

Christian Tietje/Andrej Lang

Community Interests
in World Trade Law

Heft 141

Dezember 2016

Community Interests in World Trade Law

by

Christian Tietje & Andrej Lang

Institute of Economic Law
Transnational Economic Law Research Center (TELC)
School of Law
Martin Luther University Halle-Wittenberg

Dr. Christian Tietje, LL.M. (Michigan), is Professor of International Economic Law and Director of the Transnational Economic Law Research Center (TELC) at the Law School of Martin Luther University Halle-Wittenberg.

Andrej Lang, LL.M. (NYU), is Senior Researcher and Lecturer at the Transnational Economic Research Center of the Law School of Martin Luther University Halle-Wittenberg.

Christian Tietje/Gerhard Kraft/Christoph Kumpan (Hrsg.), Beiträge zum Transnationalen Wirtschaftsrecht, Heft 141

Bibliografische Information der Deutschen Bibliothek

Die Deutsche Bibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet unter <http://www.dnb.ddb.de> abrufbar.

ISSN 1612-1368 (print)

ISSN 1868-1778 (elektr.)

ISBN 978-3-86829-874-1 (print)

ISBN 978-3-86829-875-8 (elektr.)

Nominal Charge: 5 Euro

The „Essays on Transnational Economic Law“ may be downloaded free of charge at the following internet addresses:

<http://institut.wirtschaftsrecht.uni-halle.de/de/node/23>

<http://telc.jura.uni-halle.de/de/node/23>

Institut für Wirtschaftsrecht
Forschungsstelle für Transnationales Wirtschaftsrecht
Juristische und Wirtschaftswissenschaftliche Fakultät
Martin-Luther-Universität Halle-Wittenberg
Universitätsplatz 5
D-06099 Halle (Saale)
Tel.: 0345-55-23149 / -55-23180
Fax: 0345-55-27201
E-Mail: ecohal@jura.uni-halle.de

TABLE OF CONTENT

A. Introduction	5
B. Setting the Scene: The Concept of Community Interests in World Trade Law.....	6
C. Challenges to the Existence of Community Interests in WTO Law.....	8
I. The Bilateral Nature of WTO Obligations-Challenge.....	9
II. The Disregard for Non-Trade Values-Challenge	11
III. The Unfairness of the World Trading System-Challenge	13
D. Elements of Community Interests in WTO Law	14
I. Nondiscrimination	15
1. Linkage Between Nondiscrimination and Community Interest	15
2. National Treatment Principle	16
3. Most Favoured Nation Principle.....	17
II. Derogability.....	18
1. Linkage Between Derogability and Community Interest.....	18
2. Limits on Inter se Modifications through FTAs	19
III. Enforcement.....	21
1. Linkage Between Enforcement and Community Interest.....	21
2. Standing.....	22
3. Remedies.....	26
E. The Community Interest of Promoting an Essentially Rules-based and Fair World Market	27
I. The Underlying Economic Theory	28
II. Promoting a World Market.....	29
III. An Essentially Rules-based and Fair Character.....	30
IV. Establishing the Community Interest.....	31
V. Community Interests and Negative Integration?.....	34
F. Conclusion.....	35
References	36

A. Introduction*

The WTO system is a highly controversial international legal regime. Like no other, it captivates the aspirations and discontents of globalization—at least of globalization’s economic dimension. Proponents view the WTO system as a “[s]uccess [s]tory of [g]lobal [g]overnance”¹ that avoids “a world of inward-looking trade blocs and self-destructive factionalism”² and is “overwhelmingly” in the interest of all participating countries.³ Moreover, proponents argue, the WTO system plays “to the advantage of the smallest and weakest countries” because it “replaces the role of ‘power’ in international trade relations with the ‘rule of law’”.⁴ In contrast, critics contend that the WTO’s “impact on the world’s poor has been overwhelmingly negative,”⁵ that it “institutionalizes the subordination of development to corporate free trade”⁶ and that it “ignore[s] non-trade concerns such as environmental protection, consumer rights, labor rights, and state sovereignty”.⁷

This ambivalence regarding the WTO legal order is closely related to its subject matter: The WTO regulates trade among nations. In contrast to other international organizations, it does not protect an unequivocally common asset such as the environment of our planet or the preservation of international peace and security. Its members participate in the WTO out of economic self-interest. But if community interests in international law distinguish themselves precisely by transcending the bilateral exchange of benefits grounded in self-interest, is it then correct to assume that world trade law protects community interests?

Considering this background, it is a thorny task to assess whether WTO law protects community interests. In this paper, we propose to answer this question. To do so, we will address the conceptual and doctrinal dimensions of the question in four steps. Initially, we will set forth a specific understanding of ‘community interests’ as a foundation upon which to build our answer (B.). Second, we will address specific challenges that are brought forward against the existence of community interests in world trade law that relate to the continuing prevalence of reciprocity in the WTO system, the consideration of non-trade interests, and fairness (or lack thereof) with respect to developing countries (C.). Third, we undertake a detailed doctrinal analysis to assess whether elements of community interests can be found in WTO law (D.). Finally, we take these different communal elements as a basis to construct a broader community interest of WTO law (E.).

* This paper will also be published in the edited volume *Benvenuti/Nolte* (eds), *Community Obligations in Contemporary International Law* (forthcoming).

¹ *Moore*, IPG 2005, 12–20. Mike Moore is the former Director General of the WTO.

² *Ibid.*, 16.

³ *Ibid.*, 14–15.

⁴ *Ibid.*, 19.

⁵ *Bullard/Chanyapate*, IPG 2005, 21 (21).

⁶ *Ibid.*, 34.

⁷ *DiMatteo/Dosanjh/Frantz/Bowal/Stoltenberg*, *Vanderbilt Journal of Transnational Law* 36 (2003), 95 (95).

B. Setting the Scene: The Concept of Community Interests in World Trade Law

In general, public international law, community interests, and community obligations are commonly discussed under the notion of *erga omnes* obligations. These are obligations that a State owes in any given case to either the international community or all other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all States to take action.⁸ The ICJ first referred to the concept of *erga omnes* obligations in the *Barcelona Traction* case,⁹ observing that such obligations are owed “towards the international community as a whole” and that, “[b]y their very nature” they are “the concern of all States”.¹⁰ However, the Court specified that *erga omnes* obligations form a very narrow category of public international law by providing four examples: the obligation to outlaw acts of aggression, the obligation to outlaw genocide, the obligation to protect from slavery, and the obligation to protect from racial discrimination.¹¹ Clearly, these examples do not fall within the scope of world trade law. Hence, if we equated community interests with *erga omnes* obligations as defined by the ICJ in *Barcelona Traction*, then community interests would be absent from the field of world trade law. We suggest, however, that the discussion about community interests in international law should not be constricted to *erga omnes* obligations. Our concern is that, if we were to limit the academic debate about community interests in such a restrictive way, we would, by definition, lose sight of the practices in international law that could and should be considered to protect community interests only because they do not meet the very demanding threshold of *erga omnes* obligations.

In our view, the notion of community interests or obligations in public international law should be understood in a wider sense that can include the “promotion of global welfare” and often “require collective action in order to attain them”.¹² Community interests must not be limited to the protection of naturally existing common goods like the Moon, Antarctica, or more generally, the environment. Rather, community interests can consist of man-made communal structures.¹³ *Samantha Besson* has shown that community interests in international law are significantly broader and more multi-faceted than the traditional notion of *erga omnes* obligations. She identi-

⁸ Cf. Article 1 of the Resolution of the Institut de droit international on “Obligations and rights *erga omnes* in international law” adopted at the 2005 Krakow Session, in: 71 II Annuaire de l’Institut de droit international 289 (2006). Article 1 carefully distinguishes between *erga omnes* owed under general international (a) and *erga omnes partes* obligation owed under a multilateral treaty (b).

⁹ ICJ, *Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain), ICJ Reports 1970, 3.

¹⁰ *Ibid.*, para. 33. The case concerned the claim of Belgium to protect the interests of Belgium shareholders of the Canadian company Barcelona Traction Ltd. that was the effectively expropriated by Spain. While denying Belgium standing to bring the case, the ICJ famously stated in an obiter dictum that the necessary “legal interest in their protection” would require that Spain had violated “obligations *erga omnes*”. *Ibid.*

¹¹ *Ibid.*, para. 34.

¹² See *Benvenisti/Nolte*, Introductory chapter in *Benvenisti/Nolte* (eds), *Community Obligations in Contemporary International Law* (forthcoming).

¹³ *Feichtner*, in: Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, para. 18.

fies various criteria and structural features that may be indicative of norms protecting community interests such as their collective holders or bearers, their importance or fundamental character, their content, their universal character or the procedural possibility for *actio popularis*.¹⁴ For good reasons, however, *Besson* does not define community interests because there is no definitive definition.

Against this background, we suggest that community interests are best understood as an interpretative concept. *Ronald Dworkin* defines an interpretative concept as one that “is best explained by taking its correct use to depend on the best justification of the role it plays for us”.¹⁵ He distinguishes interpretative concepts from criterial concepts: The latter are given if “we use the same criteria in identifying instances”; the former if we agree about the existence of certain values but disagree about “the precise character of these values”.¹⁶ This is the case with respect to community interests. We agree that instances exist in international law in which states transcend the reciprocal interaction commonly characterized as bilateralism. However, there are no definitive criteria for what they are. As a result, we disagree about what makes a certain interest communal, albeit “we agree sufficiently what we take to be paradigm instances of the concept”.¹⁷

But how can we know whether certain legal norms and practices in world trade law constitute community interests and what does it depend upon? We are required to develop indicators that signify the community character of a legal obligation. These indicators should be informed by the meaning of the concept of community interests in public international law beyond the notion of *erga omnes* obligations and by the different topoi in the academic discourse about the WTO system that are related to the concept of community interests. A central aim of the concept of community interests in public international law is to provide an alternative source of legitimacy for public international law apart from state consent. Moreover, community interests are of particular importance and attach distinct legal consequences.¹⁸ They are held by the international community as a whole or by all parties to a treaty¹⁹ and are therefore contrasted with self-interested and reciprocal bilateralism that is only in the common interest of particular states.²⁰ The concept of community interests also closely overlaps with the concept of the constitutionalization of international law: Both seek an autonomous source of legitimacy and both only encompass particularly important inter-

¹⁴ See *Besson*, Chapter on community interests in international law-making in *Benvinisti/Nolte* (eds), *Community Obligations in Contemporary International Law* (forthcoming).

¹⁵ *Dworkin*, *Justice for Hedgehogs*, 158.

¹⁶ *Ibid.*, 160.

¹⁷ *Ibid.*

¹⁸ Cf. *Simma*, *Recueil des Cours* 250 (1994 IV), 217 (233), stating that only “certain fundamental values” constitute community obligations or interests.

¹⁹ See above at B., 6.

²⁰ For example, *Bruno Simma* characterizes community interests as the “antithesis” of bilateralism. While “international legal obligations”, according to bilateralism, only “oblige States to adopt a certain conduct ... in relation to the particular State or States ... to which a specific obligation under treaty or customary law is owed”, a community interest “is not to be left to the free disposition of States individually or inter se but is recognized and sanctioned by international law as a matter of concern to all States”. *Simma*, *Recueil des Cours* 250 (1994 IV), 217 (233).

ests.²¹ Both concepts are based on the premise that the protection of such interests cannot be achieved satisfactorily through the traditional international law mechanisms and procedures of reciprocity and bilateralism alone.

In the WTO context, the discourse about community interests is informed by these general concepts but takes on a more specific form. It has largely manifested itself with respect to two distinct but interrelated and overlapping dichotomies: the dichotomy between the collective or bilateral character of WTO obligations and the dichotomy between the constitutional or contractual nature of the WTO system.²² On the one hand, *Joost Pauwelyn* has argued that WTO obligations are essentially bilateral. In contrast to collective obligations that are owed to all states or treaty members as a whole, WTO obligations “can be reduced to a compilation of bilateral, state-to-state relations”.²³ On the other hand, *Chios Carmody* has countered that “WTO obligations are more appropriately regarded as collective because their principal object is the protection of collective expectations about the trade-related behaviour of governments”.²⁴ Moreover, the constitutional model of WTO law is based on different premises that all build on the concept of constitutionalism. From an institutional perspective, WTO law is “constitutional” because it constitutes a basic governance framework—the “constitution’ of the world trading system”²⁵—and sets forth an effective system of judicial review. From a legal perspective, it is “constitutional” because it enshrines binding and non-derogable legal commitments that are effectively assigned a “higher legal rank”,²⁶ and because it protects the fundamental principles of world trade law. Finally, the contractual model of WTO law is premised on an analogy to the private-law concept of contract that basically entitles the autonomous parties to the contract, within the limits of the law, to create, modify, or extinguish contractual obligations as they wish. The contractual model is mostly congruent with *Pauwelyn’s* conceptualization of WTO obligations as bilateral. It holds that WTO members can bilaterally vary and modify their WTO obligations with relative ease through subsequent international treaties, bilateral negotiations and countermeasures.

C. Challenges to the Existence of Community Interests in WTO Law

In the academic debate about the WTO, there appear three different *topoi* under which WTO law is discussed that provide distinct challenges to the existence of community interests in world trade law. The first challenge is that WTO obligations are allegedly only bilateral in nature (I.), the second challenge contends that the WTO

²¹ As *Simone Peter* observed, “[w]herever elements of international law are deemed to be dedicated to the protection of these global interests, they are held to be an evidence of a constitutionalized legal order”. *Peter*, *Public Interest and Common Good in International Law*, 133.

²² The former dichotomy is used by *Pauwelyn*, *EJIL* 14 (2003), 907–951. The latter dichotomy has been formulated by *Langille*, *N.Y.U. Law Review* 86 (2001), 1482–1518.

²³ *Pauwelyn*, *EJIL* 14 (2003), 907 (907).

²⁴ *Carmody*, *EJIL* 17 (2006), 419 (419).

²⁵ *Jackson*, *Fordham International Law Journal* 24 (2000), 371 (375).

²⁶ *Petersmann*, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*, 47.

system disregards non-trade values (II.), and the third challenge concerns the lack of fairness towards developing countries (III.).

I. The Bilateral Nature of WTO Obligations-Challenge

In his seminal Hague lectures on the changing structure of international law from a web of bilateral obligations to community obligations that concern all states, *Bruno Simma* delineates community interests from bilateralism.²⁷ It follows that if WTO obligations were exclusively bilateral, they cannot, at the same time, constitute community obligations. *Joost Pauwelyn* argues in his typology of multilateral treaty obligations that WTO obligations are essentially bilateral.²⁸ This position poses a challenge to the view that WTO law protects community interests.

Pauwelyn's analysis of the nature of WTO obligations forms part of a broader inquiry into how WTO law relates to other rules of public international law.²⁹ He assesses the nature of WTO obligations on the basis of a notion of collective obligations derived from the Vienna Convention on the Law of Treaties and the ILC Articles on State Responsibility that are geared towards the demanding category of *erga omnes* obligations. *Pauwelyn* refers to treaties concerning global warming, collective security, or the protection of human rights as examples that meet these requirements.³⁰ Against the foil of such a narrow understanding, *Pauwelyn* assesses and ultimately negates the existence of community obligations in WTO law.³¹ He points to various features of WTO law to substantiate his claim. First, he contends that trade, the object of the WTO agreements, “remains a bilateral occurrence”.³² As goods were traded between two countries, trade was “a bilateral state-to-state operation”.³³ This “trade-related object matter” has the effect, according to *Pauwelyn*, that WTO obligations could—unlike collective obligations—be “differentiated or individualized”.³⁴ Denying market access affected only particular WTO members;³⁵ gains and losses resulting from the imposition or withdrawal of a trade restriction could be calculated.³⁶ In contrast, a breach of the collective obligations set forth in human rights treaties do not injure individual member states because violations are typically committed by the offending state against its own citizens, and accordingly, violations affect the collective human rights commitment of all member states.³⁷ In the same vein, *Pauwelyn* argues that dispute settlement and enforcement mechanisms in the WTO legal order are essentially

²⁷ *Simma*, Recueil des Cours 250 (1994 IV), 217 (233).

²⁸ *Pauwelyn*, EJIL 14 (2003), 907 (907).

²⁹ *Pauwelyn*, Conflict of Norms in Public International Law.

³⁰ *Pauwelyn*, EJIL 14 (2003), 907 (929-30).

³¹ *Ibid.*, 950.

³² *Ibid.*, 930.

³³ *Ibid.*, 928.

³⁴ *Ibid.*, 930.

³⁵ *Ibid.*

³⁶ *Ibid.*, 933.

³⁷ *Ibid.*

conducted in a bilateral manner.³⁸ In most cases, they were only directed against a single state and aimed at “nullification and impairment of negotiated benefits to a particular Member”.³⁹ He also points to the reciprocal, economically driven “give and take’ exercise” of negotiating trade concessions that “is indicative for the contractual nature of WTO obligations”.⁴⁰ In his view, this exercise does not transcend “the sum total of individual interests of states”.⁴¹ Rather, it is aimed at “individual welfare increases”.⁴² *Pauwelyn* concludes that WTO obligations are essentially “a bundle of bilateral commitments”.⁴³

However, the existence of community interests does not mainly hinge upon the divisibility of trade concessions and breaches but, more generally, on the purpose and structure of the WTO’s legal system. *Pauwelyn*’s characterization of the nature of WTO obligations is based on a very narrow definition of community obligations and draws a one-sided picture of WTO law. In particular, it neglects the economic, legal and institutional transformation that the world trade system has experienced since the establishment of the WTO in 1995.

First, the depiction of trade as a “bilateral occurrence”⁴⁴ better fits the historic period of friendship, commerce, and navigation agreements in the nineteenth century than today’s inextricably interdependent economic relations between WTO members. Computing trade benefits and engaging in traditional *quid pro quo* bargaining have become very difficult against the background of new trade and production patterns in a globalized economy in which the focus has shifted away from tariffs to regulatory non-trade barriers, and in which global value chains create complex products through many different economic operators in many different states, making it a vexing task to determine the origin of that product.⁴⁵

Second, establishing the WTO Appellate Body as the effective ultimate arbiter of WTO law and abandoning the consensus requirement – and hence each member’s veto right – regarding the adoption of panel reports has transformed the mode of WTO governance from an “ethos of diplomats” to a “rule of lawyers”.⁴⁶ This institutional setup has significant consequences for how WTO obligations are interpreted. Independent and impartial international adjudicatory bodies are likely to define their institutional roles as trustees of the particular international legal order that they represent.⁴⁷ Hence *Eyal Benvenisti* argues that “international adjudicators are institutionally inclined to [...] promote community interests”.⁴⁸ Appellate review by a permanent

³⁸ *Ibid.*, 934-36.

³⁹ *Ibid.*, 929.

⁴⁰ *Ibid.*, 931 (citing WTO, *European Communities — Customs Classification of Certain Computer Equipment*, Report of the Appellate Body of 22 June 1998, WT/DS62/AB/R, para. 109).

⁴¹ *Ibid.*, 940.

⁴² *Pauwelyn*, *Conflict of Norms in Public International Law*, 78.

⁴³ *Pauwelyn*, *EJIL* 14 (2003), 907 (931).

⁴⁴ *Ibid.*, 930.

⁴⁵ *Cho*, *The Social Foundations of World Trade*, 3.

⁴⁶ *Weiler*, *JWT* 35 (2001), 191–207.

⁴⁷ *Alter*, *European Journal of International Relations* 14 (2008), 33–63.

⁴⁸ See *Benvenisti*, Chapter on community interests in international adjudication in *Benvenisti/Nolte* (eds), *Community Obligations in Contemporary International Law* (forthcoming).

Appellate Body therefore steers against a purely bilateral conception of WTO obligations and of the WTO's dispute settlement system.⁴⁹ The WTO Appellate Body conceptualizes the WTO's legal system as integrated and coherent and insists that WTO law contains "universally-applied commitments"⁵⁰ that must be interpreted "harmoniously" and "read as a whole"⁵¹. Within the WTO's integrated legal system, "WTO obligations are always the same for all members".⁵² Conceiving of the effects of trade restriction as purely bilateral and of breaches of WTO obligations as entirely divisible against this background is hardly compatible with a hermeneutic approach that is aimed at protecting the "security and predictability" of the multilateral trading system.⁵³

II. The Disregard for Non-Trade Values-Challenge

A critique regularly brought forward against the WTO system is that decisions are produced by an epistemic community of trade experts that disregard or at least neglect non-trade interests.⁵⁴ This criticism—a procedural criticism in essence—presents a challenge to the view that WTO law protects community interests, for the narrow sectoral interests of the trade community can hardly be equated with the interests of the international community at large. Consider an analogy to the constitutional state: Its procedural promise is that it provides for collective lawmaking procedures that are designed to produce outcomes in which the public or communal interest prevails over other interests that were all included in the process.⁵⁵ Although global governance, being organized into sectorally divided issue-areas such as trade, cannot fully live up to this promise, the ability of the multilateral trade system to protect community interests depends in part on its ability to take non-trade interests seriously.

The general exceptions clause of Article XX of the GATT allows members to deviate from the basic trade principles for certain enumerated non-trade public policy exceptions such as the protection of public morals (XX(a)), of animal and human life and health (XX(b)) or the conservation of exhaustible natural resources (XX(g)).⁵⁶ Therefore, the extent to which non-trade concerns are taken into consideration within the WTO legal order depends critically upon how the exceptions clause is interpreted by the WTO adjudication system. In the GATT-era before the establishment of the WTO, there were serious shortcomings regarding the consideration of non-trade con-

⁴⁹ *Richard Stewart and Michelle Sanchez Badin* note that the "Appellate Body has sought to promote an orderly and transparent system of global trade law to structure the practices of members and the expectations of global economic actors". *Stewart/Sanchez Badin*, *ICON* 9 (2011), 556 (563).

⁵⁰ WTO, *EC — Tariff Preferences*, Report of the Appellate Body of 7 April 2004, WT/DS246/AB/R, para. 107.

⁵¹ WTO, *Korea — Dairy*, Report of the Appellate Body of 12 January 2000, WT/DS98/AB/R, para. 74.

⁵² *Marceau*, *EJIL* 13 (2002), 753 (772).

⁵³ See Article 3.2 of the DSU.

⁵⁴ See, e.g., *DiMatteo/Dosanjh/Frantz/Bowal/Stoltenberg*, *Vanderbilt Journal of Transnational Law* 36 (2003), 95 (95).

⁵⁵ *Peter*, *Public Interest and Common Good in International Law*, 17.

⁵⁶ An equivalent exceptions clause in the GATS is Article XIV.

cerns. Panels essentially viewed deviations from GATT obligations for non-trade reasons as protectionist threats to the multilateral trading system. In the *Shrimp – Turtle* case concerning a US ban on imports of shrimp that was fished with methods endangering rare sea turtles, the WTO Panel, affirming the established pre-WTO Panel jurisprudence, interpreted Article XX GATT “narrowly” as a “limited and conditional exception” that could under no circumstances encompass measures, even if nondiscriminatory, conditioning imports on the environmental conservation policies of other members.⁵⁷ However, the Appellate Body, in what *Robert Howse* portrays as a “watershed” ruling for the WTO system,⁵⁸ overruled the Panel and fundamentally changed the role of the general exceptions clause of Art. XX GATT within the WTO legal order. In the eyes of *Bogdandy* and *Venzke*, “[p]erhaps the most important contribution of the Appellate Body [...] was that it embedded the specific orientation of the regime into a broader legal context, thereby correcting a worrisome blindness toward other concerns”.⁵⁹ In *Shrimp – Turtle*, the AB modified its hermeneutic approach by interpreting the exception of “exhaustible natural resources” teleologically in light of the principle of sustainable development and non-trade related international agreements.⁶⁰ As a result, Art. XX(g) GATT is read to include living natural resources such as sea turtles and, in consequence, broadly accommodates environmental concerns. In the years since, the AB has repeatedly stressed that non-trade values such as the protection of human health, animal or plant health are “vital and important in the highest degree”.⁶¹ The AB also introduced a proportionality test as a decision-making technology that is geared toward deciding between trade and non-trade interests in “a process of weighing and balancing”.⁶² Finally, the AB asserted its authority to accept amicus briefs from NGOs that represent non-trade concerns.⁶³ Although the WTO legal order arguably still displays a certain “pro-trade bias”⁶⁴ as non-trade interests are only considered as exceptions to trade principles that are in need of justification, the AB has recalibrated the relationship between trade and non-trade concerns in a way that takes non-trade interests seriously.⁶⁵

⁵⁷ WTO, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel of 15 May 1998, WT/DS58/R, para. 7.45.

⁵⁸ *Howse*, EJIL 27 (2016), 36.

⁵⁹ *von Bogdandy/Venzke*, In *Whose Name?*, 88.

⁶⁰ WTO, *US — Shrimp*, Report of the Appellate Body of 12 October 1998, WT/DS58/AB/R, para. 129-34.

⁶¹ WTO, *EC — Asbestos*, Report of the Appellate Body of 12 March 2001, WT/DS135/AB/R, para. 172.

⁶² WTO, *Korea — Beef*, Report of the Appellate Body of 11 December 2000, WT/DS169/AB/R, para. 164.

⁶³ However, arguably in reaction to the ensuing criticism by WTO members against the assumption of this authority, the Appellate Body has yet to accept an amicus brief from a non-state actor.

⁶⁴ *Cf. Cho*, *The Social Foundations of World Trade*, 13.

⁶⁵ *Von Bogdandy/Venzke*, In *Whose Name?*, 87.

III. The Unfairness of the World Trading System-Challenge

The biggest challenge to the communal character of WTO law is not its doctrinal structure but its fairness deficit towards developing countries, especially the least developed among them.⁶⁶ A multilateral trading system that is verifiably unfair towards the underprivileged members of the trade community can hardly be deemed to protect community interests. The central criticism with respect to fairness is that economic sectors such as textile and agriculture in which developing countries have a comparative economic advantage are highly protected in the EU and in the US, which obstructs the economic development of the poorest countries and stands in stark contrast to the trade liberalizations achieved in other sectors, such as services and intellectually property (from which developed members benefit).⁶⁷ As a result, many developing countries only derive small benefits from the world trade system while, at the same time, incurring substantial costs as rule takers of burdensome Western standards and regulations.⁶⁸ Economic analyses suggest that the projected net benefit for some developing countries is negative,⁶⁹ which puts into question minimal notions of fairness.⁷⁰ At the root of this fairness deficit lies a procedural problem: The WTO system does not only establish an international legal order but it also provides a negotiation forum in which trade liberalizations are facilitated through intergovernmental trade rounds. The problem is that bargaining is an inapposite means of providing redress for developing countries as power asymmetries tend to reflect the bargain between the parties by privileging the more powerful party.⁷¹

However, we should not underestimate the extent to which law and legal institutions in the WTO system provide a counterbalance to these power asymmetries. As a social technique geared toward norms and generalizability, law furthers deliberative and issue-based discourse that can transcend interests and power structures.⁷² In his constructivist reinterpretation of the WTO system,⁷³ *Sungjoon Cho* views law as “an indispensable communicative device or language”⁷⁴ that contributes to “imbuing stability and predictability in development-related issues and tames political whims”⁷⁵. *Jackson* suggests that the dispute settlement system aims at “leveling the playing field between large, powerful states and small or relatively weak states” because if the system

⁶⁶ See for a thorough analysis of the role developing countries in the WTO: *Hudec*, *Developing Countries in the GATT Legal System*.

⁶⁷ *Cho*, *Alabama Law Review* 56 (2004), 483 (485).

⁶⁸ *Mendoza*, in: *Kaul/Conceicao/Le Goulven/Mendoza*. (eds), *Providing Global Public Goods*, 455 (461).

⁶⁹ *Ibid.*, 464.

⁷⁰ *Ibid.*, 469.

⁷¹ *Cho*, *The Social Foundations of World Trade*, 15. See also *Weiler*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 64 (2004), 547 (555), who argues with regard to the WTO system that “[t]he only veritable arms length negotiations is among the giants - EU, USA and a handful of others. For the rest it is mostly a take-it-or-leave-it affair”.

⁷² On this point, see *Lang*, *Die Verfassungsgerichtsbarkeit in der vernetzten Weltordnung*, 184.

⁷³ *Cho*, *Alabama Law Review* 56 (2004), 483–542.

⁷⁴ *Ibid.*, 524.

⁷⁵ *Ibid.*, 531.

seeks to remain “credible, it must remedy the asymmetries of power between WTO members so as to give every one—large, small, weak, or powerful—its ‘day in court’”.⁷⁶

The counterbalancing effect of the law to power asymmetries in the WTO system is reflected in various legal texts and judicial decisions. First, the most favoured nation clause is a legal principle that is specifically designed to overcome negotiation imbalances by providing that negotiated advantages be extended to all other WTO members. In other words, poor and powerless states enjoy trade concessions that were and could have only been negotiated by powerful members.⁷⁷ Second, the preambles of several WTO Agreements accept overcoming existing global economic inequalities as a common interest of WTO Members,⁷⁸ thereby keeping the issue of unfairness on the WTO agenda. Third, the WTO legal order contains numerous provisions such as the Enabling Clause, the new Trade Facilitation Agreement and various technical assistance and training programs that were crafted with an eye towards the special situation of developing countries. Finally, the WTO Appellate Body has addressed the concerns of developing countries in an effective manner.⁷⁹ And importantly, the WTO adjudicative system is not only utilized by developed members but also extensively by developing members.⁸⁰

D. Elements of Community Interests in WTO Law

In his aforementioned Hague lectures, *Simma* noted with respect to public international law in general that “community elements are nowadays overlapping, superseding and sometimes even abolishing the oldfashioned bilateralist structures”.⁸¹ Although world trade law has a bilateral dimension, as the third recital of the Preamble of the WTO Agreement indicates by speaking of “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to

⁷⁶ *Jackson*, AJIL 98 (2004), 109 (120).

⁷⁷ *Stoll*, in: Fastenrath et al (eds), *From Bilateralism to Community Interest*, 172 (178).

⁷⁸ The WTO Agreement itself recognizes the “need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development”. Agreement Establishing the World Trade Organization, Preamble, paragraph 2. The Doha Ministerial Declaration recognizes “the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates”. WT/MIN(01)/DEC/1 (14 November 2001), para. 2.

⁷⁹ *Cho*, Alabama Law Review 56 (2004), 483 (532). See, e.g., WTO, *EC — Tariff Preferences*, Report of the Appellate Body of 20 April 2004, WT/DS246/AB/R, para. 158 (interpreting the Enabling Clause of the GATT to allow for differential treatment so long as the scheme does “respond positively” to the “needs of developing countries”); WTO, *United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Report of the Appellate Body of 8 Oct. 2001, WT/DS192/AB/R (declaring US transitional safeguard mechanism under the Agreement on Textiles and Clothing [ATC] against Pakistani yarn imports illegal by interpreting the conditions for safeguard measures strictly).

⁸⁰ In fact, developing countries brought more complaints before the WTO Dispute Settlement Body in half of the years since 2000. *Van den Bossche*, in: De Baere/Wouters (eds), *The Contribution of International and Supranational Courts to the Rule of Law*, 176 (179).

⁸¹ *Simma*, *Recueil des Cours* 250 (1994 IV), 217 (235).

trade”,⁸² it has also developed a community dimension that the fourth recital embodies when it stresses the WTO’s objective “to develop an integrated, more viable and durable multilateral trading system”.⁸³ We argue that it is this interplay between communal and bilateral elements that adequately characterizes WTO law today. These two competing dimensions of WTO law are reflected in *Chio Carmody*’s distinction between the “law of expectations” and the “law of realities” within the WTO legal order.⁸⁴ Given this ambiguity, it is misguided to qualify WTO obligations in their entirety as bilateral. Rather than making sweeping statements about the nature of a complex body of law as a whole, it seems more appropriate to assess “on a norm-by-norm basis” whether particular principles or norms of WTO law are designed to protect community interests.⁸⁵ In the following section, we therefore conduct a detailed doctrinal analysis of parts of the WTO legal order in search for traces of community interests in WTO law. In particular, we analyze in this respect the basic nondiscrimination principles (I.), the derogability from WTO obligations (II.), and the WTO enforcement regime (III.).

I. Nondiscrimination

1. *Linkage Between Nondiscrimination and Community Interest*

The concept of community interests and the concept of constitutionalism overlap at least insofar as both do not cover every legal norm but only principles and norms of particular importance. A constitution enshrines principles and provides them with a higher legal rank because those principles are considered to be foundational to the political community. Similarly, only “certain fundamental values” constitute community obligations or interests.⁸⁶ In WTO law, the twin nondiscrimination principles of WTO law, the most favoured nation clause (“MFN”) and the national treatment clause (“NT”), constitute fundamental principles of constitutional magnitude for the multilateral trading system.⁸⁷ The Appellate Body described the former as “one of the

⁸² Agreement Establishing the World Trade Organization, Preamble, para. 3. See also in this vein: WTO, *Japan — Taxes on Alcoholic Beverages*, Report of the Appellate Body of 4 October, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1996, 14 (“The WTO Agreement is a treaty - the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain.”).

⁸³ Agreement Establishing the World Trade Organization, Preamble, para. 4.

⁸⁴ *Carmody*, EJIL 17 (2006), 419 (422). According to *Carmody*, “[t]he principal aim of the WTO Agreement is to protect expectations” but, at the same time, he acknowledges that the WTO Agreement also “gives some flexibility to governments to respond to discrete situations encountered in the actual pattern of trade”. *Ibid.*

⁸⁵ *Bäumler*, *The Legal Nature of WTO Obligations*, 47.

⁸⁶ *Simma*, *Recueil des Cours* 250 (1994 IV), 217 (233).

⁸⁷ Both are laid down in several WTO agreements: the MFN clause in Article I GATT, Article II GATS, and Article IV TRIPS, the NT clause in Article III GATT, Article XVII GATS, and Article III TRIPS.

pillars of the WTO trading system”⁸⁸ that is “both central and essential to assuring the success of a global rules-based system for trade in goods”,⁸⁹ and called the latter a “general principle” of WTO law.⁹⁰ It characterized both clauses as “cornerstones of the world trading system”.⁹¹

Arguably, the core objective of WTO law, as laid down in the preamble of the GATT of 1947, is “the elimination of discriminatory treatment in international commerce”.⁹² The MFN and NT clauses operationalize the principle of nondiscrimination in international trade relations in the form of legally binding, predictable and transparent norms. The Appellate Body noted in *EC — Bananas III* that “[t]he essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin”.⁹³ The MFN and NT principles are intended to enshrine that all WTO members treat each other’s products and services equally. Together, they constitute the external and the internal dimension of the principle of nondiscrimination in world trade law.⁹⁴

2. National Treatment Principle

The national treatment principle protects the internal dimension: it requires equal treatment between domestic and foreign products inside a domestic legal order. Article III:1 of the GATT requires WTO members to refrain from subjecting foreign products to “internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products”. In general terms, NT demands the elimination of discriminations against foreigners in trade. This commitment originally laid down in the GATT of 1947 needs to be viewed in its historical context. The Great Depression of the 1930s, preceding World War II, was substantially caused by the rise of unilateral protectionist trade policies such as the U.S. Smooth-Hawley Tariff Act of 1930. In reaction to this previous protectionism, the twenty-three signing nations of the GATT sought to establish a general framework for international trade based on the commitment to nondiscrimination. Against this background, the Appellate Body held that the purpose of Article III:1 GATT is “avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal

⁸⁸ WTO, *EC — Tariff Preferences*, Report of the Appellate Body of 20 April 2004, WT/DS246/AB/R, para.101; WTO, *Canada — Autos*, Report of the Appellate Body of 31 May 2000, WT/DS139/AB/R, WT/DS142/AB/R, para. 69.

⁸⁹ WTO, *US — Section 211 Appropriations Act*, Report of the Appellate Body of 2 January 2002, WT/DS176/AB/R, para. 297.

⁹⁰ WTO, *Japan — Alcoholic Beverages II*, Report of the Appellate Body of 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 18-19.

⁹¹ WTO, *US — Section 211 Appropriations Act*, Report of the Appellate Body of 2 January 2002, WT/DS176/AB/R, para. 297.

⁹² General Agreement on Tariffs and Trade 1947, Preamble, para. 3.

⁹³ WTO, *EC — Bananas III*, Report of the Appellate Body of 9 September 1997, WT/DS27/AB/R, para. 190.

⁹⁴ *Tietje*, in: Tietje (ed), *Internationales Wirtschaftsrecht*, § 3, 158–236, para. 65.

competitive relationships”.⁹⁵ For the purpose of overcoming protectionism, the WTO members created mutual expectations by committing to treating each other’s products alike. According to *Carmody*, “the protection of collective expectations about the trade-related behaviour of governments” is the “principal object” of the GATT.⁹⁶ WTO members “are supposed to enjoy the *same* expectation of trade with a given Member country”.⁹⁷ It constitutes “a common interest over and above the interests of WTO Member States individually”.⁹⁸ The community character of the commitment to nondiscrimination is substantiated by the historical context. There are rare moments in international relations in which states transcend their pure self-interest and are guided by broader communal considerations.⁹⁹ The post-World War II period constitutes such a transformative historical time. Although the U.S. had emerged as the new superpower, vested with considerable bargaining power to extract bilateral economic trade concessions, “[t]he American delegation [at the GATT negotiations] wanted the twin nondiscrimination principles of MFN and national treatment to be at the heart of the new global trade regime”.¹⁰⁰ Rather than leveraging its power to push for international trade rules specifically oriented towards American interests, the U.S. sought to level the international trade playing field by general principles of non-discrimination.¹⁰¹

3. *Most Favoured Nation Principle*

The MFN principle represents the external dimension of the nondiscrimination principle: it proscribes discrimination between foreign products. Article I:1 GATT requires that “[a]ny advantage granted to any country shall be accorded *immediately and unconditionally* to [...] *all other contracting parties*”. In *Canada — Autos*, the Appellate Body noted that the purpose of Article I:1 GATT “is to prohibit discrimination among like products originating in or destined for different countries”.¹⁰² The wording of Article I GATT underlines the communal character of the MFN clause. It is formulated as a fundamental obligation owed “immediately and unconditionally

⁹⁵ WTO, *Korea — Alcoholic Beverages*, Report of the Appellate Body of 18 January 1999, WT/DS75/AB/R, WT/DS84/AB/R, para. 120.

⁹⁶ *Carmody*, EJIL 17 (2006), 419 (419). An example of how WTO law protects collective expectations “is a concession by the United States to grant a certain tariff on textiles. The tariff is not about textile imports today. Rather, it is a promise by the US government to treat textile imports in a certain way in the future. That promise gives security to textile producers and exporters in foreign countries that their goods will encounter a predictable kind of treatment when entering the US. In effect, the tariff serves as a basis for upstream decisions about investment, production and exports. They may decide to invest in certain machinery, or use certain inputs, or locate their manufacturing in certain countries. Whatever the outcome, many decisions will turn on the expectations created by the US tariff.” See also *Carmody*, JIEL 11 (2008), 527 (542).

⁹⁷ *Carmody*, EJIL 17 (2006), 419 (427).

⁹⁸ *Ibid.*, 419.

⁹⁹ See *Slaughter/Burke-White*, Harvard International Law Journal 43 (2002), 1–21.

¹⁰⁰ *Langille*, N.Y.U. Law Review 86 (2001), 1482 (1501).

¹⁰¹ *Irwin/Mavroidis/Sykes*, The Genesis of the GATT, 199.

¹⁰² WTO, *Canada — Autos*, Report of the Appellate Body of 31 May 2000, WT/DS139/AB/R, WT/DS142/AB/R, para. 84.

[...] to all” members – and not to each and every member.¹⁰³ However, as *Pauwelyn* has argued, the MFN clause could be considered an expression of the bilateral nature of WTO obligations because of how the clause operates. The basic mechanism of Article I:1 GATT is, in the words of the Appellate Body, that “tariff concessions are negotiated bilaterally, but the results of the negotiations are extended on a multilateral basis”.¹⁰⁴ For *Pauwelyn*, the fact that advantages granted under Article I GATT “first negotiated on a state-to-state, bilateral level” and only subsequently “multilateralized”¹⁰⁵ makes them a mere “duplication [...] of the original bilateral concession”¹⁰⁶. *Pauwelyn’s* view, however, understates the significance of the multilateralization prescribed by MFN. What matters is not that trade concessions are negotiated bilaterally but that they are “universally-applied”¹⁰⁷ to all WTO members. *Carmody* observed that this multilateralization “changes the usual matrix of international relations”.¹⁰⁸ Indeed, the requirement to extend a trade-related advantage granted to one member to all other members has several important consequences for trade relations. First, the awareness of the subsequent multilateralization already impacts the bilateral negotiation. Second, a bilateral concession creates trade expectations not only within the bilateral relationship but among all WTO members.¹⁰⁹ Third, discriminations between different WTO members are, in principle, precluded. Finally, the uniformity of WTO obligations is greatly enhanced and the trading system as a whole calibrates itself toward liberalization. The MFN clause hence functions as a “collectivizing mechanism”¹¹⁰ that converts bilateral “into collective obligations”.¹¹¹

II. Derogability

1. Linkage Between Derogability and Community Interest

In the debate about the nature of WTO obligations, derogability is used as an important indicator to assess the communal character of WTO law. This linkage between the communal nature and the derogability of a norm can also be illustrated by the “contract vs. constitution” and “bilateral vs. collective” dichotomies referenced above.¹¹² While constitutions are designed to endure by heightening the requirements for constitutional amendments because they protect values that are fundamental to a particular community,¹¹³ the endurance of contracts hinges upon the will of the parties

¹⁰³ *Bäumler*, *The Legal Nature of WTO Obligations*, 79; *Carmody*, *JIEL* 11 (2008), 527 (543).

¹⁰⁴ WTO, *EC — Poultry*, Report of the Appellate Body of 13 July 1998, WT/DS69/AB/R, para 94.

¹⁰⁵ *Pauwelyn*, *EJIL* 14 (2003), 907 (931).

¹⁰⁶ *Ibid.*, 932.

¹⁰⁷ WTO, *EC — Tariff Preferences*, Report of the Appellate Body of 20 April 2004, WT/DS246/AB/R, para. 107.

¹⁰⁸ *Carmody*, *EJIL* 17 (2006), 419 (439).

¹⁰⁹ *Ibid.*, 425.

¹¹⁰ *Carmody*, *JIEL* 11 (2008), 527 (543).

¹¹¹ *Ibid.*, 531.

¹¹² See above at B., 8.

¹¹³ Cf. *Langille*, *N.Y.U. Law Review* 86 (2001), 1482 (1492).

and can, in principle, be nullified with ease. Similarly, collective obligations are owed to secure the expectations of the collectivity and can therefore not be modified by only some of the members of this collectivity, while bilateral obligations, in contrast, can be modified bilaterally because they typically do not affect states beyond the bilateral relationship. So if we view WTO law through a constitutional or collective lens, it “cannot be easily varied by individual WTO members”.¹¹⁴ In contrast, if we look at it through a contractual or bilateral lens, WTO obligations are “easily variable by subsets of members, since WTO commitments are made only on a bilateral (country-to-country) basis”.¹¹⁵

2. *Limits on Inter se Modifications through FTAs*

On a very general level, WTO law grants its members the freedom to derogate in several respects. As *Carmody* rightly put it, derogations are “an integral part of the WTO package” because “[n]o country would have agreed to it otherwise”.¹¹⁶ At the same time, WTO law contains numerous provisions that proscribe or at least limit derogations,¹¹⁷ indicating that reservations cannot be made or accepted bilaterally but that they require the consent of all WTO members. Arguably, the most pertinent question concerning the derogability in WTO law is to what extent WTO obligations can be modified through *inter se* agreements. *Inter se* modifications are changes to the obligations set forth in a multilateral treaty, such as the WTO Agreement, that are undertaken by a subset of members of the multilateral treaty through a subsequent international treaty. According to *Pauwelyn*, WTO members can modify their WTO obligations through *inter se* agreements.¹¹⁸ This assessment of the relationship between WTO law and general public international law is critically based on the alleged bilateral nature of WTO obligations. In his view, WTO law does not command a special place within the realm of international law and the usual international rules of conflict apply, in particular the Vienna Convention on the Law of Treaties.¹¹⁹ Art. 41 of the Vienna Convention explicitly allows *inter se* modifications, providing that “[t]wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone”. However, it attaches certain conditions to such modifications. Article 41 is a specific expression of the general default conflict rule in public international law laid down in Article 30 of the Vienna Convention, according to which the conflicting provisions of the later treaty prevail over those of the earlier treaty. So if Article 41 of the Vienna Convention applies to the WTO legal order, international law rules can prevail over WTO norms in situations of conflict and

¹¹⁴ *Ibid.*, 1482.

¹¹⁵ *Ibid.*

¹¹⁶ *Carmody*, EJIL 17 (2006), 419 (432).

¹¹⁷ For example, Art XVI:5 of the WTO Agreement provides that “[n]o reservations may be made in respect of any provision of this Agreement”. Similarly, the Art. 18.2 AD-Agreement, Art. 32.2 SCM, Art. 15:1 TBT and Art. 72 TRIPS each provide that “[r]eservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members”.

¹¹⁸ *Pauwelyn*, EJIL 14 (2003), 907 (951).

¹¹⁹ *Ibid.*, 947.

WTO law can—just like other norms of international law—be modified through subsequent treaties as a consequence of the *lex posterior* principle.

In the WTO context, the derogability of WTO law through *inter se* agreements is primarily discussed with respect to regional or bilateral free trade agreements (FTAs). Article XXIV GATT with respect to trade in goods, Article V GATS with respect to trade in services, and the Enabling Clause, as far as agreements between developing countries are concerned, allow WTO members to conclude FTAs and hence enable them to derogate from their WTO obligations.¹²⁰ In particular, the obligation to grant the most favourable treatment to all WTO members enshrined in the MFN principle has been limited through the formation of FTAs because members of FTAs are entitled to grant each other more favorable terms than to non-members, and thus, to deviate from the principle that WTO members accord to each other the most favorable treatment.¹²¹ However, the WTO Appellate Body puts significant limits on the right of WTO members to derogate from their WTO obligations through the conclusion of FTAs in order to safeguard the integrity of the WTO's legal system and to protect core principles of WTO law, especially the principles of nondiscrimination and judicial review.

First, the WTO Appellate Body has made clear that the right to contract out of WTO obligations cannot mainly depend on the general conflict rules of public international law. Instead, it must be assessed on the basis of the rules and terms set forth by WTO law. In the *Peru – Agricultural Products* case, the AB noted that “the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41”.¹²² According to the AB, “the proper routes to assess whether a provision in an FTA that may depart from certain WTO rules is nevertheless consistent with the covered agreements are the WTO provisions that permit the formation of regional trade agreements”.¹²³ Put differently, the AB insists that *inter se* modifications of WTO law are only permitted to the extent that they are provided for by WTO law itself. This confirms the view that the WTO legal order constitutes a *lex specialis* system that forms part of international law but that must primarily be interpreted in light of the specific rights, obligations, remedies and enforcement mechanisms set forth in WTO law.¹²⁴ It is therefore misplaced to predominantly interpret

¹²⁰ Although Articles XXIV GATT and V GATS impose narrow substantive and procedural requirements for the formation of FTAs, those requirements have not effectively contained the formation of FTAs. The main reason is the institutional design of the responsible review body through which the conformity of proposed FTAs with these requirements is assessed ex-ante: The WTO Committee on Regional Trade Agreements constitutes a purely intergovernmental review mechanism that has not imposed any meaningful legal limits on the formation of FTAs. See *Langille*, N.Y.U. Law Review 86 (2001), 1482 (1505).

¹²¹ As a result of numerous free trade agreements, the EU, for example, actually grants most favoured nation duty rates not to all 164 WTO members but only to ten members: US, Canada, Japan, Australia, New Zealand, South Korea, Singapore, Hongkong, Russia and Ukraine.

¹²² WTO, *Peru — Agricultural Products*, Report of the Appellate Body of 20 July 2015, DS/457/AB/R, para. 5.112.

¹²³ *Ibid.*, para. 5.113.

¹²⁴ Against this background, *Gabrielle Marceau* convincingly argues that WTO “members wanted to set up an international system of rules and obligations specific to their trade relations, a system

the system of derogability and enforcement of WTO obligations through the lens of general rules of international law such as the Vienna Convention and the ILC Articles on State Responsibility and to assume, as a consequence, that WTO obligations can seamlessly be amended bilaterally between two WTO members via subsequent treaties.¹²⁵ Such an approach would go against the normative duty of the AB to protect the integrity and coherence of the WTO's legal system. This illustrates that the institutionalization of a judicial body tends to restrict derogations from the body of law that this institution is assigned to interpret.

Second, the AB substantially protects the principles of nondiscrimination and the right to judicial review by the WTO adjudicative system against derogations through FTA rules. *Langille* rightly observes that the Appellate Body and the panels have imposed significant limits on discriminations against WTO members that are not members of the FTA at issue.¹²⁶ She notes that the AB has continually asserted “the core constitutional obligation to mitigate discrimination against third parties”.¹²⁷ Moreover, the AB insists that WTO members maintain their right to judicial review by the Dispute Settlement Body to assess whether FTA measures are compatible with WTO obligations.¹²⁸ Against this background, *Langille* concludes that as a result of the jurisprudence of the WTO Appellate Body, “the contractual model of the WTO, which states that all WTO obligations should be able to be modified by parties acting at a bilateral or regional level, is flawed”¹²⁹ because “[t]here are core constitutional obligations in WTO law that, to some extent, cannot be varied.”¹³⁰

III. Enforcement

1. *Linkage Between Enforcement and Community Interest*

As we have seen, the debate about community obligations in public international law is geared toward enforcement.¹³¹ The essence of *erga omnes* obligations, the essential community obligation in international law, is that “[a]ny State other than an injured State is entitled to invoke the responsibility”—and hence to take specified enforcement measures—in reaction to a breach of a community obligation.¹³² In the context of WTO law, the question of who can enforce breaches of WTO obligations is also used as an indicator for the community character of a norm. The main questions

that would be coherent in itself and within which rights, obligations and related state action would be the result of an overall balance of concessions”. *Marceau*, EJIL, 13 (2002), 753 (773). In reality, “[i]t is difficult to conceive of situations where a panel would set aside a WTO provision in favour of another treaty or a customary provision claimed to have superseded the relevant WTO provision”. *Ibid.*, 771.

¹²⁵ Cf. *Carmody*, EJIL 17 (2006), 419 (437).

¹²⁶ *Langille*, N.Y.U. Law Review 86 (2001), 1482 (1510).

¹²⁷ *Ibid.*, 1514.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, 1515.

¹³⁰ *Ibid.*

¹³¹ See above at B., 6.

¹³² See Art. 48(1) of the ILC Articles on State Responsibility.

in this regard are, first, under what conditions a WTO member is entitled to bring a case before a panel and, second, what remedies are available against another member whose conduct allegedly violates WTO obligations. These questions are linked to the basic dichotomy between the collective or communal and bilateral or contractual nature of WTO obligations. Roughly speaking, if WTO obligations are bilateral and breaches of these obligations only affect the bilateral relationship between the breaching and the injured state, then there is no good reason to extend the rights to advance a claim to a non-injured state or to provide for compensation as a remedy. It would best fit this bilateral structure to require that the complainant has a distinct legal interest in the matter, for example, because it has suffered as a result of the breach of a WTO obligation an adverse economic effect in the form of nullification or impairment of its trade benefits.¹³³ In contrast, if WTO obligations represent community interests, there should, in principle, be no limits on which WTO member has standing to challenge a breach and a return to legality should be the preferred remedy, for every member would have a general interest that all members respect their WTO obligations.

2. *Standing*

The standing regime in WTO law is predominantly geared towards legality control. It broadly empowers WTO members to bring alleged violations of WTO law before a panel regardless of any adverse trade economic effect. A WTO member is not required to establish a special legal interest that extends beyond the general interest in ensuring compliance with WTO law in order to have legal standing.¹³⁴ WTO law therefore provides for generous standing rules that clearly extend beyond the bilateral relationship between the wrongdoer and the injured state. This holds especially true for trade in services and prohibited subsidies where WTO law effectively provides for some form of *actio popularis*, entitling WTO members to initiate dispute settlement proceedings regardless of what economic effect the breach of a WTO obligation has on them. By contrast, the GATT regime of legal standing has not entirely abandoned the requirement of an adverse trade effect, but its role has been significantly reduced in WTO adjudicatory practice.

Bilateral elements are notably absent with respect to prohibited subsidies under the Agreement on Subsidies and Countervailing Measures (SCM). Article 3(1) SCM provides that export and import subsidies shall be prohibited. Article 4 SCM entitles a WTO member to bring a complaint irrespective of any adverse trade effect whenever it “has reason to believe that a prohibited subsidy is being granted or maintained by another Member”. In the controversial decision in *US – FSC*, a WTO panel held that, in order to initiate dispute settlement proceedings, WTO members are only “required simply to establish the existence of a measure that is, as a matter of principle, expressly

¹³³ Pauwelyn, EJIL 14 (2003), 907 (935).

¹³⁴ Bäumler, *The Legal Nature of WTO Obligations*, 63.

prohibited”.¹³⁵ By contrast, they “are not obliged to make a case regarding the adverse effects to successfully challenge such measures”.¹³⁶ The panel decisively based its decision on the communal character of Article 3 SCM: “It is an erga omnes obligation owed in its entirety to each and every Member. It cannot be considered to be ‘allocatable’ across the Membership. Otherwise, the Member concerned would be only partially obliged in respect of each and every Member, which is manifestly inconsistent with an erga omnes per se obligation.”¹³⁷

Similarly, Art. XXIII(1) of the General Agreement on Trade in Services (GATS) also entitles any member to bring a case in the event of a breach of the services agreement. Art. XXIII GATS provides that “[i]f any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU”. According to the recent Panel report in *Argentina — Measures Relating to Trade in Goods and Services*,¹³⁸ this provision contains no requirement that violations of GATS obligations “have trade effects for the complainant”.¹³⁹ As a consequence, the effects of the breach of GATS obligations on the WTO member for bringing a complaint are immaterial for that member’s legal standing. Art. XXIII GATS is concerned with “the conditions of competition and not [...] the actual effects on specific service suppliers”.¹⁴⁰ Against this background, the Panel argued strongly that requiring the complainant to establish that it is engaged in trade in services with the respondent “would lead to an absurd situation in which the GATS would apply to measures provided that there is actual trade in services but would not apply to the most trade-restrictive measures, that is, bans on supplying services, which, by their very nature, prevent actual flows of services”, adding that “such an outcome would serve to weaken the GATS and would clearly be contrary to the object and purpose of the Agreement”.¹⁴¹ In other words, it is not only contrary to Art. XXIII GATS to require a showing of any adverse economic effect; a complainant is not even required to establish the existence of service relations with the respondent. It suffices to base the complaint on an alleged violation of a GATS obligation.

The equivalent standing provision to Article XXIII of the GATS in the GATT is Article XXIII GATT. Practically, the most important complaint procedure is the violation complaint pursuant to Article XXIII:1(a) of GATT 1994¹⁴² that sets forth two alternative grounds for legal standing: The failure of another contracting party to carry out its obligations under this Agreement either results in nullification or impairment

¹³⁵ WTO, *US — FSC (Article 22.6 Arbitration)*, WT/DS108/AB/R, Report of the Panel of 30 August 2002, para. 5.39.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*, para. 6.10; Critical *Howsel Neven*, WTR 4 (2005), 101–124.

¹³⁸ WTO, *Argentina — Financial Services*, Report of the Panel of 30 September 2015, WT/DS453/R.

¹³⁹ *Ibid.*, para. 7.92.

¹⁴⁰ *Ibid.*, para. 7.89.

¹⁴¹ *Ibid.*, para. 7.94.

¹⁴² In addition to the violation complaint (XXIII:1(a)), Article XXIII of the GATT 1994 also provides for the procedural avenues of the non-violation complaint (Article XXIII:1(b)) and the situation complaint (Article XXIII:1(c)).

of a trade benefit or impediment of the attainment of any objective of the Agreement. These two alternatives echo the ambivalence of WTO law more generally: While the standing requirement of nullification or impairment of a negotiated trade benefit to a particular WTO member is an expression of the bilateral dimension of WTO law, the alternative requirement of an impediment of the attainment of any objective is more in line with a communal dimension. Article 3(8) of the DSU specifies the relationship between those two alternatives, providing that “[i]n cases where there is an infringement of the obligations assumed under a covered treaty, the action is considered as prima facie to constitute a case of nullification or impairment”. According to Article 3(8) DSU, “[t]his means that there is normally a presumption that a breach of the rules has an adverse impact on other Member parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.” Article 3(8) DSU hence lays down the rebuttable presumption that the infringement of a WTO obligation causes an adverse effect on the economic interests of all other WTO members. The requirement of an adverse trade effect in the form of nullification or impairment is not entirely abandoned, but the breaching state is required to rebut the presumption and to prove that the measure has not had an adverse trade impact on WTO members.

Pauwelyn argues in support of the alleged bilateral nature of WTO obligations that “WTO dispute settlement does not tackle breach, but rather nullification of benefits that accrue to a particular member”.¹⁴³ Yet, the opposite is the case: The WTO Appellate Body and the panels interpret the linkage between the breach of a WTO obligation and the existence of an adverse trade impact in a manner that has marginalized the requirement of an adverse trade effect. According to the AB, “standing may also exist in cases that result in no finding of nullification or impairment”.¹⁴⁴ What matters for establishing legal standing is that a WTO obligation was violated. It is immaterial whether this violation resulted in nullification or impairment of trade benefits in WTO practice. As a consequence, the presumption has yet to be rebutted. Some panels have even cautiously questioned whether the presumption in Article 3(8) DSU is rebuttable at all.¹⁴⁵

The most important step in the marginalization of the nullification or impairment-requirement was the *EC – Bananas III* case, in which the AB affirmed the legal standing of the U.S. to act as the complainant in the matter although it barely produced bananas and did not export any bananas at all. The European Communities put forward two arguments against the U.S.’s standing: First, they argued that the

¹⁴³ *Pauwelyn*, EJIL 14 (2003), 907 (934-35).

¹⁴⁴ WTO, *EC — Bananas III — Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, Report of the Appellate Body of 11 December 2008, para. 464.

¹⁴⁵ See, e.g.: GATT, *US — Taxes on Petroleum and Certain Imported Substances*, Report of the Panel of 17 June 1987, L/6175 – BISD 34S/136, para. 5.1.7. (observing that ‘the presumption that illegal measures cause nullification or impairment could be rebutted [...] had in practice operated as an irrefutable presumption’); WTO, *Turkey — Textiles*, Report of the Panel of 31 May 1999, WT/DS34/R, para. 9.204 (noting that “even if the presumption in Article 3.8 of the DSU were rebuttable, Turkey has not provided us with sufficient information to set aside the presumption”).

U.S. lacked the required legal interest to bring a complaint;¹⁴⁶ second, in an attempt to “rebut the presumption of nullification or impairment”, they contended that because “the United States has never exported a single banana to the European Community”, it “could not possibly suffer any trade damage”.¹⁴⁷ However, the AB rejected both arguments. First, it held that “neither Article 3(3) nor 3(7) DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a ‘legal interest’ as prerequisite for requesting a panel”,¹⁴⁸ stressing that “a Member has broad discretion in deciding whether to bring a case against another Member under the DSU”.¹⁴⁹ Second, it found that a violation of the NT principle must “be regarded ipso facto as a nullification or impairment of benefits”.¹⁵⁰ In the context of the NT principle, the AB stressed repeatedly that it is irrelevant whether the effects of a measure on a particular trade volume are insignificant or non-existent.¹⁵¹ This is because the NT principle does not “protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products”.¹⁵² Hence, a breach of the NT principle necessarily impairs the expectations regarding the equality of competitive conditions regardless of whether the parties to the dispute are actually engaged in trade relations with regard to a particular good. The consequence in *EC – Bananas III* was that the AB could not exclude the possibility that the United States “could at any time start exporting the few bananas it produces to the European Communities”,¹⁵³ irrespective of how unlikely this may seem. But if the potentiality of trade in the future already suffices to infer an adverse trade impact from a breach, then every violation of a nondiscrimination principle has at least an indirect effect on the protected expectations of virtually all WTO members.¹⁵⁴

In effect, this broadly conceived notion of standing empowers WTO members to act as agents of the common interest in compliance with WTO obligations and to bring complaints alleging breaches of WTO law before Panels. The WTO’s enforcement regime therefore does not primarily protect against the nullification or impairment of particular trade benefits; rather, it protects the general interest of all WTO

¹⁴⁶ WTO, *EC — Bananas III*, Report of the Appellate Body of 9 September 1997, WT/DS27/AB/R, para. 17.

¹⁴⁷ *Ibid.*, para. 250.

¹⁴⁸ *Ibid.*, para. 132; The Panel in *Korea — Dairy* has extended this reasoning to reject Korea’s argument that there is a requirement for an economic interest to bring a matter to the Panel, stressing that “[w]e cannot read in the DSU any requirement for an ‘economic interest’”. WTO, *Korea — Dairy*, Report of the Panel of 21 June 1999, WT/DS98/R, para. 7.13.

¹⁴⁹ *Ibid.*, para. 135.

¹⁵⁰ *Ibid.*, para. 252.

¹⁵¹ WTO, *Japan — Alcoholic Beverages II*, Report of the Appellate Body of 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 16.

¹⁵² WTO, *EC — Bananas III*, Report of the Appellate Body of 9 September 1997, WT/DS27/AB/R, para. 252.

¹⁵³ WTO, *EC — Bananas III - Second Recourse to Article 21.5 of the DSU by Ecuador*, Report of the Appellate Body of 26 November 2008, WT/DS27/AB/RW2/ECU, para. 469.

¹⁵⁴ The AB has recognized itself that “... with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly”. WTO, *EC — Bananas III*, Report of the Appellate Body of 9 September 1997, WT/DS27/AB/R, para. 136.

members that WTO obligations, especially the principles of nondiscrimination, are observed.

3. Remedies

In comparison to the rules on standing, bilateral elements are more persistent with respect to remedies. The most striking examples are mutually agreed solutions and suspensions of WTO obligations. Article 3.7 DSU encourages parties to a dispute to settle the dispute through mutually agreed solutions before bringing a case to the WTO institutions in accordance with Article 3.6 DSU. In practice, the wrongdoer agrees in a mutually agreed solution to pay a certain amount to the complainant without bringing the non-compliant measure into conformity with WTO law.¹⁵⁵ Article 22 DSU provides that if, and only if, a WTO member fails to comply with the recommendations and rulings of the Appellate Body or a Panel, the complainant that won the case “may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements”.¹⁵⁶ This type of “tit-for-tat play”¹⁵⁷ is hardly suited to further the central purpose of the dispute settlement system as set out in Article 3.2 DSU, namely, to “provid[e] security and predictability to the multilateral trading system”. It also clearly shows that bilateral elements still persist within the WTO enforcement regime.¹⁵⁸

The availability of these remedies begs the question, once succinctly asked by *John Jackson*, of whether WTO law gives members “the choice to compensate or obey”. *Jackson* himself convincingly answered this question in the negative. Article 22.1 DSU obliges WTO members to bring their measures “into conformity” with WTO law regardless of whether they have negotiated a mutually agreed solution or whether they are entitled to take countermeasures which can only be temporary. A mutually agreed solution does not cure the violation of WTO law; the obligation to return to compliance with WTO law continues to exist after conclusion of a mutually agreed solution.

¹⁵⁵ In the *US — Upland Cotton* case, for example, the U.S. agreed to pay Brazil \$ 300 million USD in exchange for Brazil’s commitment not to bring a WTO dispute concerning US subsidies on cotton. WTO, *US — Upland Cotton*, Report of the Appellate Body of 3 March 2005, WT/DS267/AB/R. See also WTO, *US — Clove Cigarettes*, Report of the Appellate Body of 4 April 2012, WT/DS406/AB/R, in which the U.S. and Indonesia notified the WTO of a Mutually Agreed Solution.

¹⁵⁶ For example, in the *European Communities — Bananas* case, the U.S. responded to the failure of the EU to bring its Bananas importation regime in conformity with WTO law by imposing extra duties on luxury handbags imported from the European Union. See Communication from the United States to the Chairman of the Dispute Settlement Body of the WTO, 14 January 1999, WT/DS27/43. This is pointed out by *Stoll*, in: Fastenrath et al (eds), *From Bilateralism to Community Interest*, 172 (172).

¹⁵⁷ *Ibid.*

¹⁵⁸ *Steve Charnovitz* sarcastically noted that “the World Health Organization does not authorize one party to spread viruses to another party. The World Intellectual Property Organization does not fight piracy with piracy. So the WTO’s use of trade restrictions to promote freer trade is bizarre”. *Charnovitz* in: Kennedy/Southwick (eds), *The Political Economy of International Trade Law*, 602 (622).

Compensation and retaliation are only fallback options.¹⁵⁹ WTO members are only entitled to take countermeasures to induce compliance with WTO law.

The preferred and only final remedy under WTO law is the recommendation to bring a non-compliant measure into conformity with WTO law. Article 3.7 DSU stresses that “the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the [non-compliant] measures”. Article 22.1 DSU underlines that “neither compensation nor the suspension of concessions [...] is preferred to full implementation”. *Carmody* correctly observes against this background that WTO remedies are geared toward principles of distributive justice.¹⁶⁰ The emphasis is “not to repair prior or existing damage, but rather to correct future behavior”.¹⁶¹ In fact, compensation for damages is not even an objective of the dispute settlement system.¹⁶² The real aim of the system is “to re-establish the distribution of expectations”¹⁶³ by returning to WTO-conformant behavior. *Pascal Lamy* views this emphasis of the WTO’s remedies regime on compliance and legality rather than on compensation as “a clear sign of the transformation of a society into a community”.¹⁶⁴ It furthermore indicates, as *Jelena Bäumler* observes, “that the violation is not resolved exclusively within the bilateral relation but the respective member is obliged to observe its obligations towards all member states by again behaving in conformity with the WTO agreements”.¹⁶⁵ The idea that WTO obligations are owed to all members is especially pronounced in the context of prohibited export subsidies. Here, every member is entitled to take countermeasures even if it has not suffered a negative trade effect.¹⁶⁶ To conclude, the WTO’s system of remedies is characterized by a finely-tuned interplay between the communal and bilateral dimensions of WTO law. It is well described as “a highly complex system which combines elements of reciprocity and those of common interest”.¹⁶⁷

E. The Community Interest of Promoting an Essentially Rules-based and Fair World Market

What is the greater community interest that WTO law protects? While searching for elements of community interests in WTO law, we have seen that at the core of the WTO’s legal system lie the foundational principles of WTO law, the most-favoured

¹⁵⁹ *Jackson*, AJIL, 1997, 60 (61).

¹⁶⁰ *Carmody*, EJIL 17 (2006), 419 (427).

¹⁶¹ *Ibid.*

¹⁶² *Van den Bossche*, in: De Baere/Wouters (eds), *The Contribution of International and Supranational Courts to the Rule of Law*, 176 (188).

¹⁶³ *Carmody*, EJIL 17 (2006), 419 (421).

¹⁶⁴ *Lamy*, EJIL 17 (2007), 969 (976).

¹⁶⁵ *Bäumler*, *The Legal Nature of WTO Obligations*, 42.

¹⁶⁶ The Panel in *Brazil — Aircraft* noted that countermeasures taken in reaction to violations of Article 4 of the SCM aim “at removing a measure which is presumed under WTO Agreement to cause negative trade effects, irrespective of who suffers those trade effects and to what extent”. WTO, *Brazil — Aircraft — Recourse to Art. 22(6)*, Report of the Panel of 28 August 2000, WT/DS46/R, para. 3.57(c).

¹⁶⁷ *Stoll*, in: Fastenrath et al (eds), *From Bilateralism to Community Interest*, 172 (179).

nation and the national treatment clauses; we have seen that the WTO Appellate Body and the Panels assert the importance of these nondiscrimination principles by imposing strict limits on derogations whenever these principles are affected; and we have seen that WTO law provides enforcement mechanisms, especially broad standing rules that extend beyond the bilateral relationship between the breaching and the injured state, that are primarily concerned with protecting the equality of competitive conditions between WTO members. We argue that these communal elements in WTO law are related to a greater community interest: the promotion of an essentially rules-based and fair world market. This community interest finds expression in the preambles and provisions of the various WTO agreements: the Agreements on Subsidies, on Agriculture, and on Trade in Civil Aircraft explicitly refer to the “world market”.¹⁶⁸ Indeed, the WTO Agreement itself seeks to develop a “multilateral trading system” for this world market that is “integrated, more viable and durable”.¹⁶⁹

I. The Underlying Economic Theory

The economic rationale behind the communal interest in the promotion of a rules-based and fair world market has been fleshed out in *David Ricardo's* theory of comparative advantage. Despite all of its criticism, *Ricardo's* free trade theory, complemented by the *Heckscher-Ohlin* model, remains the most persuasive explanatory approach for world trade today.¹⁷⁰ This theory suggests that free trade leads countries to concentrate their economic resources on producing in areas in which they have a comparative competitive advantage over other countries. If countries mutually exchange products with comparative cost advantages, resources are allocated more efficiently and the overall welfare among all countries is maximized. In this theory, free trade provides the conditions for an optimal allocation of resources. An undistorted global market on which buyers and sellers can trade with each other under equal competitive conditions hence leads to overall welfare gains from which all countries participating in this exchange, rich and poor, can benefit. By contrast, protectionist policies and discriminations result in welfare losses because they distort this optimal allocation of resources and, consequently, create inefficiencies. They hence cannot be explained based on the concept of comparative advantage, but only with public choice theories according to which welfare losses are accepted for political reasons.¹⁷¹

WTO law, as laid down in various preambles and declarations, is based on the premise that the overall welfare gains created by a liberalized world trade further other

¹⁶⁸ The Preamble of the Agreement on Trade in Civil Aircraft desires “to provide fair and equal competitive opportunities for their civil aircraft activities and for their producers to participate in the expansion of the *world civil aircraft market*”. See Agreement on Trade in Civil Aircraft, Preamble, para. 4. The Preamble of the Agreement on Agriculture aims at “correcting and preventing restrictions and distortions in *world agricultural markets*”. Agreement on Agriculture, Preamble, para. 3. According to Art. 6.3(d) of the SCM, “serious prejudice” may arise, inter alia, if “the effect of the subsidy is an increase in the *world market* share of the subsidizing Member in a particular subsidized primary product or commodity”.

¹⁶⁹ Agreement Establishing the World Trade Organization, Preamble, para. 4.

¹⁷⁰ *Tietje*, in: *Tietje* (ed), *Internationales Wirtschaftsrecht*, § 3, 158–236, para. 11.

¹⁷¹ *Ibid.*, para. 11-13.

community interests. Indeed, the Marrakesh Declaration claims that “a fairer and more open multilateral trading system” is “for the benefit and welfare of [the] peoples [of WTO member states]”.¹⁷² The WTO Agreement and the GATT of 1947 assert that world trade can contribute “to raising standards of living, ensuring full employment and a large and steadily growing volume of real income”,¹⁷³ and the Doha Ministerial Declaration of 2001 adds that it “can play a major role in the promotion of economic development and the alleviation of poverty”.¹⁷⁴ WTO law hence establishes a link between welfare gains that are held in prospect by economic free trade theory and broader community interests such as raising standards of living and alleviating poverty.

II. Promoting a World Market

But how specifically does WTO law contribute to the promotion of a world market? Simplifying a complex reality, a market is a place providing sellers and buyers with opportunities to exchange values such as products and services. Therefore, in principle, a world market exists if sellers and buyers exchange values globally. But global economic activity depends critically on regulatory conditions for trade across borders. The WTO system provides a necessary legal framework that is virtually global in membership and in scope. Although not all states are members, the WTO is a truly universal international organization. It currently comprises 164 members, including all major trading nations, and has nineteen further accessions pending. It covers almost all fields of international trade almost everywhere on this planet.¹⁷⁵

The WTO aims at providing the regulatory conditions for the emergence of a world market. The core concern of WTO law is the protection of those structures that enable and further global economic activity for the purpose of generating overall welfare. This focus on the protection of a trade-conducive structure rather on trade volume has been confirmed repeatedly by WTO jurisprudence.¹⁷⁶ By “requiring equality of competitive conditions”,¹⁷⁷ WTO law creates opportunities for traders to compete with each other globally and consequently creates the necessary conditions for global economic activity to prosper and to lead to the formation and consolidation of an increasingly dense and interdependent world market. It is this background against which the MFN principle requires equal treatment between foreign products regard-

¹⁷² Marrakesh Declaration, 15 April 1994, para. 2.

¹⁷³ Agreement Establishing the World Trade Organization, Preamble, para. 1; General Agreement on Tariffs and Trade 1947, Preamble, para. 2.

¹⁷⁴ WT/MIN(01)/DEC/1, 14 November 2001, para. 2.

¹⁷⁵ See *Bäumler*, Das Schädigungsverbot im Völkerrecht, 205. In 2014, the worldwide share of merchandise exports of WTO members was 97 per cent. *WTO*, International Trade Statistics 2015, 34.

¹⁷⁶ The WTO Appellate Body stated with respect to the national treatment principle that “Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products”. *WTO, Japan — Alcoholic Beverages II*, Report of the Appellate Body of 4 October 1996, WT/DS8/AB/R, para. 16.

¹⁷⁷ *WTO, Korea — Alcoholic Beverages*, Report of the Appellate Body of 18 January 1999, WT/DS75/AB/R, para. 120.

ing access to domestic markets and the NT principle demands equal treatment between domestic and foreign products within a domestic market. According to the Panel in *Korea — Alcoholic Beverages*, the nondiscrimination principles are intended to ensure “economic opportunities” and “potentiality to compete” for all products and services, regardless of their origin, in all WTO members.¹⁷⁸ Their fundamental objective is “to ensure equality of competitive conditions”.¹⁷⁹

Moreover, notwithstanding its lack of direct effect, WTO law is oriented toward individual economic players because the transboundary economic activity of individual players ultimately constitutes the world market. In reality, most trade is not conducted by states but by companies and individuals, and the economic benefits resulting from the WTO’s regulatory framework are reaped directly by traders and consumers and only indirectly by states. When “protecting expectations of equal competitive relationships”,¹⁸⁰ WTO law also takes into account the expectations of individuals and companies. This insight was eloquently summarized by the Panel in *US — Section 301-310*:

*[I]t would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.*¹⁸¹

III. An Essentially Rules-based and Fair Character

The WTO sets forth a rules-based multilateral trade system. As indicated above, the establishment of the WTO and the Appellate Body has transformed the initial GATT of 1947 from “a rudimentary, power-based system for settling disputes through diplomatic negotiations into a fairly elaborate, rules-based system for settling disputes through adjudication”.¹⁸² The focus of WTO law today lies in providing the legal structures for the formation and protection of a world market. It seeks to provide a reliable rules-based framework for the spontaneous order of world trade.¹⁸³ Article 3(2) DSU emphasizes this basic aim of “providing security and predictability to the

¹⁷⁸ WTO Panel Report, *Korea — Alcoholic Beverages*, Report of the Panel of 17 September 1998, WT/DS75/R, WT/DS84/R, para. 10.81.

¹⁷⁹ WTO, *Canada — Periodicals*, Report of the Appellate Body of 30 June 1997, WT/DS31/AB/R, 18.

¹⁸⁰ WTO, *Korea — Alcoholic Beverages*, Report of the Appellate Body of 18 January 1999, WT/DS75/AB/R, WT/DS84/AB/R, para. 120.

¹⁸¹ WTO, *US — Sections 301-310*, Report of the Panel of 22 December 1999, WT/DS152/R, para 7.73.

¹⁸² *Van den Bossche*, in: De Baere/Wouters (eds), *The Contribution of International and Supranational Courts to the Rule of Law*, 176 (181).

¹⁸³ *Tietje*, in: Tietje (ed), *Internationales Wirtschaftsrecht*, § 3, 158–236, para. 14.

multilateral trading System”. When *Carmody* argues that the principal object of WTO obligations “is the protection of collective expectations about the trade-related behaviour of governments”,¹⁸⁴ he essentially refers to the WTO’s legal framework, which guides and constrains the trade policies of its members. A secure and predictable regulatory framework for international trade provides the conditions for global economic activity to prosper. The objective of providing legal certainty therefore also and particularly benefits private economic operators.¹⁸⁵

The rules-based design of the WTO system aims at solving or at least restraining the collective action problems that can arise in international trade relations. The root of the collective action problem lies in the prisoner’s dilemma that each country would be best off if it could unilaterally define the trade relationships to other countries but that all countries are worse off if they all seek to unilaterally design their trade policies. The world has experienced in the 1930s how the latter approach of unilateral protectionist measures and trade wars by numerous countries spiraled into the mutually destructive Great Depression. The rules-based character of the WTO system is instrumental in helping to overcome those collective action problems. The legal commitments undertaken by WTO members and their administration through an independent and impartial adjudicatory body constrains disruptions of the multilateral trading system in the form of domestic protectionist pressures or unilateral defections from the common rules.¹⁸⁶

This rules-based character also augments the fairness of the WTO system. Notwithstanding persisting fairness deficits,¹⁸⁷ a rules-based trading system benefits all countries, including developing countries.¹⁸⁸ As we have discussed, the central cause for unfairness within the WTO system is its dimension as an intergovernmental bargaining forum that reinforces existing power asymmetries. However, the legal dimension of the WTO tends to restrain these asymmetries.¹⁸⁹

IV. Establishing the Community Interest

We argue that the promotion of an essentially rules-based and fair world market constitutes a community interest properly understood. The transformation of the multilateral trading system into a rules-based system that is interpreted and constructed by an Appeals Court acting arguably as the “constitutional court[]”¹⁹⁰ of the WTO law has communalized elements of WTO law. For *Cho*, law and legal discourse have the power to transform the WTO from “a Gesellschaftian structure driven by interest, negotiation, and contract” to a global trading Gemeinschaft that “can achieve its de-

¹⁸⁴ *Carmody*, EJIL 17 (2006), 419 (419).

¹⁸⁵ *Tietje*, in: Tietje (ed), Internationales Wirtschaftsrecht, § 3, 158–236, para. 18.

¹⁸⁶ *Mendoza*, in: Kaul/Conceicao/Le Goulven/Mendoza (eds), Providing Global Public Goods, 455 (460).

¹⁸⁷ See above at C. III., 13.

¹⁸⁸ See *Mendoza*, in: Kaul/Conceicao/Le Goulven/Mendoza (eds), Providing Global Public Goods, 455 (460); *Cottier*, JIEL 18 (2015), 3 (5).

¹⁸⁹ See above at C. III., 13–14.

¹⁹⁰ *Stone Sweet*, Indiana Journal of Global Legal Studies 16 (2009), 621 (642).

velopment agenda and become fair and legitimate”¹⁹¹. But even beyond optimistic scenarios, legalization has injected systematic values such as legal certainty, predictability and stability into the WTO system.¹⁹² *Isabel Feichtner* therefore argues for good reason that “[a] functioning legal system which creates security and predictability in international trade relations may [...] itself be regarded as a common good”.¹⁹³

Moreover, the interrelatedness between the WTO’s legal system and the world market also indicates that community interests are at stake. First, the legal framework of the multilateral trading system has been designed to boost economic interdependence not only among WTO members but also among individual economic operators, and hence, provides conditions for the formation of a world market. According to *Carmody*, “the tendency of the WTO Agreement to promote interaction among producers and consumers in different countries, and thereby to spin an indissoluble web of economic relations [...] goes beyond the interests of WTO Members individually”. *Simma* noted, in the same vein, that this “rapidly increasing international concern with [...] economic interdependence [tends to] communaliz[e] and publiciz[e]” international relations.¹⁹⁴ Second, if it is true that the attainment of community interests will often require collective action,¹⁹⁵ then a legal system such as the WTO legal order that is aimed at overcoming collective action problems is in the communal interest. Against this background, the promotion of this essentially rules-based and fair world market is in the interest of all WTO members and is protected by impartial WTO institutions, especially the Appellate Body, against recurring self-interested protectionist measures by some members.

The communal character of promoting a world market is further confirmed by the specific design of the rules of enforcement under WTO law. Ultimately, the question of what constitutes a community interest of a particular legal regime must be informed by how the relevant actors within that regime perceive a certain interest and in which way they have constructed the legal principles and norms relating to that interest. Our analysis of the WTO’s enforcement regime has shown that virtually every WTO member is entitled to bring a complaint before the Dispute Settlement Body if a WTO nondiscrimination obligation is breached regardless of showing an adverse economic effect.¹⁹⁶ The standing rules in the GATS and the SCM contain no requirement whatsoever that the complainant has suffered trade damage. Article 3 of the SCM is illustrative in this regard: Every prohibited export subsidy is irrefutably presumed to distort equal competitive conditions in the marketplace. As a result, every WTO member is considered to have a general interest in the protection of a market undistorted by prohibited export subsidies. Article 3 SCM is effectively treated like

¹⁹¹ *Cho*, *Alabama Law Review* 56 (2004), 483 (490).

¹⁹² *Ibid.*, 524.

¹⁹³ *Feichtner*, in: Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, para. 4.

¹⁹⁴ *Simma*, *Recueil des Cours* 250 (1994 IV), 217 (234).

¹⁹⁵ See *Benvenisti/Nolte*, Introductory chapter in *Benvenisti/Nolte* (eds), *Community Obligations in Contemporary International Law* (forthcoming).

¹⁹⁶ See above at D. III. 2., 25-26.

“an erga omnes obligation owed in its entirety to each and every Member”.¹⁹⁷ In the context of the GATT rules on standing, the Dispute Settlement Body has interpreted the nullification or impairment requirement in Article XXIII of the GATT in a way that marginalizes this requirement. In effect, the rules on standing do not require the complainant to establish a specific interest; the general interest shared by all WTO members that the nondiscrimination principles are observed suffices. Because the national treatment principle does not protect actual export volumes but equality of competitive conditions, “[i]t is sufficient to point to a measure as it exists on the books and to explain how this measure affects competitive opportunities in favor of domestic products”.¹⁹⁸ The reason for this generous construction of the standing requirement is that it is in the communal interest of all WTO members that “the equality of competitive conditions” is preserved.¹⁹⁹ The standing requirements are relaxed to allow all members to enforce the basic trade conditions that enable the formation of a world market.²⁰⁰

Of course, this does not imply that all WTO law remotely related to the notion of world market is communal or collective. It is more accurate to think of WTO law as interplay of communal and bilateral interests in which communal elements have slowly overlapped and superseded bilateral elements.²⁰¹ What constitutes collective obligations in WTO law are the core norms that pursue the promotion of an essentially fair and rules-based world market, in particular the nondiscrimination principles of most favored nation and national treatment with respect to trade in goods and in services, the obligation set forth in Article 3 SCM to neither grant nor maintain prohibited export subsidies, the access to judicial review by the dispute settlement body, and the principal obligation of wrongdoers to bring their measures into conformity with WTO law.

¹⁹⁷ WTO, *US — FSC (Article 22.6 Arbitration)*, Report of the Panel of 30 August 2002, WT/DS108/AB/R, para. 6.10.

¹⁹⁸ *DiMasciol Pauwelyn*, AJIL, 2008, 48 (89).

¹⁹⁹ *Bäumler*, *Das Schädigungsverbot im Völkerrecht*, 206, who draws a parallel to *erga omnes* obligations in international law that could be enforced by anyone.

²⁰⁰ *Pauwelyn* and *Gazzini* contest that the generous construction of standing rules is indicative of the communal character of elements of WTO law. They argue that it is doctrinally possible to extend the enforcement mechanisms typically designed for collective obligations to bilateral obligations “notwithstanding the bilateral nature of the obligations”. *Pauwelyn*, EJIL 14 (2003), 907 (925-26); *Gazzini*, EJIL 17 (2006), 723 (739-740). Their argument is, essentially, that the collective or bilateral character of WTO law does not depend on the design of the enforcement mechanism set forth but on the nature of the WTO’s legal obligation. However, it is simply not convincing to exclude the design of enforcement mechanisms as a criterion for the existence of a community obligation if, as is the case, the entire debate about community obligations in international law is geared towards the issue of enforcement – likely because enforcement (or a lack thereof) is the Achilles heel of public international law. The very definition of *erga omnes* obligations depends on enforcement for what critically defines *erga omnes* obligations is that they entitle all States to take enforcement actions. If, in contrast, enforcement did not matter, what would be the point of providing for an *actio popularis* that entitles all members to bring a case, including non-injured members, if the obligational structure is purely conceived of as bilateral and hence only exists between the breaching and the injured state?

²⁰¹ See similarly: *Stoll*, in: Fastenrath et al (eds), *From Bilateralism to Community Interest*, 172 (175) (“the international trade regime may serve as a good example to demonstrate that reciprocity and common interest may go hand in hand.”).

V. Community Interests and Negative Integration?

An argument that can be brought forward against the notion that WTO law pursues the community interest of promoting an essentially fair and rules-based world market is that it would only target negative integration. In order to understand this objection, it is necessary to take one step back and to explain the dichotomy between positive and negative economic integration, which is often used to distinguish the WTO from the EU. A commonly made claim is that EU law pursues positive integration because it aims at the establishment of a common market by means of regulatory harmonization. In contrast, WTO law is concerned with negative integration because its scope is limited to prescribing certain trade-restrictive measures to enable market access and to protect the equality of competitive relationships between the members. While negative integration only requires governments to refrain from taking trade-restrictive measure, positive integration positively obliges governments to adopt new domestic policies.²⁰² But why should the promotion of an essentially fair and rules-based world market, even if the world trade system primarily operates through the mechanisms of negative integration, not constitute a community interest?

The juxtaposition between positive and negative integration disguises the fact that both merely describe different degrees of economic integration. Moreover, although the WTO system predominantly pursues the mode of negative integration, there exist several cases of positive integration in the various WTO agreements that provide for positive obligations such as harmonization of standards and mutual recognition, in particular in the TRIPs, the SPS, the TBT and the TRIMs.²⁰³ But even though the extent of positive integration in the WTO is minor compared to the EU, it is not clear why any economic integration beyond the state that falls short of the level of integration achieved in the supranational European Union is precluded from counting as a community interest. In this regard, we should remember that the constitutionalization of the EU was initially pushed forward substantially by negative integration. After all, it was the European Court of Justice that transformed the European market freedoms into fundamental principles through the doctrines of direct effect and primacy, and existing judicial procedure such as the preliminary reference into a full-blown legal system. Against the background of the foundational period of the EU in the 1960s and 70s, *Joseph Weiler* observed an asymmetry between the active development of supranational law and the inactive intergovernmental policy-making.²⁰⁴ A similar asymmetry, albeit on a lesser integration level, exists in the WTO. While the difficulties of intergovernmental lawmaking with over 160 countries in a multipolar world-order under conditions of consensus have stalled the Doha Development Round,²⁰⁵ the WTO dispute settlement system has proven to be a “success”.²⁰⁶ Nevertheless, *Van Den Bossche* warns of “a dangerous institutional imbalance in the WTO

²⁰² *Petersmann*, CMLR 37 (2000), 1363 (1364-1366).

²⁰³ *De Bièvre*, *Governance in International Trade*, 14-16.

²⁰⁴ See *Weiler*, *Yale Law Journal* 100 (1991), 2403-2483.

²⁰⁵ *Cottier*, *JIEL* 18 (2015), 3 (3).

²⁰⁶ *Van den Bossche*, in: *De Baere/Wouters* (eds), *The Contribution of International and Supranational Courts to the Rule of Law*, 176 (202).

between its ‘judicial’ branch and its political ‘rule-making’ branch”.²⁰⁷ This suggests that the dichotomy between negative and positive integration is ultimately about the difference between legal and political integration, between judicial and legislative lawmaking, and between law and democracy. The formation of a true political community cannot be realized through legal integration alone. Hence, the predominance of the mode of negative integration operationalized through the Dispute Settlement Body places inherent limitations on understanding the WTO system as a community. We suggest, however, that it would overly restrict our notion of community interests in public international law if it was inseparably tied to the existence of a community.

F. Conclusion

In our view, WTO law protects the community interest of promoting an essentially rules-based and fair world market. The core concern of WTO law is to protect trade-conducive structures that enable and further global economic activity for the purpose of generating overall welfare. The foundational principles of WTO law, the most-favored nation and the national treatment clauses aim to protect the equality of competitive conditions between WTO members. Derogations from WTO law are strictly limited whenever these principles are affected. The WTO enforcement regime entitles virtually every WTO member to bring a complaint before the Dispute Settlement Body, if a WTO nondiscrimination obligation is breached, to enforce the basic trade conditions that enable the formation of a world market. Although bilateral elements have long been dominant and still prominently exist in the WTO legal order, communal elements slowly overlap and supersede bilateral elements as part of the legal and institutional transformation of the world trade system, in particular, the establishment of the Appellate Body, brought about by the founding of the WTO.

²⁰⁷ *Ibid.*

REFERENCES

- Alter*, Karen J., Agents or Trustees? International Courts in their Political Context, *European Journal of international Relations* 14 (No. 1, 2008), 33–63.
- Bäumler*, Jelena, Das Schädigungsverbot im Völkerrecht: Eine Untersuchung anhand des Umwelt-, Welthandels- und Finanzvölkerrechts, Berlin/Heidelberg 2016.
- The Legal Nature of WTO Obligations Bilateral or Collective?, LLM Thesis, University of the Western Cape, South Africa 2013.
- Benvenisti*, Eyal/*Nolte*, Georg (eds), Community Obligations in Contemporary International Law (forthcoming).
- Bullard*, Nicola/*Chanyapate*, Chanida, Ten Years of the WTO: Subordinating Development to Free Trade, *Internationale Politik und Gesellschaft* 2005, 21–34.
- Carmody*, Chios, A Theory of WTO Law, *Journal of International Economic Law* 11 (No. 3, 2008), 527–557.
- WTO Obligations as Collective, *European Journal of International Law* 17 (No. 2, 2006), 419–443.
- Charnovitz*, Steve, Should the Teeth Be Pulled? An Analysis of WTO Sanctions. in: Kennedy, Daniel L./ Southwick, James D. (eds), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec*, Cambridge 2002, 602–635.
- Cho*, Sungjoon, *The Social Foundations of World Trade – Norms, Community and Constitution*, Cambridge 2014.
- The WTO’s Gemeinschaft, *Alabama Law Review* 56 (No. 2, 2004), 483–542.
- Cottier*, Thomas, The Common Law of International Trade and the Future of the World Trade Organization, *Journal of International Economic Law* 18 (No. 1, 2015), 3–20.
- De Bièvre*, Dirk, Governance in International Trade: Judicialisation and Positive Integration in the WTO, Preprints of the Max Planck Institute for Research on Collective Goods (No. 7, 2004), 1–21.
- DiMascio*, Nicholas/*Pauwelyn*, Joost, Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?, *American Journal of International Law* 102 (No. 1, 2008), 48–89.
- DiMatteo*, Larry A./*Dosanjb*, Kiren/*Frantz*, Paul L./*Bowal*, Peter/*Stoltenberg*, Clyde, The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime, *Vanderbilt Journal of Transnational Law* 36 (No. 2, 2003), 95–160.
- Dworkin*, Ronald, *Justice for Hedgehogs*, Cambridge 2011.
- Feichtner*, Isabel, Community Interest, in: Wolfrum, Rüdiger (ed), *Max Planck Encyclopedia of Public International Law*, available at: < <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1677?rskey=hfHhBK&result=1&prd=EPIL>> (1.12.2016).
- Gazzini*, Tarcisio, The Legal Nature of WTO Obligations and the Consequences of their Violation, *European Journal of International Law* 17 (No. 4, 2006), 723–742.
- Howse*, Robert, The World trade Organization 20Years On: Global Governance by Judiciary, *European Journal of International Law* 27 (No. 1, 2016), 9–77.
- *Neven*, Damien, United States – Tax treatment for “Foreign Sales Corporations” Recourse to Arbitration by the United States under Article 22.6 of the DSU and Arti-

- de 4.11 of the SCM Agreement: A comment, *World Trade Review* 1 (No. 1, 2005), 101–124.
- Hudec*, Robert E., *Developing Countries in the GATT Legal System*, Cambridge 2003.
- Irwin*, Douglas A./*Mavroidis*, Petros C./*Sykes*, Alan O., *The Genesis of the GATT*, Cambridge 2009.
- Jackson*, John, Editorial Comment: International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?, *American Journal of International Law* 98 (No. 1, 2004), 109–125.
- The Perils and the World Trading System, *Fordham International Law Journal* 24 (No. 1-2, 2000), 371–382.
 - Editorial Comment: The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation, *American Journal of International Law* 91 (No. 1, 1997), 60–64.
- Lamy*, Pascal, The Place of the WTO and its Law in the International Legal Order, *European Journal of International Law*, 17 (No. 5, 2007), 969–984.
- Lang*, Andrej, Die Verfassungsgerichtsbarkeit in der vernetzten Weltordnung (unpublished manuscript).
- Langille*, Joanna, Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting Out Through Regional Trade Agreements, *New York University Law Review* 86 (No. 5, 2011), 1482–1518.
- Marceau*, Gabrielle, WTO Dispute Settlement and Human Rights, *European Journal of International Law* 13 (No. 4, 2002), 753–814.
- Mendoza*, Ronald U., The Multilateral Trade Regime: A Global Public Good For All?, in: Kaul, Inge./Conceição, Pedro/Le Goulven, Katell/Mendoza, Ronald U. (eds), *Providing Global Public Goods*, Oxford/New York, 455–583.
- Moore*, Mike, Ten Years of WTO: A Success Story of Global Governance, *Internationale Politik und Gesellschaft* 2005, 12–20.
- Pauwelyn*, Joost, A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?, *European Journal of International Law* 14 (No. 5, 2003), 907–951.
- Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law, Cambridge/New York, 2003.
- Peter*, Simone, *Public Interest and Common Good in International Law*, Basel 2009.
- Petersmann*, Ernst-Ulrich, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*, Den Haag/London/Boston 1997.
- From “Negative” to “Positive” Integration in the WTO: Time for “Mainstreaming Human Rights” into WTO Law?, *Common Market Law Review* 37 (No. 6, 2000), 1363–1382.
- Simma*, Bruno, From Bilateralism to Community Interest in International Law, *Recueil des Cours* 250 (1994-VI), 217–384.
- Slaughter*, Anne-Marie/*Burke-White*, William W., An International Constitutional Moment, *Harvard International Journal* 43 (No. 1, 2002), 1–21.
- Stewart*, Richard R./*Sanchez Badin*, Michelle R., The World Trade Organization: Multiple dimensions of Global Administrative Law, *International Journal of Constitutional Law* 9 (No. 3-4, 2011), 556–586.

- Stoll*, Peter-Tobias, The World Trade Organization as a Club: Rethinking Reciprocity and Common Interest, in: Fastenrath, Ulrich et al (eds), *From Bilateralism to Community Interest: Essays in Honor of Bruno Simma*, Oxford/New York 2011, 172–183.
- Stone Sweet*, Alec, Constitutionalism, Legal Pluralism, and International Regimes, *Indiana Journal of Global Legal Studies* 16 (No. 2, 2009), 621–645.
- Tietje*, Christian, WTO und Recht des Weltwarenhandels, in: Tietje, Christian, (ed), *Internationales Wirtschaftsrecht*, Internationales Wirtschaftsrecht, 2nd edt, Berlin/Boston, 2015, § 3, 158–236
- Van den Bossche*, Peter, The Appellate Body of the World Trade Organization, in: De Baere, Geert/Wouters, Jan (eds), *The Contribution of International and Supranational Court to the Rule of Law*, Cheltenham Glos 2015, 176–202.
- von Bogandy*, Armin/*Venzke*, Ingo, *In Whose Name? A Public Law Theory of International Adjudication*, Oxford/New York, 2014.
- Weiler*, J.H.H., The Transformation of Europe, *Yale Law Journal* 100 (No. 8, 1991), 2403–2483.
- The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement, *Journal of World Trade* 35 (No. 2, 2001), 191–207.
 - The Geology of International Law – Governance, Democracy and Legitimacy, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 64 (No. 3, 2004), 547–562.

Beiträge zum Transnationalen Wirtschaftsrecht

(bis Heft 13 erschienen unter dem Titel: Arbeitspapiere aus dem
Institut für Wirtschaftsrecht – ISSN 1619-5388)

ISSN 1612-1368 (print)

ISSN 1868-1778 (elektr.)

Bislang erschienene Hefte

- Heft 100 Ernst-Joachim Mestmäcker, Die Wirtschaftsverfassung der EU im globalen Systemwettbewerb, März 2011, ISBN 978-3-86829-346-3
- Heft 101 Daniel Scharf, Das Komitologieverfahren nach dem Vertrag von Lissabon – Neuerungen und Auswirkungen auf die Gemeinsame Handelspolitik, Dezember 2010, ISBN 978-3-86829-308-1
- Heft 102 Matthias Böttcher, „Clearstream“ – Die Fortschreibung der Essential Facilities-Doktrin im Europäischen Wettbewerbsrecht, Januar 2011, ISBN 978-3-86829-318-0
- Heft 103 Dana Ruddigkeit, Die kartellrechtliche Beurteilung der Kopplungsgeschäfte von *eBay* und *PayPal*, Januar 2011, ISBN 978-3-86829-316-6
- Heft 104 Christian Tietje, Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenen-system des Rechts, Januar 2011, ISBN 978-3-86829-320-3
- Heft 105 Jürgen Bering/Tillmann Rudolf Braun/Ralph Alexander Lorz/Stephan W. Schill/Christian J. Tams/Christian Tietje, General Public International Law and International Investment Law – A Research Sketch on Selected Issues –, März 2011, ISBN 978-3-86829-324-1
- Heft 106 Christoph Benedict/Patrick Fiedler/Richard Happ/Stephan Hobe/Robert Hunter/Lutz Kniprath/Ulrich Klemm/Sabine Konrad/Patricia Nacimiento/Hartmut Paulsen/Markus Perkams/Marie Louise Seelig/Anke Sessler, The Determination of the Nationality of Investors under Investment Protection Treaties, März 2011, ISBN 978-3-86829-341-8
- Heft 107 Christian Tietje, Global Information Law – Some Systemic Thoughts, April 2011, ISBN 978-3-86829-354-8
- Heft 108 Claudia Koch, Incentives to Innovate in the Conflicting Area between EU Competition Law and Intellectual Property Protection – Investigation on the Microsoft Case, April 2011, ISBN 978-3-86829-356-2
- Heft 109 Christian Tietje, Architektur der Weltfinanzordnung, Mai 2011, ISBN 978-3-86829-358-6
- Heft 110 Kai Hennig, Der Schutz geistiger Eigentumsrechte durch internationales Investitionsschutzrecht, Mai 2011, ISBN 978-3-86829-362-3
- Heft 111 Dana Ruddigkeit, Das Financial Stability Board in der internationalen Finanzarchitektur, Juni 2011, ISBN 978-3-86829-369-2

- Heft 112 Beatriz Huarte Melgar/Karsten Nowrot/Wang Yuan, The 2011 Update of the OECD Guidelines for Multinational Enterprises: Balanced Outcome or an Opportunity Missed?, Juni 2011, ISBN 978-3-86829-380-7
- Heft 113 Matthias Müller, Die Besteuerung von Stiftungen im nationalen und grenzüberschreitenden Sachverhalt, Juli 2011, ISBN 978-3-86829-385-2
- Heft 114 Martina Franke, WTO, China – Raw Materials: Ein Beitrag zu fairem Rohstoffhandel?, November 2011, ISBN 978-3-86829-419-4
- Heft 115 Tilman Michael Dralle, Der Fair and Equitable Treatment-Standard im Investitionsschutzrecht am Beispiel des Schiedsspruchs *Glamis Gold v. United States*, Dezember 2011, ISBN 978-3-86829-433-0
- Heft 116 Steffen Herz, Emissionshandel im Luftverkehr: Zwischen EuGH-Entscheidung und völkerrechtlichen Gegenmaßnahmen?, Januar 2012, ISBN 978-3-86829-447-7
- Heft 117 Maria Joswig, Die Geschichte der Kapitalverkehrskontrollen im IWF-Übereinkommen, Februar 2012, ISBN 978-3-86829-451-4
- Heft 118 Christian Pitschas/Hannes Schloemann, WTO Compatibility of the EU Seal Regime: Why Public Morality is Enough (but May not Be Necessary) – The WTO Dispute Settlement Case “European Communities – Measures Prohibiting the Importation and Marketing of Seal Products”, Mai 2012, ISBN 978-3-86829-484-2
- Heft 119 Karl M. Meessen, Auf der Suche nach einem der Wirtschaft gemäßen Wirtschaftsrecht, Mai 2012, ISBN 978-3-86829-488-0
- Heft 120 Christian Tietje, Individualrechte im Menschenrechts- und Investitionsschutzbereich – Kohärenz von Staaten- und Unternehmensverantwortung?, Juni 2012, ISBN 978-3-86829-495-8
- Heft 121 Susen Bielesch, Problemschwerpunkte des Internationalen Insolvenzrechts unter besonderer Berücksichtigung der Durchsetzung eines transnationalen Eigentumsvorbehalts in der Insolvenz des Käufers, Juli 2012, ISBN 978-3-86829-500-9
- Heft 122 Karsten Nowrot, Ein notwendiger „Blick über den Tellerrand“: Zur Ausstrahlungswirkung der Menschenrechte im internationalen Investitionsrecht, August 2012, ISBN 978-3-86829-520-7
- Heft 123 Henrike Landgraf, Das neue Komitologieverfahren der EU: Auswirkungen im EU-Antidumpingrecht, September 2012, ISBN 978-3-86829-518-4
- Heft 124 Constantin Fabricius, Der Technische Regulierungsstandard für Finanzdienstleistungen – Eine kritische Würdigung unter besonderer Berücksichtigung des Art. 290 AEUV, Februar 2013, ISBN 978-3-86829-576-4
- Heft 125 Johannes Rehahn, Regulierung von „Schattenbanken“: Notwendigkeit und Inhalt, April 2013, ISBN 978-3-86829-587-0
- Heft 126 Yuan Wang, Introduction and Comparison of Chinese Arbitration Institutions, Mai 2013, ISBN 978-3-86829-589-4

- Heft 127 Eva Seydewitz, Die Betriebsaufspaltung im nationalen und internationalen Kontext – kritische Würdigung und Gestaltungsüberlegungen, August 2013, ISBN 978-3-86829-616-7
- Heft 128 Karsten Nowrot, Bilaterale Rohstoffpartnerschaften: Betrachtungen zu einem neuen Steuerungsinstrument aus der Perspektive des Europa- und Völkerrechts, September 2013, ISBN 978-3-86829-626-6
- Heft 129 Christian Tietje, Jürgen Bering, Tobias Zuber, Völker- und europarechtliche Zulässigkeit extraterritorialer Anknüpfung einer Finanztransaktionssteuer, März 2014, ISBN 978-3-86829-671-6
- Heft 130 Stephan Madaus, Help for Europe's Zombie Banks? – Open Questions Regarding the Designated Use of the European Bank Resolution Regime, Juli 2014, ISBN 978-3-86829-700-3
- Heft 131 Frank Zeugner, Das WTO Trade Facilitation-Übereinkommen vom 7. Dezember 2013: Hintergrund, Analyse und Einordnung in den Gesamtkontext der Trade Facilitation im internationalen Wirtschaftsrecht, Oktober 2014, ISBN 978-3-86829-735-5
- Heft 132 Joachim Renzikowski, Strafvorschriften gegen Menschenhandel und Zwangsprostitution de lege lata und de lege ferenda, November 2014, ISBN 978-3-86829-739-3
- Heft 133 Konrad Richter, Die Novellierung des InvStG unter besonderer Berücksichtigung des Verhältnisses zum Außensteuergesetz, März 2015, ISBN 978-3-86829-744-7
- Heft 134 Simon René Barth, Regulierung des Derivatehandels nach MiFID II und MiFIR, April 2015, ISBN 978-3-86829-752-2
- Heft 135 Johannes Ungerer, Das europäische IPR auf dem Weg zum Einheitsrecht Ausgewählte Fragen und Probleme, Mai 2015, ISBN 978-3-86829-754-6
- Heft 136 Lina Lorenzoni Escobar, Sustainable Development and International Investment: A legal analysis of the EU's policy from FTAs to CETA, Juni 2015, ISBN 978-3-86829-762-1
- Heft 137 Jona-Marie Winkler, Denial of Justice im internationalen Investitionsschutzrecht: Grundlagen und aktuelle Entwicklungen, September 2015, ISBN 978-3-86829-778-2
- Heft 138 Andrej Lang, Der Europäische Gerichtshof und die Investor-Staat-Streitbeilegung in TTIP und CETA: Zwischen Konfrontation, Konstitutionalisierung und Zurückhaltung, Oktober 2015, ISBN 978-3-86829-790-4
- Heft 139 Vinzenz Sacher, Freihandelsabkommen und WTO-Recht Der Peru-Agricultural Products Fall, Dezember 2015, ISBN 978-3-86829-814-7
- Heft 140 Clemens Wackernagel, The Twilight of the BITs? EU Judicial Proceedings, the Consensual Termination of Intra-EU BITs and Why that Matters for International Law, Januar 2016, ISBN 978-3-86829-820-8
- Heft 141 Christian Tietje/Andrej Lang, Community Interests in World Trade Law, Dezember 2016, ISBN 978-3-86829-874-1

Die Hefte 1 bis 99 erhalten Sie als kostenlosen Download unter:

<http://telc.jura.uni-halle.de/de/forschungen-und-publikationen/beitr%C3%A4ge-transnationalen-wirtschaftsrecht>