the developing countries and their standing within the international world trading system.

Ideally, the script should serve as a guideline for legal argumentation with national and international partners, including all levels of government.

## B. History of World Trade Law

### I. From Ancient Times to GATT 1947

Cross-border trade has been in existence since the formation of the first political entities in the early advanced civilizations of Asia and North Africa. In ancient times, it was mainly the maritime trade in the Mediterranean that became an important economic factor. First treaties dealing with the promotion and regulation of trade already existed back then. The first preserved trade agreement dates from 507 B.C. and was concluded between Rome and Carthage. Another treaty between Rome and Carthage already contained the principle of non-discrimination, which represents an essential element of today's world trade law. Regarding the sale of goods, Romans and Carthaginians were granted the same rights as the local citizens.<sup>1</sup>

In the Middle Ages contracts between princes and merchants served to organize cross-border trade. With the formation of the nation states in the 17th century and the upcoming policy of mercantilism, international trade was, for the first time, state-controlled. The aim of politics was to increase the national property through the promotion of exports and, by raising the costs for imports, through import tariffs. The colonization of the world by the European powers, which resulted in the political oppression of the colonies, and industrialization, which brought forth new transportation and communication technologies, were the decisive factors for the expansion of global trade in the 18th and 19th centuries.

World War I caused international economic relations to collapse. At the beginning of the 1920s, most states adopted a protectionist economic policy. Tariffs were raised throughout the world in order to protect the national economies. Consequently, international trade decreased considerably – also due to the lack of an organized coordination of economic policy. It was the catastrophe of World War II that reminded the global community of the necessity for reorientation. The idea to institutionalize international relations and international trade was globally supported. This idea was reflected in the conclusion of the GATT in 1947.<sup>2</sup>

### II. The Development of GATT and the Founding of the WTO

Originally, the GATT was considered to be only an interim solution until the establishment of an International Trade Organization (ITO). This establishment, however, finally failed in 1950. As a consequence, the GATT provided the sole framework for international trade policy for over half a century. Since the GATT was lacking an overall institutional structure and this was legitimately considered a serious deficit, negotiations were held in 1986 within the framework of the Uruguay Round. These negotiations resulted in the foundation of the WTO. The WTO Agreement entered into force on 1 January 1995 – with 72 members. It stopped the fragmentation of GATT's legal order. The relation between the legal order of GATT 1947 and the WTO Agreement cannot be easily defined by international law; in terms of function, the WTO can be defined as the successor to GATT 1947.

<sup>1</sup> Weiß/Herrmann, Welthandelsrecht, p. 39.

<sup>2</sup> Krajewski, Wirtschaftsvölkerrecht, p. 51.

For the first time ever, multilateral agreements related to the trade of services (GATS) and to the aspects of intellectual property protection (TRIPS) were reached as a result of the Uruguay Round. Also in terms of technical barriers to trade, new approaches were developed and governed by the TBT Agreement.

The world trade law continued to develop even after the establishment of the WTO. This was due to the fact that – even after the establishment of the WTO – there was the interest to remove barriers to trade, and that the members committed themselves to conduct further negotiations regarding unsettled aspects. To this day, negotiations and ministerial conferences take place – their aim is the further removal of barriers to trade.

## C. Economic Bases of World Trade

States allowing cross-border trade and doing business with other states usually strive for economic advantages. According to economic theory, free trade increases the prosperity of all participating countries. Foreign trade is carried on whenever goods are not available in one country, whenever there are special preferences for foreign goods, or whenever countries have different cost advantages. Different models and theories attempt to explain the existence of international trade flows from an economic point of view. Adam Smith still assumed that free trade would only be profitable in the presence of absolute cost advantages. The division of labour resulting from trade makes sense when one country is able to produce goods more cheaply. However, such a theory no longer serves to explain today's industrialized world trade. Nowadays, similar products are imported and exported. The assumption that trade could be profitable even without the existence of absolute cost advantages and that it mainly depends on scale economies and specific patterns of demand is the central argument of the ruling *New Trade Theory*.

Although most economic theories assume that free trade is carried out to the advantage of all nations involved, in reality, countries use protectionist instruments. These include, in particular, customs duties, tariff and non-tariff barriers to trade, such as quantitative restrictions, export subsidies or technical standards. But protectionism can only improve the welfare effects of a country's economy temporarily and under certain circumstances. Therefore, the primacy of free trade has to persist.<sup>3</sup>

## D. Political Bases of World Trade

The foreign trade of states does not only serve economic interests but is often used specifically to attain political aims. Kant had already attributed a peace-building impact to the trade between nations. Free trade can also serve to reward states for their political allegiance. On the other hand, the threat to cut off trade relations can be used as leverage. A trade embargo often represents a last resort to force certain behaviours before taking military action.

The political theories of world trade are based on the assumption that the international system, as is also the case with society, is in a state of anarchy. Whereas society ended the struggle of all against all through the formation of nation states, the international system is lacking such a disciplinary force. To a great extent, the modern world trading system is politically shaped by the ideas of neoliberal institutionalism. This theory is based on Wilson's *14-Points Programme for World Peace* dating from 1918. The theory's central ideas for a modern world trading system consist of non-discriminating free trade as an expression of liberal economic thought and the creation of an institutional framework which now exists thanks to WTO.<sup>4</sup>

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<sup>4</sup> Weiß/Herrmann, Welthandelsrecht, p. 18 et seq.

## E. Principles of International Law

The legal order of world trade law is determined to a great extent by its own legal principles and rules which refer to specific questions of international trade. Nevertheless, world trade law forms part of the international legal order and thus international law is applicable. This is explicitly determined by article 3.2 of the Dispute Settlement Understanding (DSU)<sup>5</sup> which states that the interpretation of the WTO law shall be in line with “the common rules of interpretation of international law”. The term “international law” refers to a supranational legal order which governs the relations between states on the basis of equality.

### I. Legal Sources of International Law

International treaties and agreements, customary international law and general principles of law are the legal sources of international law.

Contracts under international law are concluded and subsequently ratified by the legal entities involved. A difference exists with regard to bilateral contracts. These include trade agreements and multilateral agreements such as the Kyoto Protocol. The application of these treaties is a matter to be decided by the individual states as long as the principle *pacta sunt servanda* (agreements must be kept) remains intact. People’s right to self-determination, which is an essential basic concept of international law, requires the consent of the parliaments. Basically, standards of international law are directly applicable. At least this is the case if the treaty explicitly implies their direct application. If it does not, it is subject to interpretation as to whether the standards will be directly applied.

Customary international law is made up of elements of long-term exercise (several years) and the belief that this exercise is lawful (*opinion iuris*). Although laid down in writing, the international law of treaties has no priority over customary international law. If a state does not want to be bound by nascent customary international law, explicit objection has to be filed, and, as long as the other states cling to their conviction, the objection has to be repeated.

The general principles of law are composed of the totality of domestic legal orders based on common principles, i.e. principles that are immanent in any legal order, e.g. *pacta sunt servanda*, *lex specialis derogat legi generali* (a law governing a specific subject matter overrides a law which only governs general matters) or *lex posterior derogat legi priori* (the most recently enacted legal provisions prevail against those previously in place), *venire contra factum proprium* (no one may set himself in contradiction to his own previous conduct), and principles of legal logic.

## II. Rules of Interpretation

Since the trade agreements are treaties under international law, they have to be interpreted according to the general rules of interpretation of international law. These principles are governed by Articles 31-33 of the *Vienna Convention on the Law of Treaties (VCLT)* dating from 1969. As in other standard texts, the starting point for any contractual interpretation is the wording, i.e. the literal sense of the words. However, additional criteria are necessary. Such criteria are the historic will of the contracting parties, the systematic context and the purpose and scope of the whole contract, the teleological interpretation.

According to the Vienna Convention on Treaties, the crucial point for interpretation is the objective will of the party. VCLT, Article 31, paragraph 1 states:

*"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

In addition to the terms of the contract, including preamble and annexes, further agreements of the contracting parties have to be taken into account for interpretation. VCLT, Article 33, paragraph 3 defines that in the case of multilingual treaties, where two or more languages have been authenticated, each language version shall be considered an authentic text.

In the case of multilateral treaties, which are aimed at a long-term cooperation, the interpretation has to ensue in consideration of the common purpose of the treaty and its constant promotion (*effet utile*).<sup>6</sup>

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<sup>6</sup> More details: Herdegen, *Völkerrecht*, p. 122 et seq.

## F. The WTO Agreements

### I. WTO Bodies

The WTO, located in Geneva, provides the organizational framework for the creation and application of world trade law within and by its member states. The WTO has to be considered as an international organization in terms of international law. Its tasks are to review the trade policy of its members, to take over administrative and monitoring functions and to serve as a key vehicle for negotiations between governments. The WTO carries out its tasks through its own bodies. The top level decision-making body is the *Ministerial Conference* which is responsible for the basic key decisions (WTO Agreement, Article IV, paragraph 1). The ministers meet once every two years. A *General Council*, which meets monthly and consists of representatives of all member states, is set up between the meetings of the *Ministerial Conference* in order to perform their tasks and to take key decisions. The *General Council* also functions as *Dispute Settlement Body (DSB)*. At the next level, we find the specific councils dealing with the trade of goods, the trade of services and trade-relevant aspects of intellectual property.

### II. WTO Agreements

The WTO Agreement creates the legal basis for the WTO.<sup>7</sup> According to the WTO Agreement, Article II, paragraph 1, the WTO forms the common institutional framework for the trade relations between its members, but only with regard to the agreements listed in annexes 1-4 of the Agreement. These trade agreements have to be divided into Multilateral Trade Agreements (annexes 1-3) and Plurilateral Trade Agreements (annex 4). As integral part of the WTO Agreement, the Multilateral Trade Agreements are legally binding for all WTO members, whereas the Plurilateral Agreements do not establish any rights or obligations for those members who have not agreed.

GATT 1994 (which incorporates GATT 1947) as well as the *Agreement on Technical Barriers to Trade (TBT Agreement)* are included in the Multilateral Agreements on Trade.

## G. Main Features of GATT

### I. Objectives

The *General Agreement on Tariffs and Trade (GATT)* 1994 is the most important legal source of world trade law. The GATT of 1947 as well as all legal sources agreed to before the date of entry into force of the WTO Agreement were included in GATT 1994. GATT pursues several goals that are explicitly mentioned, as for example: increasing the standard of living, realising full employment, increasing the real incomes and the effective demand as well as increasing production. The complete development and utilization of global natural resources and the increase of the exchange of goods are mentioned as external economic goals. As extensively described in GATT 1947, Article XXXVI, particular attention was given to the developing countries. The establishment of legal certainty, e.g. by duty of information and transparency or dispute settlement, remains a functional goal.

### II. GATT Principles

Non-discrimination and reciprocity are important fundamental principles of GATT. Moreover, GATT aims at reducing customs tariffs and non-tariff barriers to trade. Further principles are the principle of solidarity and the principles of liberalization and transparency. However, these principles are not strictly adhered to in practical usage and, in some respects, are subject to exceptions and restrictions. Subsequently, you will find a description of these basic principles and their exceptions since they are of particular importance to international trade law.

#### 1. Principle of non-discrimination

The principle of non-discrimination includes the most-favoured-nation principle and equal national treatment. The non-discrimination principle shall prevent protectionist measures and guarantee the freedom of trade among the member states. Like products serve as a reference point: concept of "likeness". However, a definition of "like products" is not provided. In any case, it is not possible to give a general and precise definition and it most likely depends on the specific details of the situation. As seen from this perspective, the crucial point is whether the goods are in competition with each other due to their characteristics and quality, are meant for an identical consumer, or whether they are exchangeable.<sup>8</sup>

##### a. Most-favoured-nation principle

According to the most-favoured-nation principle, any trade and financial advantages granted by one contracting party to another have to be granted to all member states, immediately and unconditionally (i.e. without asking for reciprocity). This means that customs tariffs or other fees charged by one country for the import or export of like products have to be identical for all contracting parties.

##### b. Principle of National Treatment:

The Principle of National Treatment states that foreign imported and locally-produced goods should be treated equally. Again, "like goods" serve as a reference point. This principle shall guarantee national compliance with the non-discrimination rule in foreign trade.

<sup>8</sup> Weiß/Herrmann, Welthandelsrecht, p. 163.

### **c. The Principle of non-discrimination with regard to quantitative restrictions**

Quantitative restrictions are, as a matter of principle, prohibited. Insofar as they are authorized, they must not be applied in a discriminatory way.

### **2. Principle of Reciprocity**

The principle of reciprocity states that a country which takes new steps towards liberalization is in turn granted equivalent privileges by the other WTO member states. Thus, the negotiations have to be conducted according to the principle of reciprocity.

### **3. Principles of Liberalization and Transparency**

Customs tariffs are not prohibited, but they have to be transparent and shall be removed by way of multilateral negotiations. The customs tariffs of the individual countries are listed. Afterwards, they cannot be raised unilaterally. The customs tariffs on industrial products by the EU, for example, are the lowest in the world and were largely removed by 2004.

## **III. Exceptions to the Principles**

Even though the principles are clearly laid down and declared as legally binding, GATT explicitly allows exceptions.

There are, for example, exceptions with regard to customs unions or free-trade zones. According to the most-favoured-nation principle, a customs union like the EC would normally be exempt. In this case, an exception to the principle is made.

Another exception is made in favour of the developing countries. The contracting parties shall omit the principle of reciprocity when negotiating with developing countries. This complies with the principle of solidarity which states that the economic interests of developing countries have to be taken into account. The *Enabling Clause* generally permits its members to grant trade preferences to developing countries. These trade preferences have to be granted to all developing countries which are similarly situated.

A catalogue of further exceptions is listed in GATT, Article XX lit- a-j. The contracting parties are allowed, inter alia, to implement measures to protect human, animal and plant life and health, provided that these measures do not constitute an arbitrary means of discrimination or a disguised restriction on international trade.

## H. The Agreement on Technical Barriers to Trade (TBT)

### I. Overview

The TBT Agreement is an integral part of the WTO Agreement and therefore legally binding on all WTO members. Like the WTO Agreement, it entered into force on 1 January 1995. It also applies to technical regulations and standards enacted before its entry into force.

Up to now, the TBT Agreement was only twice the subject of litigation before the Appellate Body, WTO's supreme dispute settlement body.<sup>9</sup> But the only case in which legal discussions regarding the TBT Agreement were held was the dispute between Peru and the EC, the so-called "Sardines case". Since there is no established practice regarding the legal treatment of this Agreement, it remains subject to interpretation to obtain legally clarifying findings. The TBT Agreement has frequently been the subject of disputes between its members. But these disputes were settled either by mutual consent or by the *Panel* which represents the first level of jurisdiction of the dispute settlement procedure. However, these settlements did not provide legal explanations with regard to the TBT Agreement. But legal interpretations cannot be deduced from the mere fact of a rapid agreement. The interpretation has to be in accordance with the rules of interpretation of common international law (see Chapter E). It is therefore significant for the interpretation to grant the best possible effectiveness aimed at by legislature (*effet utile*).<sup>10</sup>

### II. Application Area

The TBT Agreement is applicable to all technical regulations, standards and conformity assessment procedures for all kinds of goods, including industrial and agricultural products. Sanitary and phytosanitary measures, which are regulated by a separate agreement, are excluded. The TBT Agreement is also not applicable to product-related regulations laid down by governmental bodies within the framework of public procurement.

The key terms are defined under Annex 1 of the TBT Agreement.

According to this definition, *Technical Regulations* are binding rules regarding the characteristics of a product or the corresponding processes and production methods, insofar as they are reflected in the product.

Definitions regarding the terminology, graphic symbols or packaging, marking and labelling requirements of a product, a process or a production method are exemplified by the list under Annex 1, No.1. In the "Sardines case"<sup>11</sup> this definition was specified, explaining that a measure as a whole has to be regarded as a technical regulation if it defines the characteristics of a product and if the compliance with this regulation is binding in order to market the product in that specific WTO member state. It does not matter whether the definitions are positive or negative. A regulation that, for example, allows the use of a specific commercial designation only under certain preconditions also counts as a technical regulation – because, at the same time, it excludes products that do not fulfil the requirements from using this commercial designation. Even a complete import ban on products can count as a technical regulation.<sup>12</sup>

<sup>9</sup> See chapter J for more details regarding the dispute settlement procedures.

<sup>10</sup> Prieß/Berrisch, WTO-Handbuch, p. 283.

<sup>11</sup> Appellate Body, WT/DS231/AB/R, EC-Trade Description of Sardines.

<sup>12</sup> Weiß/Herrmann, Welthandelsrecht, p. 220.

In contrast to technical regulations, *technical standards* are not legally binding. They have to be regarded as specifications and do not have a mandatory status.

According to legal definition, a conformity assessment procedure is “any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled”.

### III. Substantive Provisions of the TBT Agreement

According to the preamble of the agreement, no country should be prevented from taking the necessary measures in order to protect human, animal or plant life as well as the environment, or to prevent deceptive practices. However, these practices shall not represent unnecessary barriers to trade. There is a special focus on the development of international systems since they can contribute to the promotion of trade and technology transfer in the developing countries. With regard to content, the TBT Agreement intends to achieve these aims by establishing certain principles.

#### 1. Principles and obligations regarding technical regulations

Article 2 is the central provision of the TBT Agreement<sup>13</sup>. Just like GATT, the TBT Agreement defines the most-favoured-nation principle and the principle of national treatment, but in this case with regard to technical regulations. Consequently, any kind of less favourable treatment or measure might constitute a breach. As in the case of GATT, “like products” serve as a link.

Article 2.2 explicitly clarifies that technical regulations must not create unnecessary obstacles to international trade. Technical regulations shall not be more trade-restrictive than necessary in order to achieve the intended protection goal. According to Article 2.2. such goals are, amongst others, national security requirements, the prevention of deceptive practices, the protection of human health and safety, the protection of animal or plant life and health, or the protection of the environment.

The TBT Agreement means to promote international harmonization. Therefore, Article 2.4 provides that the members have to use existing international standards or those with imminent completion as a basis for their technical regulations. In the “Sardines case”, the responsible dispute settlement body deduced from Article 2.4 that the WTO members are obliged to continuously adapt their technical regulations to changing international standards. According to Article 2.6, members are obliged, within the limits of their possibilities, to collaborate in international standardization organizations when having adopted or planning to adopt technical regulations for the respective products. This regulation is necessary to avoid unequal treatment of industrial and developing countries, since the industrial countries have long had technical regulations at their disposal, whereas the developing countries still have to elaborate technical regulations in many areas.<sup>15</sup> A deviation from international standards is only permitted when such international standards would be ineffective or inappropriate in order to fulfil the legitimate objectives, e.g. due to fundamental climatic or geographical factors or fundamental technological problems (Article 2.4).

In the “Sardines case” between Peru and the EC, which has already been mentioned several times, the definition of Article 2.4 was a central issue. The placing on the market of certain kinds of fish labelled as “sardines” had been prohibited by the EC for fear of misleading the consumers, although the labelling would have been possible according to international standards, provided the origin of the product was indicated. The Appellate Body, i.e. the board which had to decide the appeal, considered

<sup>13</sup> All articles not described in full are those of the TBT Agreement.

<sup>14</sup> More details in chapter G II.

<sup>15</sup> Weiß/Hermann, Welthandelsrecht, p. 232.

the measure to be a violation of Article 2. The EU measure might influence the determination of the product and, therefore, would have to be regarded as a technical regulation deviating from the international standards without sufficient justification. The international standard would not be unsuitable to protect the consumers from being misled. The TBT Agreements would not encompass consumer protection as a legitimate objective.<sup>16</sup>

In favour of measures which serve the objectives explicitly mentioned in Article 2.2 and which are in accordance with the corresponding international standards, Article 2.5 grants the rebuttable presumption that they do not represent an unnecessary obstacle to international trade.

Article 2.7 requires members to give positive consideration to accepting technical regulations of other members as being equivalent. Nevertheless, an obligation for recognition cannot be deduced, even if the exporting country proves the equivalence. This is one of the reasons why, for example, the EU and the USA have signed comprehensive agreements on the recognition of the equivalence of technical regulations in certain areas.

Article 2.9 defines extensive disclosure requirements and notification obligations for technical regulations whenever there are no corresponding international standards or if the content of the technical regulation significantly differs from that of the international standards and if it has a significant effect on trade with other members. An exception to this is made in Article 2.10 – in case urgent problems of safety, health, environmental protection or national security should arise, the obligation for disclosure and notification can be ignored.

A general obligation for the publication of all technical regulations is provided in Article 2.11. Furthermore, a reasonable period of time must be given between the publication of technical regulations and their entry into force in order to allow manufacturers in other countries time to adapt their production.

If technical regulations have been worked out, accepted and applied by local governmental or administrative or non-governmental bodies, the members are obliged to take adequate measures to ensure the compliance with the provisions of Article 2.2.

Article 3.5 explicitly provides that the members are responsible for complying with Article 2.

The TBT Agreement, too, is subject to the dispute settlement proceeding according to the *Dispute Settlement Understanding (DSU)*.<sup>17</sup>

## **2. Obligations regarding standards and conformity assessment procedures**

Article 4 prescribes the member's obligations regarding standards, i.e. regarding non-binding characteristics of production. According to Article 4, the members must ensure that their central government standardizing bodies accept and comply with the code of good practice for the development, adoption and application of standards. The code of good practice forms part of the TBT Agreement and is laid down in Annex 3.

<sup>16</sup> Appellate Body, WT/DS231/AB/R, EC-Trade Description of Sardines. On this matter: Weiß/Herrmann, *Welthandelsrecht*, p. 74.

<sup>17</sup> On this matter see chapter J.

Article 5 contains provisions regarding conformity assessment procedures which are similar to those in Article 2. Here too, the most-favoured-nation principle and the principle of equal treatment, as well as the prohibition of unnecessary obstacles to international trade are explicitly set forth. Articles 6-8 contain detailed provisions regarding the recognition of conformity assessment procedures by central government bodies and by local and non-local bodies. Article 9 commits its members to elaborate and adopt international systems for conformity assessment.

### **3. Limitations of these obligations**

The TBT Agreement –just like international trade law– takes into consideration the specific requirements of the developing countries and therefore states exceptions to the obligations of the TBT Agreement.

#### **a. The specific situation of developing countries**

Due to their specific economic situation and their restricted administrative resources, the developing countries are given special treatment by the WTO. They are entitled to certain benefits and may deviate from various obligations. The preamble of the WTO Agreement already states that developing countries shall be promoted. They shall be able to secure a share in the growth of world trade which meets the needs of their economic development. The special treatment of developing countries is necessary since the principles of world trade law – especially the most-favoured-nation principle and the principle of equal treatment – can only be fair when applied to comparably developed economies. For development purposes, the developing countries shall be granted, for example, a preferential customs regime which conflicts, of course, with the most-favoured-nation principle.<sup>18</sup>

Classification as a developing country according to WTO is not clearly defined. GATT itself offers an approach by saying that developing countries are countries with a usually low standard of living and which are at an early stage of development. Otherwise it is up to the WTO member state whether it regards itself as a developing country. However, in this context the question is at which stage does a country lose its status as a developing country and, as a result then has to follow the general rules. There is no unanimous reply and, therefore, the only way to solve this problem is to interpret each case individually. Here, an economic approach is helpful. In economics and when compared on an international level, a country is considered as not developed when there is an unusual high proportion of absolute poverty and a relative poverty of the average population. Absolute poverty exists when fundamental basic needs cannot be adequately met. Criteria here include diseases, a low life expectancy, a high rate of infant mortality, a low literacy rate and a high level of unemployment. The developing countries do not form a homogenous group. But with regard to their economic situation, a commonly shared characteristic is the juxtaposition of traditional products with labour-intensive and inefficient methods and a modern industrial sector. Currently, about two thirds of the WTO member states are developing countries.

#### **b. Provisions of the TBT Agreement**

Article 11 obliges all WTO members, if requested by other members and especially by the developing countries, to provide advice and assistance for the implementation of the TBT Agreement.

Article 12 contains essential provisions which shall serve to take into consideration the specific situation of developing countries within the context of the Agreement. Article 12.1 states that the members shall grant the developing countries a differential and favourable treatment. Members are obliged by Article 12.3 to take account of the special development, financial and trade needs of the developing countries when preparing and applying technical regulations, standards and conformity assessment procedures. This intends to ensure that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles for the exports from developing countries.

According to Article 12.4, the members shall recognize that developing countries cannot be expected to adopt international standards as a basis for their technical regulations or standards, including test methods, which do not meet their development, financial and trade needs. Moreover, the members have to grant technical support to the developing countries.

Article 12.8 forces the members to recognize that developing countries may face special problems when preparing technical regulations and that their special situation may hinder developing countries from completely fulfilling their obligations under this agreement (especially with regard to Article 2).

In conclusion, it can be said that Article 12 represents a limitation of the basic obligation to maintain international standards which is defined in Article 2.4. Where the conditions of Article 12 are met and, in case of doubt, can be proved, the developing countries can obtain an exemption and thus deviate from international standards with regard to their technical regulations and within their own territory. Of course this does not apply to the technical regulations which form the basis for trade with other countries. Here, the compliance with international standards must be guaranteed.

#### IV. The Relationship between the TBT Agreement and the GATT

The TBT Agreement constitutes an independent commitment of all WTO member states. Conflicts between the GATT and the TBT Agreement have to be decided in favour of the latter. However, GATT remains applicable alongside the TBT Agreement and therefore, technical regulations, etc., also have to meet the requirements of GATT. However, it is rather unlikely that a technical regulation would overcome all obstacles of the TBT Agreement while violating a provision of GATT.<sup>19</sup>

<sup>19</sup> Weiß/Herrmann, Welthandelsrecht, p. 236.

# I. Protection Measures of World Trade

## I. Anti-Dumping Regulations

The adoption of GATT 1947 already identified – besides the general principles of freedom – the need to create common rules for the protection against distortions of competition by dumping. The accusation of dumping implies the existence of unfair predatory pricing for imported third country goods. Hence, dumping describes the practice of exporting a product below the price charged in its home market. In this case, affected countries may take defensive measures. These measures consist in increasing the price of imports by imposing customs duties in order to compensate for the unfair competitive advantage. GATT Article IV explicitly allows the WTO members to take action against dumping; otherwise anti-dumping measures would constitute an infringement of the prohibition to levy additional tariffs and the principle of non-discrimination between the trade partners. However, these measures can only be applied under the following conditions:

1. The product is sold at an export price that is lower than its normal value, i.e. at a price lower than the comparable price of the like product in its country of origin.
2. The dumped imports seriously injure the corresponding economic sector in the importing country or are threatening to do so.
3. A causal link between the dumped imports and the serious injuries of the economic sector can be clearly established.

The WTO Anti-Dumping Agreement regulates in detail how to determine the dumping and the injury. The regulations of this Agreement need to be strictly followed since the anti-dumping instrument must not be misused for protectionist purposes.

## II. Anti-Subsidy Regulations

The same is true for the anti-subsidy regulations. Third-country subsidies might result in prices for import goods that could hurt the respective economic sector. It is therefore perfectly legitimate to adopt preventive measures, allowing the member states to impose countervailing duties. Again, a precondition for preventive measures is the existence of a subsidy and the fact that this subsidy is the cause of injury to the economic sector. The term subsidy is defined as a financial contribution by a government or any other public body within the territory of a member state which confers an advantage on the beneficiary.

As to the relationship between anti-dumping law and subsidy measures, GATT, Article VI, paragraph 5 states that an imported product cannot be subject to both anti-dumping and countervailing duties to compensate for the same situation (dumping and export subsidization).

## J. The Dispute Settlement Procedure

### I. Contents of the Dispute Settlement

The agreement regarding the rules and procedures governing the settlement of disputes (Dispute Settlement Understanding, DSU) is the centrepiece of the multilateral trade system. Its objective is to create security, predictability and unity of the legal order within the multilateral trade system. The Dispute Settlement Procedure is of general validity for all WTO Agreements and therefore is the first obligatory intergovernmental procedure worldwide. This leads to a “juridification” and institutionalisation of the dispute settlement.

There is a central *Dispute Settlement Body (DSB)* which is exclusively responsible for the settlement of disputes. This body is composed of members of the General Council. The reluctance to make use of the dispute settlement procedure was overcome by obliging the WTO members to make use of this procedure whenever it is deemed applicable.<sup>20</sup> Unilateral and bilateral measures are therefore excluded.

Increasing use of the dispute settlement procedure is being made by the developing countries. As has already been explained, there are a great number of special rules and facilitations for developing countries.

### II. Procedural Course of Action

If one member state claims that a measure taken by another member state violates an obligation laid down in the WTO Agreement, the member state which makes the complaint has to first inform the DSB and ask the other country to enter into negotiations. If the parties cannot come to an understanding within a period of 60 days, the member state is entitled to request the establishment of a *Panel* to settle the dispute. After determination of the facts and the gathering of evidence, a recommendation is given by the Panel.

On appeal, the Panel report can be reviewed by the *Appellate Body*. The *Appellate Body* can confirm, change or revise the decision of the Panel. Subsequently, the report is presented to the DSB. If the DSB does not unanimously reject the report, it becomes legally binding.

### III. Legally Binding Character and Enforcement of the Decisions

As opposed to decisions taken by national bodies, the binding decisions of the DSB cannot be enforced by the WTO, since the WTO does not have proper executive power. The DSU Articles 21 and 22 therefore concretize the legal consequences in the case of a confirmed contract violation by setting detailed guidelines for implementation which have to be fulfilled by the defeated party under the supervision of the DSB.

If the defeated party does not implement a decision taken by the DSB within a reasonable period of time, the appellant may, for example, be authorized by the DSB to impose trade sanctions.<sup>21</sup>

<sup>20</sup> Details regarding the WTO Dispute Settlement Procedure: Emmerich-Fritsche, *Das Streitbelegungsverfahren der WTO*, Source: [www.oer-alt.wiso.uni-erlangen.de/WTOStreitteil.pdf](http://www.oer-alt.wiso.uni-erlangen.de/WTOStreitteil.pdf)  
<sup>21</sup> Prieß/Berrisch, *WTO-Handbuch*, p. 733.

## K. Bilateral Free Trade Agreements

In view of the complexity of multilateral agreements within the framework of WTO, which are reflected in repeated setbacks as, for example, in the slow negotiation process of the Seattle talks (1999), the countries increasingly tend to negotiate on a bilateral basis. The number of bilateral trade agreements has greatly increased during the last 20 years. In fact, bilateral free trade agreements already existed prior to the WTO. However, the increase of free trade agreements since the establishment of the WTO is remarkable. Whereas a total of 124 agreements were reached between 1948 and 1994 within the scope of the GATT, already more than 130 agreements within the framework of WTO between 1995 and 2002 were recorded.<sup>22</sup>

Although the point is sporadically made that free trade agreements have a discriminatory effect, mostly their positive impact on world trade is stressed. This is achieved by a greater product differentiation, a significant increase in efficiency and a better macro-economic coordination.

Bilateral agreements are not unproblematic due to the most-favoured-nation provision which obliges a member state to concede those trade preferences, that have already been granted to one trade partner, also to all trade partners. Nevertheless, GATT, Article V and Article XXIV authorize free trade agreements if certain criteria are met. This essentially means that tariff rates for non-participating countries shall not be higher than they were before the conclusion of the agreement.

Subsequently, we want to take a closer look at three trade agreements. These agreements will be examined mainly regarding their statements concerning the removal of technical barriers to trade. We will also consider the question as to what extent general legal or guiding principles can be derived from these agreements. The agreements to be examined are the Association Agreement between the EU and Chile, the Euro-Mediterranean Agreement between the EU and Egypt, and the Free Trade Agreement between the EU and South Korea.

### I. The Association Agreement between the EU and Chile

The EU-Chile Agreement established a political and economic association which covers topics focusing on trade policy as well as financial, technical, social and cultural matters. The Agreement was signed on 18 November 2002. It entered into force on 1 March 2005.

#### 1. General trade-related provisions of the Agreement

The Agreement contains comprehensive statements concerning trade-related questions. Thus, the removal of tariff and non-tariff barriers to trade shall improve market access

The Agreement envisions the gradual establishment of free trade during a transition period of a maximum of 10 years through the elimination of customs duties. The complete liberalization of bilateral trade shall be reached by the end of this period. This is also valid for non-tariff measures. The prohibition of quantitative restrictions is explicitly provided. These restrictions shall be removed and new measures of this kind may not be introduced. Furthermore, the Agreement spells out the principle of non-discrimination of the respective other contractual party and the requirement of equal national treatment. Moreover, there are regulations regarding anti-dumping and compensation measures. The measures to be taken must be consistent with the GATT and the WTO Agreement.

## 2. Provisions regarding technical regulations, standards and conformity assessment procedures

A substantial part of the Agreement (Articles 83-88) deals with technical regulations, standards and conformity assessment procedures. The aim of these extensive regulations is to facilitate and strengthen the movement of goods by eliminating unnecessary barriers to trade and, in doing so, take into account the legitimate objectives of the contracting parties and the principle of non-discrimination according to the TBT Agreement.

Regarding the scope of application and the definitions of the regulations, a reference is made to the TBT Agreement. Article 86 of the Agreement provides that the contracting parties confirm their rights and obligations under the TBT Agreement and ensure their implementation.

Article 87 lays down the specific measures of the parties within the scope of the Agreement. It is agreed that the contracting parties will intensify their bilateral cooperation in the field of standards, technical regulations and conformity assessment procedures. The cooperation aims at developing mechanisms in order to reach a harmonization and/or equivalence of technical regulations and to adjust to international standards.

Article 87, Number 4 of the Agreement therefore stipulates that the contracting parties work together to develop common views regarding good regulatory practices. In this context, transparency in the preparation of technical regulations, standards and conformity assessment procedures and the use of international standards are expressly enumerated.

Article 88 of the Agreement provides that the contracting parties will set up a committee for technical regulations, standards and conformity assessment procedures.

## II. The Euro-Mediterranean Agreement between the EU and Egypt

The Association Agreements between the EU and the nine Mediterranean partners (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestine Liberation Organization, Syria, Tunisia), which replaced the 1970s Cooperation Agreements, formed a key element for the implementation of the Euro-Mediterranean partnership. The Euro-Mediterranean Agreements contain different provisions for each Mediterranean partner. Here, for example, we will take a look at the Agreement between the EU and Egypt. This Agreement was signed on 25 July 2001 and entered into force on 1 June 2004.

### 1. General trade-related provisions of the Agreement

The contracting parties have agreed to gradually establish a free trade zone during a transitional period of a maximum of 12 years in accordance with the provisions laid down in the GATT and in the annex of the WTO Agreement. This Agreement, too, provides for the elimination of quantitative restrictions and the prevention of the reinstatement of such restrictions. Moreover, the Agreement identifies the non-discrimination principle and the principle of equal national treatment. The admissibility of anti-dumping and anti-subsidy measures, as defined by GATT, is also laid down. However, import or export restrictions are admissible if they are justified by reasons of public morality, public policy and public security, and if they aim to protect the health and life of humans, animals or plants, national treasures or intellectual property.

## **2. Provisions regarding technical regulations, standards and conformity assessment procedures**

In contrast to the EU-Chile Agreement, this Agreement contains only few statements regarding the provisions for technical regulations and standards. Article 47 of the Agreement merely states that the contracting parties shall aim at “reducing the differences in standardization and conformity assessment”. The cooperation in this area shall focus on the regulations in the fields of standardization, metrology, quality standards and the recognition of conformity assessments. In particular, the level of the Egyptian conformity assessment bodies shall be raised to ensure the conclusion of mutual recognition agreements in this field.

There are no further statements with respect to technical regulations and standards. In particular, the Agreement does not state that international standards should serve as a basis for technical regulations. However, since the EU member states as well as Egypt are WTO member states, the regulations of the TBT Agreement apply.

### **III. The Free Trade Agreement between the EU and South Korea**

The Free Trade Agreement between the EU and South Korea is a current and very significant agreement; it was initialled on 15 October 2009. It is expected to enter into force on 1 July 2011. The negotiations between the EU and South Korea started in May 2007. South Korea has become an extremely important non-European trade partner due to its strong economy. In 2008, the EU exports to South Korea reached a value of 25.6 billion euros. South Korea exported goods worth 39.4 billion euros to the EU.

#### **1. General trade-related provisions of the Agreement**

The above-mentioned agreement represents a new generation of free trade agreements, since it contains, besides tariff reductions, extensive rules regarding trade in services, competition/state aid, protection of intellectual property and public procurement. It stipulates that almost 99% of all tariffs in the industrial and agricultural sector will be eliminated within a period of 5 years. There are also extensive rules regarding the elimination of non-tariff barriers to trade in general and in some key sectors (as cars and electronics). Strict provisions with regard to the geographical indications are basic rules of the Agreement. Never before has an agreement contained such kinds of rules. Moreover, chapter 14 provides for a bilateral dispute settlement system which enables the contracting parties to resolve disputes within a reasonable period of time of 160 days and without intervention of the WTO, and to thus take action against unjustified barriers to trade.

The Agreement also includes a general safeguard clause in case of a sudden import surge which threatens the economy of the respective contracting party. Another part of the Agreement imposes far-reaching obligations regarding labour standards and environmental protection.

#### **2. Provisions regarding technical regulations, standards and conformity assessment procedures**

According to Article 4.1, the contracting parties reaffirm their rights and obligations arising out of the TBT Agreement which thus, *mutatis mutandis*, forms part of the bilateral agreement. Reference is also made to the TBT Agreement regarding the definition of terms.

Article 4.3 lays down the obligation that the parties shall strengthen their cooperation in the field of standards, technical regulations and conformity assessment procedures. Examples are listed in order to show what this cooperation might look like. For example, information, experiences and data shall be exchanged in order to improve the quality of the technical regulations.

With regard to technical regulations, the parties agree to fulfil the transparency obligations as defined by the TBT Agreement. Moreover, Article 4.4, paragraph 1b states that international standards shall serve as a basis for technical regulations. However, an exemption is made if the international standards should prove to be inadequate or ineffective and in fields where international standards have not served as a basis. Further exemptions with regard to international standards are not provided.

Furthermore, it is specified that mechanisms for providing improved information on technical regulations shall be worked out and that enough time shall be left between the publication of a technical regulation and its entry into force.

Article 4.4, paragraph 3 requires that the parties shall make every effort to apply technical regulations in a standardized and coherent manner in their respective territory.

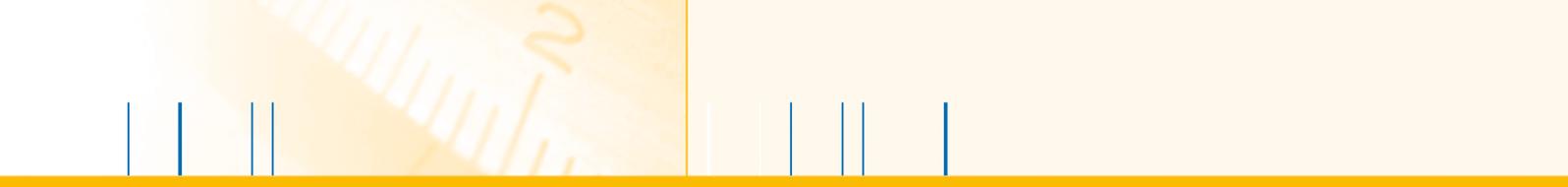
Moreover, the Agreement contains regulations regarding conformity assessment and accreditation. It is recognized that there are a multitude of mechanisms to support the acceptance of conformity assessment results.

#### IV. Assessment of the Agreements

The closer consideration of the exemplarily illustrated Agreements has revealed their predominantly political and symbolic character. In most cases, the Agreements' provisions refer to the WTO Agreements, reiterating the regulations already accepted by its member states. Consequently, there is very little new in them; the basic topics have already been agreed to by the WTO member states in the WTO Agreements. Therefore, the rules and obligations of the WTO Agreements can be seen as a guiding principle.

As already stated, the free trade agreements are international agreements. Therefore, they are subject to the interpretive measures presented in case certain regulations between the parties should be disputable or incoherent. General legal principles which go beyond the principles already mentioned cannot be derived from the free trade agreements. As far as we can tell, none of the agreements contains provisions which are inconsistent with the provisions of the GATT or with other WTO Agreements. The questions as to what extent this is actually possible and which regulations are not mandatory are therefore theoretical questions and do not require further discussion.

With regard to technical regulations, standards and conformity assessment procedures, it has to be stressed that these rules are in line with the rules of the TBT Agreement. The respective rules have been provided, taking into account the status of the contracting party. This becomes clear using the example of Chile. Since Chile is a developing country, the Agreement contains loose wording regarding the compliance with international standards. The Agreement states that the parties "work together" to ensure the use of international standards as a basis for technical regulations. This does not imply a clear commitment. The provision thus takes into account Chile's status – as provided for in Article 12 of the TBT Agreement.



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