



## **Economic Policy Programme**

**Initiative of the European Union**

Confidential

## **Conditions and Requirements to Qualify as a Separate Customs Territory under WTO Rules**

Submitted to the  
Economic Policy Programme  
London School of Economics  
and  
the European Commission's Economic Policy  
Support Programme  
Jerusalem  
(Project No OT/94/05 Technical Assistance)

Dr. Thomas Cottier, LL.M., attorney  
Professor of European & Int'l Economic Law

Krista Nadakavukaren Schefer, J.D., attorney  
Research Fellow

**Legal Opinion**  
**February 1998**

The Economic Policy Programme is funded by the European Community (EC) and coordinated by the Ministry of Economy and Trade in collaboration with the London School of Economics and Political Science. The two-year project is an initiative launched as part of the European Community's programme of assistance to the Palestinian population of the West Bank and Gaza Strip. The objective is to provide the Palestinian Authority (PA) with policy support that will both assist it in clarifying and shaping trade policy and strengthen its capacity to negotiate with current and potential trading partners on economic and trade policy issues. The programme, which was launched in May 1996, works with a team of leading international experts - economists, political scientists and trade lawyers - in support of the ministry's policy agenda, and has held in collaboration with the ministry a number of roundtables on trade-related issues.

### **Economic Policy Programme**

Programme Coordination Office  
Room Z324, Department of International Relations  
London School of Economics  
Houghton Street, London WC2A 2AE

Programme Coordinator: Valerie Yorke  
Tel: 44 171 955 6781/955 6175 Fax: 44 171 955 6176  
Email: V.Yorke@lse.ac.uk

*This report was prepared with financial assistance from the Commission of the European Communities. The views expressed herein are those of the Consultants, and do not represent any official view of the Commission.*

## I. Introduction

Trade and economic relations between countries around the globe are increasingly shaped by the rules of the World Trade Organization (WTO). These rules set the stage under the obligation of most-favored nation treatment (MFN), national treatment, and other forms of non-discrimination. They also set the stage for entering and maintaining privileged relations based upon bilateral or multilateral free trade arrangements within a region. This paper assumes that, in the future, WTO rules will be of enhanced importance in the Middle East, shaping trading relations with major markets both in Africa, Asia, the Americas and Europe, and within the region. We recall that Israel and Egypt have been long-standing parties to the GATT and are members of the WTO; and Jordan is about to join the WTO. The paper further presumes that there is and will be a consensus that a future trading regime in the Middle East should be compatible with WTO rules and that relations with all trading partners should be developed on these same foundations.

The lasting relationship of future Palestine with its neighbors, in particular the State of Israel, therefore should be shaped in accordance with the rules of the World Trade Organization legal system. A final settlement between the Palestinian Authority (P.A.) and the Government of the State of Israel needs to take WTO law into account and work to further the development of this body of law. This not only is of importance to achieving Palestine's membership in the World Trade Organization and to exercise rights therein. More importantly, it is important for shaping the substance of Palestine's future economic and trade relationship with the State of Israel and with other trading partners.

The effort implies considerable changes to the current regime under the Paris Economic Protocol. The drive for observership and eventual membership in the WTO serves to support this effort and achieve Palestine's goals of enhanced autonomy, if not independence, in international economic relations.

WTO rules are and will be shaping a number of trade-related issues. For our purposes, however, we observe them in order to define those areas of jurisdiction and competence which, need to be allocated to Palestine in order to achieve a regime compatible with the international trading system of the WTO.

This paper seeks to explore the essential areas of jurisdiction which Palestine would need to assume as a member of the WTO. Accordingly, the main terms of reference of the legal opinion are as follows:

"In order to assist the PA to prepare positions and shape requirements for the final peace talks, further explorations of those areas which, under WTO rules, should fall under the jurisdiction of the PA would be useful. Of particular importance is the need to clarify a number of areas of economic regulations which do not directly relate to trade regulations, such as taxation, agricultural policies and government procurement. A priority will be further to explore the implications of the Agreement on Trade in Services. This entails examination of a number of sectors, such as transport, including civil aviation, professional services, financial services and labour movement. It is unclear at this point whether a separate customs territory will need to have jurisdiction over all service regulations.

“3. The purpose of Professor Cottier's legal opinion is to inform the PA and the European Union on the areas of jurisdiction that Palestine needs to insist upon obtaining as a minimum requirement in the peace talks - whatever the final political configuration. WTO law and the goal of membership will set the minimal standard of jurisdiction which any settlement, whatever its political outcome, will have to reach. The study will build upon previous opinions submitted to the Economic Policy Programme, in particular the one relating to the Paris Protocol, and provide a foundation for further work once a clearer direction as to the nature of the political settlement evolves. The proposed study does not directly affect the action plan which is concerned with PA moves towards achieving observer status at the WTO as a preliminary step towards full membership under final configuration.”

While it is evident that full statehood with all its qualifications of sovereignty and full jurisdiction, inherently qualifies a territory for full membership in international agreements and organizations, the WTO system allows for membership by entities with less than full sovereignty. This is of particular importance in the context of Palestine. Should the final settlement fall short of full sovereignty and statehood of Palestine (in particular due to security arrangements), WTO rules would still permit Palestine's full participation in the WTO system as long as Palestine can be defined as a separate customs territory with an independent trade regime. Whatever the name of Palestine will be, it is therefore essential that future agreements *at the very least* meet the requirements of being a separate customs territory.

The 1995 Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement)<sup>1</sup> with its competences in trade in services and the protection of intellectual property rights, as well as its authority over trade in goods, entails a large (and increasing) field which need to come under the jurisdiction of its members. Moreover, traditional distinctions between external and internal policies and regulations decrease. Consequently, the distinctions between full statehood and dependent, non-statehood for territories are diminishing. This paper submits in conclusion that even if full formal statehood cannot be achieved for Palestine, the conditions and requirements of World Trade Law provide a powerful argument in support of achieving full jurisdiction over many key economic areas under a future peace settlement. Moreover, it will be seen that WTO rules arguably have an impact on areas which need not be formally covered by such jurisdiction to the extent that imposed rules by a metropolitan power nullifies and impairs rights of third countries.

As we will discuss, the concept of full autonomy plays a crucial part in the defining of a customs territory under WTO law, and the paper will explore in more detail what this amounts to in different regulatory areas. But before turning to the analysis of full autonomy, it would seem useful to clarify the relationship of jurisdiction and the prospects of future regional trading arrangements. Given the complex situation in current Israeli-Palestine relations under the Paris Protocol and the realities of economic interdependence, it must be questioned whether the goal of achieving economic independence, at least as a separate customs territory with full autonomy, is desirable and viable. The economies of the region, in particular Palestine and Israel are likely to stay closely intertwined, and special relations with other neighboring economies are likely to develop further. There is no interest in establishing

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<sup>1</sup> For the text of the Marrakesh Agreement, *see* WTO, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 5-18 (1995) (*hereinafter*, The Legal Texts).

new borders and controls and rendering trade in the region more complicated than it already is. There is no interest in seeking a separated regime, given the inextricably intertwined size of the territories concerned. Palestine, in other words, is likely to enter into a number of special and preferential regional agreements, regulating economic activities and trade in the Middle East.

Yet, it is important to distinguish the necessity of establishing the qualifications for participating in the World and regional trading system from the possibility of eventually entering into such agreements. Whatever the treaty relations in the future, it is important to establish Palestine's necessary treaty making power and thus its qualification for participation in the World Trading system. Jurisdiction required to qualify at least as a separate customs territory may be achieved in cooperation with other states. Such arrangements may be even concluded simultaneously within the final peace talks and become part of a settlement. Under Article XXIV GATT and Article V GATS there are two main avenues for bilateral or multilateral regional economic integration as at least a separate customs territory, and thus a member of the WTO:

- Palestine may, under conditions contained in WTO rules, enter into bilateral or multilateral preferential agreements and establish free trade areas in the region. Rights vis-à-vis third countries will thus be exercised *independently* by Palestine under separate and independent trade policies; or
- Palestine may, enter into a bilateral or multilateral customs union. Under such a structure, rights within the union and rights vis-à-vis third countries will be exercised *jointly* by the union and its members. Internal decision-making structures and the administration of the customs union are open to a wide field of options, ranging from supranational structures (such as in the European Communities) to delegation of powers to one of the parties (such as under the present *de facto* constellations under the Paris Protocol).

This paper will not deal with the merits of these or further options.<sup>2</sup> They will need further thought and tailor-made solutions have to be developed and found with, or after, the peace settlement. The point to emphasize is that all tailor-made options require, in the first place, the establishment of jurisdiction and thus compliance with the requirements for participation in the World Trading system. While Palestine may eventually exercise its rights to different degrees, they have to be claimed and established in the first place.

The paper first addresses the concept of separate customs territory, the issue of full autonomy, and the terms of acceding to the WTO. It continues to examine the scope of full autonomy

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<sup>2</sup> For reading on conditions to form privileged trade relations within the law of the WTO see P. Demarez, J.-F. Bellis, and G. García Jiménez (eds.), *Regionalism and Multilateralism After the Uruguay Round: Convergence, Divergence and Interaction* (European University Press: Brussels 1998); F. Abbott, *Law and Policy of Regional Integration* (Kluwer Law: Boston 1995); K. Anderson & R. Blackhurst, eds., *Regional Integration and the Global Trading System* (Harvester: New York 1993); T. Cottier, „The Challenge of Regionalization and Preferential Relations in World Trade Law and Policy,“ 1 *European Foreign Affairs Revue* 149-167 (1996). For state practice see WTO, *Regionalism and the World Trading System* (WTO, Geneva 1995).

required under WTO rules. This is done first by looking into past state practice. The paper then turns to the legal analysis of the main agreements of the WTO. It concludes in discussing those areas of economic regulations which need not necessarily be part of jurisdiction from the point of view of the World Trading system.

## II. The WTO Concept of Separate Customs Territories

### A. A Triumph of Pragmatism

The possibility for entities with less than full sovereignty to join and participate in the World Trade Organization is a seldom-found feature in international law. It is contained in the provision for both recognized states and non-states to enjoy membership in the Organization. This provision is an unusual one for an international organization, and should be acknowledged as a triumph of pragmatism in responding to the process of decolonization after World War II. Despite an increasing awareness of the rising importance of non-state actors<sup>3</sup> at the global level, membership in the formal international system of political and economic relations is still predominantly based on the entity of the state. International organizations particularly tend to keep to the old rules of state players. Although non-state members are allowed in some specialized organizations<sup>4</sup>, the largest of the international organizations other than the WTO, including the United Nations, the IMF, and the World Bank are all organized around state membership.

The WTO, as a functionalist organization, requires of its members only what is needed to ensure an effective commitment to the liberalization of trade. The politics involved in recognizing states and the legitimacy of particular governments is not immediately relevant to the creation of trade, and could be highly destructive to the smooth functioning of the World trade system. Such issues are largely avoided by the WTO's allowance of "separate customs territories" as members. Article XII of the Marrakesh Agreement provides:

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<sup>3</sup> By "non-state actor," we are referring to any entity which is not a recognized state under international law. This includes territories and protectorates as well as international organizations, non-governmental organizations, customs unions, corporations, associations, and private individuals.

The definition of a state is not firmly fixed in international law. The Convention on Rights and Duties of States, signed in Montevideo, sets out four characteristics of a state:

- (a) some amount of defined geographical territory;
- (b) a permanent population inhabiting the territory;
- (c) an independent government; and
- (d) ability to enter into treaties with other states.

Bengt Broms, "Subjects: Entitlement in the International Legal System" in: R. St.J. Macdonald and Douglas M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* 383-423, 387 (1983). For more on the criteria for statehood, see Barry E. Carter and Phillip R. Trimble, *International Law* 411-452 (1991) (includes a selected bibliography on pages 451-452).

<sup>4</sup> See Henry G. Schermers, *International Institutional Law* §59 at 38-39 (1980).

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.
3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.<sup>5</sup>

The option open to separate customs territories to join the World Trade Organization stems from rules designed in the Havana Charter (never adopted) and, subsequently the GATT. Article XXIII GATT 1947 contained comparable language to Article XII Marrakesh Agreement. It provided that a government not party to the Agreement, or one

acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement on its own behalf or on behalf of that territory....<sup>6</sup>

Article XXXIII GATT provided the basis for the accession of states that did not qualify for original membership or sponsorship. Potential new members negotiated individual protocols of accession under Article XXXIII pursuant to specific procedures developed by the Council.<sup>7</sup> While the possibility for non-states to become contracting parties to the GATT in their own right existed in the GATT Article XXXIII, no customs territory has ever done so. At the same time, GATT law and state practice has not remained silent on separate customs territories, and they were dealt with mainly in the process of sponsoring membership by metropolitan powers under GATT rules and of original membership under the new WTO.

## B. Modes of Accession to the WTO

Before turning to the issue of customs territories, it may be useful to recall the modes of accession to the WTO.

Under Art. XI of the Marrakesh Agreement, all Contracting Parties to GATT 1947 as of the January 1, 1995 coming into force who agreed to the Multilateral Trade Agreements and who had annexed Schedules of Specific Commitments annexed to GATT 1994 and GATS, were eligible for original membership of the WTO.<sup>8</sup> Unlike before, original membership also

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<sup>5</sup> Marrakesh Agreement Establishing the World Trade Organization (*hereinafter* Marrakesh Agreement), Art. XII, in: The Legal Texts at 15.

<sup>6</sup> GATT 1947 (now 1994), Art. XXXIII, in: The Legal Texts at 532. For full text *see infra* note 16.

<sup>7</sup> Analytical Index at 945 (citing "Accession to the General Agreement - Complementary procedures to be followed in the organization and pursuit of negotiations" GATT Doc. L/7317).

<sup>8</sup> Marrakesh Agreement, Art. XI, in: The Legal Texts at 14.

includes the European Communities (EC) as a new member distinct from the membership of the Member States of the European Union. Eighty-one parties to the former GATT 1947 became member states of the WTO on January 1, 1995<sup>9</sup> only two of them being a separate customs territories, short of full statehood and sovereignty: Hong-Kong and Macau. Under Article XIV of the Marrakesh Agreement, original membership remained open only for a period of two years.<sup>10</sup> During this period, membership could be sought without a separate protocol of accession, and without assuming additional concessions until 1997.

States and separate customs territories that were not contracting parties to the GATT 1947 will have to join the WTO by way of accession as set out in Art. XII:1. This will also apply to contracting parties of the GATT 1947 for accessions after January 1, 1997. This, at any rate, will be the relevant procedures of Palestine, either as a state or as separate customs territory.

Accession varies from original membership in procedural and substantive terms. Procedures essentially follow the model applied and tested before under the regime of GATT. Generally upon a period as an observer and de facto application of WTO rules, accession requires extensive negotiations with the WTO members to determine the terms of accession. Procedures include extensive examination of the trading system in a process of questions and answers. It is in particular necessary to demonstrate treaty-making powers and full autonomy with a view to honor commitments vis-à-vis the members of the WTO. Basic requirements and conditions for membership (statehood or at least a separate customs territory) therefore need to be in place at this stage.

The process results in drafting the terms of accession which are accompanied by the results of bilateral negotiations, applied to all members on an MFN basis. All together, such terms will include bilateral tariff and non-tariff concessions and any special rules that will be applied between members of the WTO and the new member (a similar process to that of negotiating membership to the GATT under a protocol of accession). Joining the WTO is therefore not simply a matter of passively agreeing to rules, as is often the case in joining international organizations. The WTO accession process calls for actively making initial commitments in both the schedules relating to tariffs and those relating to services. While this amounts to paying an entry ticket, the elaboration of an protocol of accession also allows to take into account specific features and unresolved problems of a candidate.

This is of particular importance in the case of Palestine. Given the complexities of the situation, it is likely that special rules, rights and obligations might emerge, in particular in defining the relationship with neighboring states, and Israel in particular. A number of difficult bilateral issues may be solved in accession negotiations. It is important to reiterate, however, that basic qualifications at least as a separate customs territory need to be realized at this time. This in particular means that the Palestine-Israel trade regime has to be brought in compliance with WTO rules, at this stage.

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<sup>9</sup> For a list of the membership status on January 1, 1995, see WTO, GT/13 Page 2/3.

<sup>10</sup> Marrakesh Agreement, Art. XIV:1, in: The Legal Texts at 16.

### C. The Concept of Customs Territories

The Marrakesh Agreement does not provide a definition of the concept of customs territories, as different from statehood. A definition is found in the GATT1994. Since this agreement is a part of the WTO and binding on all members, it is potentially relevant for defining the term for the WTO as a whole. A customs territory as defined by GATT 1994 Article XXIV:2 is:

... any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.<sup>11</sup>

If these requirements are met, a customs territory is, "exclusively for the purposes of the territorial application of this Agreement, [to] be treated as though it were a contracting party."<sup>12</sup> The provision reflects the fact that customs territories do not necessarily coincide with the territory of a sovereign state. It may be broader, or more limited, than such territory.

First, a customs territory may result from a state's territorial expansion of jurisdiction to include entities not belonging to that state. This would be similar to the case of Switzerland and the Principality of Liechtenstein up to 1994 when Liechtenstein became a member of GATT in its own right.<sup>13</sup> Second, a customs territory may be a subpart of a state or a customs union. One such case is Hong Kong, formerly part of Great Britain, and transferred to sovereignty of the People's Republic of China in 1997.

The GATT definition of a custom territory raises a number of legal issues. First, the definition clearly applies to dependent territories. They are treated "as though" they were full members. Such wording makes it unclear to what extent the definition of customs territory in Article XXIV of the GATT is relevant to defining the status of a separate customs territory under Article XII of the Marrakesh Agreement.

A second issue arises from the fact that the customs territory definition is found only in the GATT, and not in the Marrakesh Agreement as a whole. As the GATT governs trade in goods only, one must determine whether this definition also covers -- or should cover -- the new fields of services and intellectual property protection that are also included in the WTO.

A third issue is defining "separate tariff", "other regulations of commerce", and "substantial part of the trade of such a territory".

It is submitted that the provision of Article XXIV:2 GATT serves the limited purposes of defining the geographical scope of customs territories and emphasizing that the relevant territory of a member does not necessarily coincide with the borders of the state. This is

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<sup>11</sup> General Agreement on Tariffs and Trade, Art. XXIV:2, in: The Legal Texts at 522.

<sup>12</sup> General Agreement on Tariffs and Trade, Art. XXIV:1, in: The Legal Texts at 522.

With the European Communities' full membership in the WTO, a third form of customs territory was created. A customs territory may be constituted from the combined territories of a customs union, formed under GATT Art. XXIV:4-9.

<sup>13</sup> See GATT, Analytical Index: Guide to GATT Law and Practice 739 (6th ed. 1994) (*hereinafter* Analytical Index).

confirmed by the WTO system's use of the general term "country" to include both states and separate customs territories. Similarly, the use of the term "national" throughout the agreements is meant to include customs territories unless otherwise specified.<sup>14</sup>

It is not necessary to go beyond this point. Relevant criteria to establish the concept of a separate customs territory cannot be found on the basis of this provision. For this, we need to look into the meaning of a *separate* customs territory. The notion of full autonomy in Article XII of the Marrakesh Agreement provides the key for this.

#### D. The Issue of Full Autonomy

Article XII:1 of the Marrakesh Agreement requires that members of the WTO be able to conduct their own external economic affairs. For customs territories, as well as for states, the applicant must possess "full autonomy" in not only the "conduct of its external commercial relations," but also in the "other matters provided for in this Agreement" and of those matters regulated by the "Multilateral Trade Agreements annexed thereto".<sup>15</sup> Such requirements are extensions of the former Article XXXIII GATT 1947 provision which allowed for sponsored membership under similar conditions.<sup>16</sup> The main difference with the GATT 1947 lies in the Marrakesh Agreement's reference to the new generation of Multilateral Agreements, the most significant of which are the General Agreement on Trade in Services (GATS) and the Trade Related Aspects of Intellectual Property Agreement (TRIPs).<sup>17</sup>

The inclusion of services and intellectual property in the WTO has brought international trade rules into contact (and sometimes into conflict) with domestic laws to an extent perhaps unexpected. The requirement of "full autonomy" thus needs to be studied in the light of such extensive coverage. It is not clear whether it has the same meaning in all the different chapters and corners of WTO law. If a unitary view is not taken, the term "customs territory" may end up meaning something different for each of the three pillars of the system. While this would not necessarily be an undesirable result, the workability of such an outcome is questionable. We shall address this issue in examining the different agreements after having looked into past practice, mainly under the former GATT 1947.

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<sup>14</sup> Marrakesh Agreement, Explanatory Notes, in: The Legal Texts at 18.

<sup>15</sup> Marrakesh Agreement, Art. XII:1, in: The Legal Texts at 15 (emphasis added).

<sup>16</sup> General Agreement on Tariffs and Trade, Art. XXXIII, in: The Legal Texts at 532:

A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.

<sup>17</sup> Marrakesh Agreement, Art. XII:1, in: The Legal Texts at 15, *see also* Marrakesh Agreement, Art. II:2, in: The Legal Texts at 7:

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

### III. Past Experience with Accession of Non-State Members

Before turning to the interpretation of the concept of full autonomy as the constituting and essential requirement, it is interesting to look into past state practice. While Article XXXII GATT has never been applied, there has been discussions and state practice in the past on conditions for non-state membership to join the GATT by way of original or sponsored accession that help to define the level of autonomy required for Article XII of the Marrakesh Agreement. Equally, we need to look into recent practices under the WTO.

#### A. Past Experience under the GATT 1947

Since Article XII of the Marrakesh Agreement, pertinent for possible membership of Palestine in the WTO, has never been applied so far in accessions nor dispute settlement, the interpretation of the relevant provision will not only be based on the text, the object and purpose, construed in accordance with the provisions or Article 31 of the Vienna Convention on the Law of Treaties, but also on the basis of past experience. The provisions of the WTO have to take into account past practice under the GATT 1947.<sup>18</sup>

Looking to non-state members lends some insight on what competences may be required of a member under the term "full autonomy in the conduct of its external commercial relations". Although Burma, Ceylon, and Southern Rhodesia were cases of original membership to the GATT 1947, the discussions regarding their autonomy are enlightening to our analysis of accession. Of the present WTO membership, two of the three non-state members are Hong Kong and Macau.<sup>19</sup> Both of these territories were brought into the GATT under British colonial rule, and again are helpful for developing the concept of "full autonomy" even if not directly applicable to present non-sponsorship accession. The Principality of Liechtenstein, although a state, also called upon the customs territory provision asserting full autonomy despite a special relationship with Switzerland.

##### 1. Burma<sup>20</sup>, Ceylon<sup>21</sup>, and Southern Rhodesia<sup>22</sup>

In September of 1947, the UN Conference on Trade and Employment's Sub-Committee responsible for membership applications from territories released a recommendation to accept Burma, Ceylon, and Southern Rhodesia into the General Agreement.<sup>23</sup> The Sub-Committee

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<sup>18</sup> Marrakesh Agreement, Art. XVI:1 in: *The Legal Texts* at 17. ("Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.")

<sup>19</sup> GW/13, page 2/3 (WTO Membership as of January 1, 1995); the third non-state member is the customs territory of the European Communities.

<sup>20</sup> The name Burma has been changed to Myanmar.

<sup>21</sup> The name Ceylon has been changed to Sri Lanka.

<sup>22</sup> The name Southern Rhodesia has been changed to Zimbabwe.

<sup>23</sup> United Nations Economic and Social Council, "Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment: Report of the Ad Hoc Sub-Committee

based its decision on the United Kingdom's responses to four questions about the degree of autonomy each of the applicants enjoyed. The questions were relevant because of the United Kingdom's former control over and remaining legal relationship to the territories, and are important indicators of what the original negotiators considered relevant in defining "full autonomy".

The points on which the Sub-Committee asked for information were:

- (a) the ability of these territories to approve and modify tariffs without requiring the consent of the United Kingdom;
- (b) the ability of these territories to apply the General Agreement without reference to the United Kingdom;
- (c) the ability of these territories to enter into contractual relations on commercial matters with foreign Governments, including any examples of such contractual relations; and
- (d) the position of the representatives of these territories during the present negotiations, including an indication of any changes in their position which may have occurred during the course of the negotiations.<sup>24</sup>

While the United Kingdom's assurances on Burma and Southern Rhodesia's abilities questioned in (a), (b), and (c) were clear<sup>25</sup>, the case of Ceylon is particularly interesting. Ceylon was undergoing a constitutional change at the time, and the United Kingdom's Secretary of State's proposal for "full self-governing status within the British Commonwealth" was not yet accepted. Yet, the Sub-Committee accepted the United Kingdom's promise to allow Ceylon to conclude trade agreements with the other Commonwealth countries and inferred Ceylon's right to contract with other states from the existence of a United Kingdom-India trade agreement that resulted in India's ability to make trade agreements with Ceylon.<sup>26</sup> The Sub-Committee recognized that Ceylon's ability to enter into contracts with other states was *de facto* only<sup>27</sup>, but was concerned with the practical effects of admission more than legal technicalities. The applications of all three were unanimously recommended for acceptance:

Burma, Ceylon and Southern Rhodesia, according to their status *de jure and/or de facto*, can be admitted to participate as full contracting parties to the General Agreement on Tariffs and Trade.<sup>28</sup>

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of the Tariff Agreement Committee on Paragraph 3 of Art. XXIV," E/PC/T/198 (15 September 1947) (*hereinafter* E/PC/T/198).

<sup>24</sup> *Id.* at page 1.

<sup>25</sup> *Id.* at pages 2-3.

<sup>26</sup> Trade Agreement between the United Kingdom and India of 20 March 1939, Art. 13:1 (referred to in E/PC/T/198 of 15 September 1947 at page 2).

<sup>27</sup> E/PC/T/198 at page 2.

<sup>28</sup> *Id.* at page 3 (emphasis added).

The Sub-Committee's explicit reference to the *de facto* authority of the territories is a clear signal of the pragmatic approach to trade relations that has remained a characteristic of the World Trade Organization.

## 2. Macau

The admission of Macau as a Contracting Party to the GATT was fostered by a letter from the People's Republic of China certifying that upon the return of Macau to the People's Republic, the territory will be set up as a Special Administrative Region and would continue to control its own policies in "economic, trade and other fields".<sup>29</sup> The People's Republic will take control of Macau's "foreign affairs",<sup>30</sup> but presumably the GATT parties did not worry that this would interfere in the territory's full authorities in external commercial affairs. Macau continued to be a contracting party to the GATT, and is an original member of the WTO.

## 3. The Principality of Liechtenstein

The Swiss Confederation and Liechtenstein have a customs union treaty. Thus, when Switzerland accepted membership in the GATT, Liechtenstein was deemed a contracting party as member of the customs union.<sup>31</sup>

In 1994, Liechtenstein requested to become a contracting party in its own right according to the GATT Article XXVI:5(c), and sent a certification of its autonomy in external relations to the GATT.<sup>32</sup> Liechtenstein thus made an assertion of its full autonomy.

Switzerland confirmed this with a communication of its own stating:

The Principality of Liechtenstein is not bound by any undertaking that might compromise its autonomy in the conduct of its external economic relations and in other matters covered by the General Agreement.

The Swiss communication is typical of the blanket statement of autonomy often used in accession documents.<sup>33</sup>

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<sup>29</sup> "Admission of Macao as a Contracting Party: Communication from the People's Republic of China," L/6807 (14 January 1991).

<sup>30</sup> "Admission of Macao as a Contracting Party: Communication from the People's Republic of China," L/6807 at page 1 (14 January 1991).

<sup>31</sup> See Protokoll über den Beitritt der Schweiz zum Allgemeinen Zoll- und Handelsabkommen, Part I, paragraph 3 (April 1, 1966) in: SR (systematic collection of Swiss treaties) 0.632.211.1.

<sup>32</sup> "Admission of Liechtenstein as a Contracting Party: Certification by the Director-General," L/7440 (5 April 1994).

<sup>33</sup> See, e.g., "Status of Lesotho: De Facto Application of the GATT," L/2701 (28 October 1966):

The Director-General has been informed by the Government of the United Kingdom that on 4 October 1966 Basutoland acquired full autonomy in the conduct of its external commercial relations and of the other matters provided for in the General Agreement, and is now known as Lesotho.

Accordingly, the Recommendation of 18 November 1960 (9S/16), providing for the *de facto* application of the GATT as between the contracting parties and a territory which acquires autonomy, is applicable in respect of Lesotho.

#### 4. Hong Kong

In the case of Hong Kong, a letter from Great Britain again accompanied the application to GATT membership, containing blanket assurances of the autonomy of the colony over its external commercial affairs.<sup>34</sup> When Hong Kong became an independent GATT contracting party in 1986, it possessed full autonomy over its external commercial affairs.<sup>35</sup> The Governor of the territory, as its Executive, signs treaties and is authorized to join international organizations.<sup>36</sup> As a member of GATT, Hong Kong became one of the original members of the WTO in 1995.

The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China came into effect on July 1, 1997 when Hong Kong officially returned under the sovereignty of the People's Republic of China. Under the provisions of this law, Hong Kong will be under the defence of the People's Republic of China, but will retain separate competences to regulate life on the island. A general provision that Hong Kong will continue to function as a capitalist economy is contained in Article 5 of the Basic Law. Article 6 of the Basic Law provides for the protection of private property. Hong Kong will have special executive powers, and be allowed to conduct administrative, legislative, and judicial functions independently of the central Chinese government.<sup>37</sup>

More relevant to external commercial relations, Hong Kong Special Authority will not only continue to circulate its own currency<sup>38</sup> and impose its own taxes<sup>39</sup>, it will also issue certificates of rules of origin<sup>40</sup> and formulate environmental, agricultural, and tourism policies, among others.<sup>41</sup> In fact, Art. 116 sets out specifically:

The Hong Kong Special Administrative Region shall be a separate customs territory.

The Hong Kong Special Administrative Region may, using the name "Hong Kong, China", participate in relevant international organizations and international trade arrangements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles.

Export quotas, tariff preferences and other similar arrangements, which are obtained or made by the Hong Kong Special Administrative Region or

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<sup>34</sup> L/5986 (Certification by the Director-General, April 24, 1986) (may be found in BISD 34S/27); *see also* L/5687 (24 April 1986) (Communication from the People's Republic of China of April 23, 1986).

<sup>35</sup> Renu Daryanani, ed., *Hong Kong 1995: A Review of 1994* 114 (1995).

<sup>36</sup> *Id.*

<sup>37</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Art. 16, 17, 19 (*hereinafter* Basic Law).

<sup>38</sup> Basic Law, Art. 111.

<sup>39</sup> Basic Law, Art. 108.

<sup>40</sup> Basic Law, Art. 117.

<sup>41</sup> Basic Law, Art. 119.

which were obtained or made and remain valid, shall be enjoyed exclusively by the Region.<sup>42</sup>

The Basic Law of Hong Kong thus presents a nearly perfect model of how a customs territory can be assured of "full autonomy" for purposes of the WTO. Obviously written with the requirements of membership in the GATT in the minds of the drafters, the Basic Laws beyond all doubt fulfil this function.

## B. Current Experience under WTO Rules

The World Trade Organization has three non-state members at present. Two, Hong Kong and Macau, were previously GATT 1947 members<sup>43</sup>, and one, the European Communities, was included as an original member explicitly mentioned in the Marrakesh Agreement.<sup>44</sup>

### 5. The European Communities - a Customs Territory Without Complete Autonomy

The WTO membership of the European Communities (EC) as an entity alongside the membership of the constituent states of the EC provides an interesting case study in the practical interpretation of "full autonomy". The EC is an original member of the WTO, as explicitly provided for in the Marrakesh Agreement Article XI.<sup>45</sup> Although the EC was not a member of GATT, the original membership was granted during the Uruguay Round to reflect that the EC has represented the Member States in the GATT and to emphasize the Community's competence in the conduct of foreign trade policy.<sup>46</sup> As GATT Contracting Parties, the EC states became original members of the WTO as well.

When the Member States of the EC and the European Parliament disputed the European Commission's claim of exclusive authority to accept the rights and obligations of WTO membership, the European Court of Justice (ECJ) was called upon to express an opinion on the question. The ECJ's opinion was differentiated, addressing each of the WTO Agreements separately. While the GATT was considered an exclusive domain of the EC, the GATS and TRIPs Agreements were determined to be "mixed agreements".

The GATT, said the ECJ, was an agreement regulating the trade in goods, and as such, mostly fell under the exclusive competence of the EC to regulate common commercial policy of the Community, and the traditionally national areas of agricultural products and coal and steel production would not stand in the way of the exercise of this competence.<sup>47</sup>

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<sup>42</sup> Basic Law, Art. 116.

<sup>43</sup> See *supra* III(A)(2), (Macau) and (4) (Hong Kong).

<sup>44</sup> Marrakesh Agreement, Art. XI:1, in: The Legal Texts at 14.

<sup>45</sup> *Id.*

<sup>46</sup> See Treaty Establishing the European Community as Amended by Subsequent Treaties, Art. 110-115 (Rome, 25 March 1957) (*hereinafter* EC Treaty).

<sup>47</sup> Re: The Uruguay Round Treaties, in 1 CMLR 205, 312-313 (1995); *id.* at 314 [34] ("It follows that the Community has exclusive competence, pursuant to Art. 113 E.C., to conclude the Multilateral Agreements on Trade in Goods").

More problematic was the claim that the competences necessary to fulfil the obligations arising under the GATS and the TRIPs Agreement fell under Member State competence. The Court in this case was more amenable to the arguments of the Members. As regarded GATS, the ECJ denied that trade in services can be completely separated from commercial policy when discussing competences.<sup>48</sup> Due to the several forms of providing cross-border services, there is not just one single rule that can be applied. After discussing each form of trade in services, the ECJ stated that "competence to conclude GATS is shared between the Community and the Member States."<sup>49</sup>

The European Court of Justice's handling of the Commission's authority to conclude the TRIPs agreement had a similar outcome. The opinion reads:

[104] ... The Community is certainly competent to harmonise the national rules on those matters, in so far as, in the words of Article 100 of the Treaty, they "directly affect the establishment or functioning of the common market". But the fact remains that the Community institutions have not hitherto exercised their powers in the field of the "enforcement of intellectual property rights"...

[105] It follows that the Community and its Member States are jointly competent to conclude TRIPs.<sup>50</sup>

In short, without needing to understand the intricacies of European Community law, one can recognize that neither the EC nor its Member States individually have full control over the areas of trade regulated by the WTO regime. The Member States must rely on the Community's voice in the trade of goods and in the regulation of some services and particular areas of intellectual property protection. The EC, on the other hand, has no control over different aspects of services and intellectual property, criminal law, or trade in materials exclusively destined for military use. These areas are left to the Member States of the Community. According to a new provision in the Treaty of Amsterdam (not yet in force), amending Article 113 EC Treaty, transfer of such competence will require an unanimous decision by the Council (Article 133:5, ex Article 113).

Thus, if the case of the EC is to be viewed as a standard for all customs territories, neither a customs territory WTO member nor the competent state related to the territory need have full autonomy of external commercial relations on its own, as long as the autonomy exists with the two together.

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<sup>48</sup> CMLR at 316 [41].

<sup>49</sup> *Id.* at 327 [98].

<sup>50</sup> *Id.* at 328 [104]-[105].

## 2. Taiwan/Chinese Taipei

Taiwan, still disputing its political status with the People's Republic of China, was a member of GATT 1947 until its withdrawal in 1950 and is now applying once again to become a member alongside the People's Republic of China. The dynamics of the accession process in this case, however, do not turn on the question of the level of autonomy over commercial relations.

As one of the world's most active traders of goods and services in 1994,<sup>51</sup> the fact that Taiwan is not yet a member of the World Trade Organization should be cause for surprise, if not concern. Taiwan's application for accession to the GATT/WTO has been under consideration since the formation in 1992 of a Working Party to examine the suitability of accepting such an application.<sup>52</sup> The problems with a Taiwanese accession lie in the political acceptability of a formal recognition of the Taiwanese government as separate from that of the People's Republic of China and in the need for extensive negotiations to reduce trade barriers with existing WTO members, many of which have not had diplomatic relations with the government since the United Nations recognized the People's Republic as the legitimate representative of China in 1971.<sup>53</sup> The problem does not rest with indecision about whether the island is a customs territory possessing full autonomy in its external commercial relations.

Presently Taiwan maintains bilateral trade agreements with the largest of the world's traders, ensuring MFN status for its goods. Taiwan also enjoys membership in international organizations such as the Asian Development Bank independent from (and alongside) the government of the People's Republic of China. Taiwan considers itself "a political [*sic*] entity with independent sovereignty -- and of course, a separate customs territory -- since 1949,"<sup>54</sup> and is so seen by the rest of the world, including the People's Republic of China. This state of affairs makes an inquiry into the sufficiency of its autonomy superfluous.

The case of Taiwan is a good example of the GATT/WTO provisions' success in avoiding the stickiest of political issues -- recognition of who is the legitimate government of a territory -- and in the Organization's focussing solely on the necessary elements of ensuring liberal trade regimes. From a legal point of view, Taiwan could become a member of the WTO at any time.

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<sup>51</sup> Chinese Taipei was ranked by the GATT as the 14th largest world exporter and 15th largest importer of merchandise in 1994 and as the 17th largest exporter and 10th largest importer of services in the world in the same year. These rankings count the member states of the European Communities separately. *See*, WTO, WTO Focus No. 2, pages 8-9 (March-April 1995).

<sup>52</sup> *See* Analytical Index, *supra* note 12, at 943-944 (citing C/M/259 at pages 2-3 (Statement of Chairman as to consensus among contracting parties to form a Working Party on possibility of accession of Chinese Taipei to the GATT)).

<sup>53</sup> Arthur K. Yeh, "Taiwan's Membership in the General Agreement on Tariffs and Trade" 5, 12 (1989).

<sup>54</sup> *Id.* at 21-22 (1989).

### C. Assessment of State Practice

An assessment of these cases reveals that the requirement of full autonomy, in the context of GATT 1947, has not been construed in a legalistic manner, but in accordance with the particular constellations of the case. Solutions are tailor-made, negotiated and contained in the protocols of accession. Nevertheless, a number of common and shared features can be found. First assurances by metropolitan powers affirming the autonomy played an important role in the process of granting membership. Next, these territories enjoy treaty-making powers independent from the treaty-making powers of the metropolitan area. Of utmost importance is the fact that these powers can be exercised with respect to the regulation of trade and economic matters falling within the scope of the GATT, and now the WTO. Finally, it should be emphasized that such authority need not necessarily exist *de jure*, but that foremost it must exist in reality (*de facto*), affirming the pragmatic approach in WTO law. As to the WTO, we merely note at this stage that the admission of the European Communities with its arcane and complex internal allocation of powers vis-à-vis third states indicates that jurisdiction need not necessarily be fully with the Separate Customs Territory - the European Communities - but may be shared with the member States being full members of the WTO alike.

As a corollary, we note that full membership in WTO by sovereign states does not require them to exercise their rights unilaterally. Inherent sovereign rights to conduct trade policy may be delegated to a supranational customs union or otherwise restricted by international agreements. The Principality of Liechtenstein, while a full member of the WTO, is both a member of the European Economic Area (a close association with the EC) and in a customs union with Switzerland. While full autonomy exists in law and theory, state members frequently enjoy much less than full autonomy in the conduct of external relations due to treaty arrangements with trading partners.

From the point of view of past state practice, the establishment of Palestine as a separate customs territory and member of the WTO would therefore imply necessary assurances by the international community as to *de jure* and *de facto* independence of trade policies in traditional areas of GATT. Such guarantees would best become part of a final peace settlement. There is little relevant practice from the WTO, in particular with regard to the new areas such as services and intellectual property, except that there is scope of shared jurisdictions between a customs and unions and its members all being members of the WTO.

### IV. Legal Analysis of the Terms used in Article XII of the Marrakesh Agreement: Introductory

In light of the preceding background, we now attempt to construe the provision of Article XII Marrakesh Agreement. The provision of paragraph one, reproduced above is organized in three paragraphs, essentially requiring full autonomy

- in external commercial relations
- in other matters provided for in the Marrakesh framework Agreement
- in the Multilateral Trade Agreements, i.e. the GATT 1994 (including side agreements), GATS and TRIPS

It is not clear how the three elements relate and should be coordinated. There seems to be a considerable overlap. We start with discussing the concept of full autonomy.

### A. The Meaning of "Full" Autonomy

The term "full autonomy" suggests that exclusive, undivided competence of the member is required in all subject matters governed by the Marrakesh Agreement and its accompanying treaties. The customs territory, while not independent and sovereign in all statal functions, needs to be granted independence in the conduct of its economic and commercial policies. The term "full" cannot textually be read in a different manner, and the examples given in state practice under the GATT 1947 do not allow for any conclusion to the contrary.

In substance, full autonomy may be described in terms of jurisdiction. In accordance with the 3rd U.S. Restatement of International Law, we may distinguish jurisdiction to prescribe, jurisdiction to enforce, and jurisdiction to adjudicate.<sup>55</sup> While these are not categories firmly established and accepted in international law, they depict the essential functions of full autonomy relevant in the present context. A separate customs territory therefore needs to have autonomy in respective areas both in terms of legislation, in assuring compliance by private actors on its territory, and of adjudicating disputes in these fields. This is a far reaching concept. It is evident that this amounts to nothing less than sovereign rights and obligations in these respective fields.

We recall that under the GATT 1947 such autonomy was limited to trade in goods, and thus an important, yet limited, sector of external economic relations. With the broadening of the scope of World Trade Organization law, the coverage of subject-matter required to be under full autonomy of the separate customs territory encompasses a much higher percentage of all regulatory activities than before. Indeed, the difference between full sovereignty of a state and full autonomy of a separate customs territory is diminishing. On the one hand, fewer non-state territories are likely to qualify for membership in WTO, as they might not enjoy exclusive competence in all subject matters addressed by WTO law. There is an inverse relationship between the breadth of the WTO Agreement and the possibility of non-state membership under the term of full autonomy. Indeed, it is questionable whether the continued use of the term of a "separate customs territory" in Article XII Marrakesh Agreement adequately reflects the new breadth of the WTO system.

We need to look into this question when analyzing the different agreements. The term full autonomy as such ought not to set a different standard of measurement in the context of WTO than it did under the GATT 1947. Despite the fact that it may be more difficult to achieve the status of a single, separate customs territory, exclusive jurisdiction in regulating trade in services and intellectual property seem indispensable to qualify for full autonomy.

However, things are different for states and for customs unions. It is interesting to recognize the importance of the status of the European Communities as a full member of the WTO.

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<sup>55</sup> See 1987 Restatement of Foreign Relations Law (Third), *reprinted and commented in*: B. Carter & P. Trimble, *International Law* 701-702, 709, 791-792, 772-775 (Little Brown: New York 1991).

Member States of the EC non longer enjoy jurisdiction over all external commercial relations, yet individually, each remains a member of the WTO. In addition, the European Communities does not enjoy full autonomy as a customs union, yet still is a member of the WTO in its own right. We submit that the distribution of competences between the EC and the Member States discussed above is of relevance for future accessions of customs unions forming a separate customs territory under Article XII of the Marrakesh Agreement.

If the European Communities, as a new custom territory is allowed as an original member, no higher standards can be imposed on subsequent constellations of less than full autonomy of a particular applicant. This allows one to argue for using the EC-Member State shared-autonomy as the standard for Art. XII accessions of customs territories.

In the present constellation in which both the EC and its Member States are members of the WTO, partially sharing jurisdiction in services and intellectual property, "full autonomy" does not literally mean "full autonomy" for each WTO member. Full autonomy rather means effective control, *whether shared or autonomous*, to assure the ability of abiding by the obligations of the WTO agreements. It is therefore possible that a state member of the WTO can retain jurisdiction over some functions without impairing "full" autonomy of the customs territory concerned.

The precedent of the EC therefore allows for additional flexibility which may become of interest in shaping the trading regime of the Middle East region. It is conceivable to work towards a regime of partly shared and partly autonomous control within a customs union, or perhaps better, an union of economic integration, provided, of course, that both the members of that union and the union itself become members of the WTO. Full autonomy would then not be required by each member of the union, but in sum for the union as a whole.

For the time being, we do not further pursue this option. The precedent of the EC, however, shows, that a concept of partly shared and partly autonomous control may be further considered if full autonomy of Palestine cannot be politically achieved in all areas concerned and the avenue of close economic integration in accordance with Article XXIV GATT and Art. V GATS become a possible a viable option to shape the region's trade regime.

## B. The Meaning of Full Autonomy in External Economic Relations

Full autonomy in terms of "external commercial relations" was the center piece of Article XXXIII GATT. The broad term was meant to encompass all activities falling under the General Agreement. According to preparatory work of the GATT 1947, the term "full autonomy" was inserted so that "the 'responsible contracting party' should certify that the customs territory in question 'had the right *de jure* and/or *de facto* to act on its own behalf and to fulfil' its obligations" under the Agreement.<sup>56</sup>

More specifically, the objects of autonomy were the rights and obligations of the General Agreement. This included not only the authority to negotiate, implement, and enforce tariff schedules, but also accompanying rights and obligations such as the regulation of export

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<sup>56</sup> Analytical Index at 853 (citing EPCT/TAC/PV/22, p. 22).

subsidies and quantitative restrictions. Moreover, autonomy in the context of GATT necessarily requires a territory to possess treaty-making power, and thus legal personality in international law. Support for this interpretation is shown by the Accession documents of Burma, Ceylon, and Southern Rhodesia, in which "full autonomy in the conduct of external commercial relations" included the ability to have contractual relations with other states, as well as being able to set tariffs without obtaining prior approval to do so from the metropolitan power.<sup>57</sup>

Since the GATT 1947, in its limitations to trade in goods, did not encompass all external economic relations (e.g. in the field of services), the use of the term external commercial relations was overbroad. Moreover, it will be seen that the scope of jurisdiction under the WTO Agreements no longer is limited to external relations in a strict sense. The interdependence of foreign and domestic trade regulation, in particular in the field of services and intellectual property, no longer allows a limited concept of autonomy in external relations. Within the scope of the respective agreements, it equally encompasses domestic relations. The term external economic relations therefore not only is overbroad. It is, at the same time, underinclusive. With the advent of more specific treaty qualifications in the Marrakesh Agreement, discussed in a moment, it is submitted that the term no longer has any independent operational meaning.

### C. The Meaning of Full Autonomy Relating to the Marrakesh Agreement

Besides the somewhat overbroad reference to external economic relations, discussed above, Article XII Marrakesh Agreement next relates to its own specific provisions, as the use of "this Agreement" refers to the Marrakesh Agreement itself. Looking at the treaty provisions, it is apparent that it is mainly organizational and procedural. Reviewing the Marrakesh Agreement provisions in the order that they appear, the first necessary authority a member must possess is that of making the obligatory financial contributions to the Organization's budget.<sup>58</sup> Next, the custom's territory must have the competence to extend diplomatic privileges and immunities to the WTO, the Organization's officials, and its members.<sup>59</sup> The territory must also be able to participate in decision-making.<sup>60</sup> Another competence a territory would need is the ability to participate as either a complainant or disputant in dispute settlement.<sup>61</sup> Moreover, the Marrakesh Agreement requires that the members each "ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements."<sup>62</sup> Hence, a customs territory must be able to change existing laws or implement new legislation and institute administrative regulations -- if not also have an independent judiciary.

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<sup>57</sup> E/PC/T/198 at page 1; *see supra* III(A)(1) (especially text accompanying note 24).

<sup>58</sup> *See* Marrakesh Agreement, Art. VII, in: The Legal Texts at 10.

<sup>59</sup> *See* Marrakesh Agreement, Art. VIII:2, Art. VIII:3, in: The Legal Texts at 10-11.

<sup>60</sup> Marrakesh Agreement, Art. IX in: The Legal Texts at 13.

<sup>61</sup> Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, in: The Legal Texts 404-437.

<sup>62</sup> Marrakesh Agreement, Art. XVI:3, in: The Legal Texts at 17.

## D. The Meaning of Full Autonomy relating to the the Multilateral Trade Agreements: Introductory

As indicated above, the WTO contains three major agreements in addition to the Marrakesh Agreement Establishing the World Trade Organization: the General Agreement on Tariffs and Trade as amended by Understandings and Agreements (GATT 1994); the General Agreement on Trade in Services (GATS); and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Ratification of all these so-called "Multilateral Agreements" is required for membership to the Organization.<sup>63</sup> We deal with the specific requirements of these agreements separately in the next chapters.

## V. The GATT 1994 and Related Agreements

The GATT 1994 itself, while based on the same principles as the GATT 1947, is more comprehensive in its coverage than was its predecessor. A host of understanding and side agreements, complementing and amending its provisions, form part of the system of the General Agreement on tariffs and trade under the umbrella of Annex IA to the Marrakesh Agreement entitled Multilateral Agreements on Trade in Goods.<sup>64</sup> For interpreting the language of the Accession provision, this increased scope of the GATT and of the organization as a whole is important.

In light of GATT 1994 and its accompanying, mandatory agreements, full autonomy comprises trade in all goods, industrial and agricultural. The Agreement extends to all physical products, including those legally defined as such by tariff classifications, such as electric power (which is not physical in an ordinary sense). The Agreement comprises all transboundary operations affecting these products. It essential covers the following regulatory areas. They may be classified in terms of market access and conditions of competition.

### A. Market Access

#### 1. Regulation of Tariffs and Related Matters

It is evident and supported by state practice that full autonomy includes regulation of tariffs and related matters, such as customs valuation and rules of origins and anti-dumping and countervailing duty measures.

A separate customs territory needs to enjoy full autonomy in setting and negotiate all its tariff rates, either autonomously or in negotiations with trading partners. It is recalled that tariffs are the only legitimate barrier to trade under the rules of the WTO. A member has to be in position enter into tariff negotiations, make commitments as to the binding of tariffs, and be able to afford compensation by granting further concessions in cases of infringement of WTO rights.<sup>65</sup> All of this clearly requires full autonomy. The authority encompasses all goods

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<sup>63</sup> Marrakesh Agreement, Art. XI:1, Art. XII:1, in: The Legal Texts at 14, 15.

<sup>64</sup> See Legal Texts 20-326.

<sup>65</sup> Cf. GATT 1994, Art. II, XXIII, XXVIII, DSU (Understanding on Rules and Procedures Governing the Settlement of Disputes), Art. 22, in: The Legal Texts at 404.

commonly captured by international tariff nomenclature, in particular that set out by the Harmonized System.<sup>66</sup> Importantly, this schedule not only includes industrial goods, but also all agricultural products in positions 1-25 of the nomenclature.

We recall that WTO rules no longer allow for quantitative import restrictions as the main policy instrument of agricultural support. For all products listed in the Annex I of Agreement of Agriculture, such restrictions are exceptional only.<sup>67</sup> Instead, restrictions need to be operated on the basis of tariffs. Such tariffs currently still reach high levels in most countries and are effective tools in protecting domestic production. Over coming years, they are likely to be further reduced and tariff-based safeguard measures are likely to become the prime instrument for protecting the sector.<sup>68</sup>

As a corollary, regulation of a number of additional areas relating to tariffs need to come under the jurisdiction of a customs territory. They inherently accompany full autonomy in tariffs.

- Assessment of the value of a product as basis for tariff calculations (tariff valuation).<sup>69</sup>
- Determination of the origin of a product (rules of origins).<sup>70</sup>
- The operation of tariffs may be linked to quantities imported or exported, and linked to tariff quotas (licensing of tariff quotas).<sup>71</sup>
- Tariff measures imposed under safeguards<sup>72</sup>, in particular in agriculture<sup>73</sup> and in textiles.<sup>74</sup>
- Tariffs imposed as a means to countervail unlawful subsidies<sup>75</sup> and dumped imports.<sup>76</sup>

These regulatory activities encompass not only substantive issues, but also procedural requirements and guarantees set out by the respective agreements. These aspects will briefly be addressed under the horizontal heading of the rule of law.

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<sup>66</sup> Convention on the Harmonized Commodity Description and Coding System, June 14, 1983.

<sup>67</sup> Agreement on Agriculture, in: The Legal Texts at 39, Art. XI:2 GATT.

<sup>68</sup> Agreement on Agriculture, Art. 5.

<sup>69</sup> GATT 1994, Art. VII, Agreement on the Implementation of Art. VII of the General Agreement on Tariffs and Trade, in: The Legal Texts at 197.

<sup>70</sup> Agreement on Rules of Origin, in: The Legal Texts at 241.

<sup>71</sup> Agreement on Import Licensing Measures, in: The Legal Texts at 255.

<sup>72</sup> GATT 1994, Art. XIX, Agreement on Safeguards, in: The Legal Texts at 315.

<sup>73</sup> Agreement on Agriculture, Art. 5, in: The Legal Texts at 43.

<sup>74</sup> Agreement on Textiles and Clothing, Art. 6, in: The Legal Texts at 85, 94.

<sup>75</sup> GATT 1994, Art. XVI, Agreement on Subsidies and Countervailing Measures, in: The Legal Texts at 264.

<sup>76</sup> GATT 1994, Art. VI, Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994, in: The Legal Texts at 168.

## 2. Quantitative Restrictions and Related Matters

While the GATT system essentially relies upon the prohibition of quantitative restrictions (QRs), there is a considerable number of exceptions to this rule, the administration of which clearly requires full autonomy within the bounds of treaty provisions. In practice, QRs play an important role, and they have to be administered by the authorities. Such measures rely upon a number of sources. They include:

- restrictions on imports and exports based on safeguard measures.<sup>77</sup> Measures may include QRs imposed on the basis of MFN, and exceptionally, on a selective basis<sup>78</sup>;
- restrictions on imports and exports based on technical norms. In the absence of harmonization of the operation of a principle of mutual recognition, different technical standards in effect produce QRs. An agreement seeks to minimize such barriers to trade<sup>79</sup>;
- restrictions on imports and exports based on sanitary and phytosanitary measures. In the absence of harmonization different standards relating to the marketing of plants and foodstuffs amounts to QRs. Today, the range among the most important and most effective barriers to trade. A special agreement seeks to minimize such barriers to trade and provides incentives to apply international standards such as the WHO/FAO's Codex Alimentarius<sup>80</sup>;
- the operation of measures relating to reestablish the balance of payments.<sup>81</sup> While the GATT allows members to take appropriate measures to that effect, it cannot be said that these provisions imply full jurisdiction over monetary affairs. Separate customs unions need not operate their own currencies<sup>82</sup>.

We note that jurisdiction regulating technical, sanitary and phytosanitary provisions inherently entails jurisdiction over many areas of health, consumer and environmental policies. It does not, however, necessarily entail full jurisdiction over these policies as such. There are aspects of these policies which are not trade-related and which therefore may fall under different jurisdiction.

## 3. Border Controls and Inspections

The operation of tariffs and the administration of QRs inherently requires jurisdiction and full autonomy to operate border controls and inspections. Goods imported and exported need to be cleared. It is submitted that this activities entails an inherent jurisdiction to finance these operations by way of imposing different fees in return of handling the products.

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<sup>77</sup> GATT 1994, Art. XIX, Agreement on Safeguards, in: The Legal Texts at 315.

<sup>78</sup> Id. Art. 5, in: The Legal Texts at 317.

<sup>79</sup> Agreement on Technical Barriers to Trade, in: The Legal Texts at 138.

<sup>80</sup> See Agreement on the Application of Sanitary and Phytosanitary Measures, in: The Legal Texts at 69.

<sup>81</sup> GATT 1994. Art. XII and XVIII:8.

<sup>82</sup> See *infra* Chapter X(B).

## B. Conditions of Competition

An increasing number of WTO rules relate to securing fair conditions of competition for imported products once they have entered the market. With the gradual decrease of tariff rates, tariffs have declined as the main policy instrument, and rules relating to conditions of competition are becoming increasingly important. With general principles, discussed below, they are of paramount importance in assessing the issues of full autonomy. While market access rules mainly relate to imported products, this group of rules equally addresses the regulation of domestic products. Compliance therefore requires jurisdiction not only with respect to imported and exported products, but the regulation of the home market as well. It is here that we can see that modern trade rules no longer allow a distinction between external and internal economic relations.

- **Subsidies:** Governmental support to specific producers or groups of producers have a considerable impact on the competitive relationship of domestic and imported products. The GATT therefore not only regulates export subsidies, but contains detailed rules relating to domestic support. This is true for industrial products<sup>83</sup>, but is more significant for agricultural production. We recall that there are increasing limitations on production support while members remain free to provide direct payment (green box).<sup>84</sup> Full autonomy therefore implies the jurisdiction to regulate support measures in accordance with the provisions of the GATT agreements. This requires jurisdiction over domestic operations and the definition of the relationship of the public and private sectors. Jurisdiction required for trade regulation therefore involves the jurisdiction to define public intervention in the economy in compliance with GATT rules.
- **Regulation of Monopolies:** Privileges and exclusive rights accorded to domestic monopolies (such as electricity boards, state trading companies) inherently define conditions of competition for foreign suppliers of these goods. Compliance with GATT rules implies jurisdiction to regulate the public sector of the economy.<sup>85</sup>

## VI. General Agreement on Trade in Services (GATS)

The Agreement on Trade in Services<sup>86</sup> essentially applies to all transnational services. The GATS, like the GATT, has comprehensive coverage. With the exception of a number of sectors specifically excluded, full autonomy therefore is required for all sectors of the private service industries. It comprises, for example, the professions, consulting, financial services (banking, insurance and securities), transportation, telecommunication, entertainment and the media. While the subject matter of the GATT is defined by product classification in the tariff schedules based on the common harmonized system, the GATS does not contain a proper

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<sup>83</sup> GATT 1994, Art. XVI, Agreement on Subsidies and Countervailing Measures, Art. 5-8 (Actionable and Non-actionable Subsidies), in: The Legal Texts at 268-277.

<sup>84</sup> Agreement on Agriculture, Art. 6-12, , in: The Legal Texts at 46-51.

<sup>85</sup> GATT 1994, Art. XVII.

<sup>86</sup> Marrakesh Agreement, Annex I B, in: The Legal Texts at 325.

legal definition of services.<sup>87</sup> This leaves the Agreement to include potentially all self-employed, private economic activities other than trade in goods.

Trade in services (sometimes called “invisible trade”) is not suitable for border controls in most cases.<sup>88</sup> The basic approach of GATT therefore is not suitable for services. Regulation of market access at the border (such as tariffs or QRs) with the granting of national treatment and MFN upon entry into the market of the good does not work. Instead, trade liberalization essentially operates on the basis of the gradual granting of national treatment to foreign services and service suppliers. Market access and liberalization is achieved by the positive elimination of barriers to foreign suppliers and the removal of privileges accorded to domestic suppliers. The granting of national treatment, i.e. of treatment not less favorable than that accorded to domestic products and suppliers, may be qualified in many ways. We do not need to go into details because it can be readily seen that the granting of such concessions requires full autonomy over domestic and external regulation of trade in services. It is difficult to conceive of a workable regime where jurisdiction over domestically and foreign supplied services covered by the agreement could be split between different jurisdictions. The capacity to negotiate international commitments necessarily implies jurisdiction over domestic suppliers and services. Indeed, more so than in goods, external and internal relations no longer can be separated in services, and full autonomy necessarily requires jurisdiction over all service activities concerned.

In the light of the importance and largely variety of services in nearly all economies, this amounts to almost complete and exclusive jurisdiction over economic activities of growing importance in every country. However, unlike GATT, the GATS Agreement does not extend to all services despite general coverage and general definitions. A number of sensitive areas were excluded, at least for the time being. Yet, these exceptions are subject to change and may gradually be eliminated or further reduced. Moreover, in some of the following areas, commitments to negotiate were undertaken, which implies jurisdiction over the subject matter. The current exemptions from GATS stand as follows:

- Landing rights in air transportation (but not civil aviation in general). The essentially bilateral nature of air transportation market access was not changed by the Uruguay Round.<sup>89</sup> No commitments to negotiate were undertaken in this field;
- Maritime Transport Services. No agreement was found due to persistent interest in the United States to maintain privileges for domestic coastal shipping.<sup>90</sup> Commitments to negotiate were undertaken<sup>91</sup>;
- Market access of employed workforce. While the GATS comprises self-employed service providers, it does not yet generally recognize employed labor to constitute a service falling

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<sup>87</sup> Cf. GATS, Art. I and XXVIII.

<sup>88</sup> With a number of exceptions, such as road, rail and sea transportation.

<sup>89</sup> Annex on Air Transport Services, in: The Legal Texts at 353.

<sup>90</sup> Annex on Negotiations on Maritime Transport Services, in: The Legal Texts at 359.

<sup>91</sup> Decision on Negotiations on Maritime Transport Services, in: The Legal Texts at 459.

under the Agreement.<sup>92</sup> Parties, however, may enter into commitments for natural service providers (which was done for a number of specialized activities, such as management and computer engineering). A broad commitment to negotiate market access of natural persons was made.<sup>93</sup>

## VII. Government Procurement

The WTO system contains elaborate provisions with a view to combat corruption, discrimination and general lack of transparency in government procurement, both of goods and services. While the GATT and GATS generally exclude this aspect as a matter of obligation, a special plurilateral agreement<sup>94</sup> (open to all members of the WTO, but not forming part of the compulsory package) contains mutual rights and obligations.

The Agreement, of course, is open to membership by separate customs territories, as the membership of Hong Kong shows. However, it may be argued that the absence of government procurement obligations in WTO (with the exceptions of financial services for Participants of the interim financial agreements<sup>95</sup>) does not require a separate customs territory to have jurisdiction over all public procurements. The question never arose and the matter is not settled. We would note that government procurement, to a large extent, is a necessary attribute of governmental activities and is likely to be included in domestic jurisdiction of a separate customs territory in order to assume its functions. Legally, procurement and control of procurement in accordance with WTO rules cannot be separated. Moreover, the absence of jurisdiction makes accession to the agreement impossible, and therefore market access for trading partners more difficult to achieve. Finally, we note that disciplines of government procurement are likely to become part of compulsory WTO rules in the future. A separate customs territory void of the power to make procurements would therefore not be in compliance with the requirement of full autonomy.

## VIII. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)

The TRIPs Agreement<sup>96</sup> is the most comprehensive multilateral treaty on intellectual property rights, including provisions on registration and enforcement of such rights. The subject matter entered the multilateral trading system based upon the experience that the lack of adequate protection, or excessive protection, of intellectual property amounts to barriers of trade, both in terms of market access and distortions of competition. The Agreement addresses a set of detailed standards for all existing forms of intellectual property while incorporating at the

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<sup>92</sup> Annex on Movement of Natural Persons Supplying Services under the Agreement, in: The Legal Texts at 353.

<sup>93</sup> Decision on Negotiations on Movement of Natural Persons, in: The Legal Texts at 458.

<sup>94</sup> Agreement on Government Procurement, <http://www.wto.org>; also reprinted in: R. von Büren & T. Cottier eds., Die neue schweizerische Wettbewerbsordnung im internationalen Umfeld 163-196 (Staempfli: Berne 1997).

<sup>95</sup> See Understanding on Commitments in Financial Services para. B(2) in: The Legal Texts at 478. The provision is likely to remain part of the new financial services agreement concluded in December 1997, cf. 25 WTO Focus 1-2 (December 1997).

<sup>96</sup> Marrakesh Agreement, Annex I C, in: The Legal Texts at 365-403.

same time the substantive provisions of major multilateral agreements on intellectual property): copyright and related (neighboring) rights; trademarks; geographical indications; industrial designs; patents; layout-designs (topographies); and integrated circuits.<sup>97</sup> Moreover, it contains provisions on the protection of undisclosed information.<sup>98</sup> The Agreement addresses anti-competitive practices, conditions and requirements and for compulsory licensing and unfair competition.<sup>99</sup>

In addition, the Agreement contains ample provisions addressing the enforcement of intellectual property rights, including requirements of criminal proceedings to be undertaken in some cases of intellectual property right violations. The administrative law and judiciary matters gain paramount importance when assessing the jurisdiction necessary for consideration as a separate customs territory.

## IX. Horizontal Issues in the Multilateral Agreements

After briefly reviewing the scope of the three main pillars of the WTO system, we now turn to what may be called “horizontal” issues. We look into the implications of a number of common features within these agreements and their effects on jurisdiction to prescribe, enforce and adjudicate. Generally, they tend to enlarge the scope of autonomy required.

### A. General Principles of WTO Law

#### 1. Most Favored Nation Treatment and National Treatment Obligations

The WTO systems is built on the principle of non-discrimination. The general obligation of Most favored nation treatment (MFN) applies to the agreements addressed above.<sup>100</sup> The obligation to treat no member of the WTO less favorable than another one implies comprehensive jurisdiction to regulate import and market access and competitive conditions for products from all members of the WTO.

The effect of the national treatment obligation is somewhat different. It was already seen in the context of the GATS Agreement that national treatment obligations imply jurisdiction over domestic products and suppliers. The more so this is true for GATT and TRIPS, where national treatment obligations apply unconditionally.

We submit that the obligation to treat imported products no less favorable than domestic products necessarily implies jurisdiction to regulate domestic products as well. Otherwise, it would seem difficult to comply with the obligation, if regulatory powers over domestic products are left with a different jurisdiction. National Treatment amounts to a requirement of concurrent jurisdiction. To the extent it is required over imported, foreign products, it is equally necessary for domestic production. The WTO therefore, by way of external economic

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<sup>97</sup> TRIPs Agreement, Art. 9-38.

<sup>98</sup> TRIPs Agreement, Art. 39.

<sup>99</sup> RIPs Agreement, Art. 31 and 40.

<sup>100</sup> GATT 1994, Art. I; GATS Art. II; TRIPs Agreement Art. 4. It equally applies to implementing agreements and the Agreement on Government Procurement, Art. III to the extent that procurement is covered by the Agreement.

relations, considerably shapes domestic regulatory powers. It would be difficult to find a more suitable example to demonstrate that domestic and external jurisdiction cannot be separated.

## 2. Taxation of Products (Excise taxes, VAT)

The most important aspect of concurrent jurisdiction is taxation of products. There are no obligations to tax products under WTO, of course. Yet, members remain free to do so, and make ample use of such revenues. WTO rules, however, impose that foreign like products are not taxed in excess of charges imposed on domestic products.<sup>101</sup> Compliance with this basic obligation of national treatment, again, implies that jurisdiction to tax needs to comprise both foreign and domestic products. The standard can hardly be guaranteed where jurisdiction to tax would be split between the metropolitan power and the customs territory. WTO rules, again shape domestic jurisdiction and the allocation of the power to tax. These powers need to be with the separate customs territory and cannot remain with the metropolitan power. This is different for direct income taxes.

In the field of services, with national treatment obligations only applicable upon sectoral negotiations, differential taxation of domestic and foreign products remains possible as a means to protect domestic services and providers. It could therefore be argued that, unlike in goods, jurisdiction over taxation of services provided by foreign suppliers need to necessarily fall under the jurisdiction of a separate customs territory. Since the GATS Agreement aspires national treatment in negotiations and implies the authority to negotiate such commitments, however, it is necessary to have jurisdiction over taxation domestic and foreign supplied services alike. In result, the situation is not different from GATT.<sup>102</sup>

## 3. The Rule of Law

Trade relations and trade policy has a long tradition of being exercised beyond the bounds of law, as part of interest driven, *power-oriented* foreign policy. The WTO rules make an important contribution to rendering trade relations more predictable. This is not only evidenced by the great number of detailed substantive rules, briefly addressed above. It is equally evident in the process of juridification of the WTO dispute settlement procedures which, in recent years, evolved into a quasi-judicial system. At this stage, there is no need to delve on this important point. Our focus is on domestic requirements and remedies which WTO rules prescribe. Overall, they form part of what today are called elements of good governance.<sup>103</sup> A separate customs territory, as much as a state, needs to be structured in a way, and have the necessary jurisdiction, in order to comply with these important requirements.

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<sup>101</sup> See in particular GATT 1994, Art. III:2.

<sup>102</sup> For a brief discussion of direct taxation *see infra* chapter X(C)(5).

<sup>103</sup> The concept of good governance is being developed in particular by the World Bank and the OECD, see World Bank, *The State in a Changing World*, World Development Report 1997 (Oxford University Press: Oxford 1997); *ibid.* *Governance: The World Bank's Experience* (The World Bank: Washington DC 1994); Lawyers Committee for Human Rights, *The World Bank: Governance and Human Rights* (New York 1995); OECD, *Participatory Development and Good Governance* (OECD: Paris 1995).

*a) Legal Protection and Judicial Review*

The rules of the WTO extend beyond substantive norms and prescriptions. They equally comprise requirements in order to assure impartial and non-arbitrary implementation of commitments.<sup>104</sup> While the WTO dispute settlement system<sup>105</sup> and the periodic Trade Policy Review Mechanism<sup>106</sup> address the issue of compliance and implementation on the international level, a number of rules seek to assure compliance domestically. A member needs to have jurisdiction and dispose of the necessary instruments to comply with these obligations.

The GATT and its side agreements, as well as GATS and TRIPs, contain provisions which require the possibility of judicial review of administrative decisions relating to the subject matter concerned. Whatever the name of the reviewing institution, it has to be independent of the administrative authorities concerned.<sup>107</sup> The WTO therefore requires a customs territory to have a judiciary which not only is independent from the executive and legislative branches of government, but also from the metropolitan power. The World Trade System, again, shapes domestic constitutions.

The TRIPs Agreement contains by far the most advanced rules on civil and administrative procedures seeking to assure the implementation and protection of intellectual property rights in member countries. The Agreement sets out nothing less than the essentials of fair and equitable administrative and judicial procedures in great detail: rules on evidence; injunctions; damages and provisional measures; special requirements to be met in exercising border controls; and finally, obligations to impose criminal sanctions for a number of specific offenses.<sup>108</sup> It is important to note that these obligations do not require members to make additional efforts in terms of allocating funds and resources to an existing judicial system. Parties are not obliged to privilege the protection of intellectual property rights.<sup>109</sup> Yet, it is important to note that the Agreement requires an administrative and (independent) judicial system in the first place. In theory, jurisdiction is required for the purpose of protecting intellectual property rights. It does not cover private law remedies in general. In practice, however, with the exception of special border measures, the system of remedies is of a general nature and covers all areas of private and sometimes even administrative law. Given this juncture, a separate customs territory in result needs to have jurisdiction over administrative procedures, administrative and civil remedies in general. In other words, it needs to assume in an independent manner core public functions to not a lesser degree than a sovereign state.

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<sup>104</sup> GATT 1994, Art. X:3(a), GATS VI:1.

<sup>105</sup> GATT 1994, Art. XXIII, Understanding on Rules and Procedures Governing the Settlement of Disputes, in: The Legal Texts at 404.

<sup>106</sup> Trade Policy Review Mechanism, in: The Legal Texts at 434.

<sup>107</sup> See in particular GATT 1994, Art. X:2, GATS VI:2, TRIPs Agreement Art. 42:4.

<sup>108</sup> TRIPs Agreement, Art. 41-62.

<sup>109</sup> TRIPs Agreement, Art. 41:5.

*b) Transparency*

WTO rules also contain important requirements as to the publication of laws and transparency of administrative and judicial decisions. All laws and regulations need to be published and made available to the interested public and business community. Equally, all important decisions and precedents require publication.<sup>110</sup> This is part of good governance and the rule of law, and a separate customs territory needs to have jurisdiction in order to comply with these requirements. Again, while these obligations are limited to the subject-matter of the WTO Agreements, it is evident that, for domestic reasons, publication requirements cannot be limited to these areas. The WTO thus indirectly supports broader policies of transparency of which other areas of law and regulation may equally benefit.

X. Fields Open to Exclusion from Jurisdiction of the Customs Territory

What would *not* be necessary for the territory to control and still allow for "full autonomy" in the various areas related to trade? Given the increasing expansion of WTO law into domestic policy domains, a demarcation of trade-related areas clearly outside the necessary autonomy has become more difficult.

From its beginnings, addressing mainly the issue of tariff reduction, the GATT system moved into regulation of non-tariff barriers and has now, with the WTO, entered into a stage of addressing third generation barriers to trade. Most of these are primarily related to domestic regulations and apply to imports even without discrimination. The GATT process proceeded in a pragmatic manner, addressing particular problems as they arise in international trade relations. It has not been a comprehensive approach, seeking to cover entire areas of the law in a comprehensive manner. Global integration largely takes place by way of bottom-up, inductive regulations. It does not follow a plan. Future rounds may add new areas, as it was the case with services and intellectual property in the 1986-1993 Uruguay Round of Multilateral Trade Negotiations.

Thus, WTO law addresses main areas of law -- public, private and penal -- yet far from doing so in comprehensive manner. We submitted that these insular regulations may radiate into further areas and take these along. Yet, it is important to note that the scope of WTO far from covering all the main areas of government activities: areas such education, health care, social security, land development, internal and external security are indirectly affected by World trade rules, but are not part of the trade regime itself.

In result, a separate customs territory may exist and become a member of WTO with major policy areas still under control of another power. It is here, in non-WTO related issues, where the lack of sovereignty still can be significantly felt. We first look into internal security and then seek to identify the main areas of economic regulation where such control and jurisdiction is not necessary and conclude in discussing the issue of foreign affairs powers. It will be seen that clear-cut distinctions are sometimes difficult to draw. WTO rules may well affect these areas, as vice-versa these areas may affect WTO rules. Moreover, future evolutions under the GATS Agreement as well as new disciplines currently under discussion

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<sup>110</sup> GATT 1994, Art. X:1; GATS, Art. III:1; TRIPs Agreement, Art. 63:1.

may further expand the scope of necessary jurisdiction of a separate customs territory. At the time being, however, it might be possible to discern the following main areas falling outside the scope of WTO rules, at least in principle and to a large extent.

### A. Domestic Security and Public Order

The main and pragmatic rationale of allowing separate customs territories into the GATT, of course, was to overcome the problem of remaining dependence of a territory from a metropolitan power in terms of geopolitical, strategic and military policies. Domestically, this implies powers to keep the public order within a customs territory and to entertain military and police presence for such purposes. The WTO does not require the separate customs territory to enjoy jurisdiction in these areas in order to comply with the requirements of full autonomy in terms of Article XII of the Marrakesh Agreement.

### B. Monetary Affairs

The international trading system is still largely deficient on disciplines on currency fluctuations, despite the fact that such fluctuations are frequently of a much larger distorting impact than other trade barriers, in particular low and predictable tariffs. Yet, apart from balance of payment measures (BOP) and institutional links with the IMF, the WTO rules do not address monetary and currency issues. There is no need to establish jurisdiction in terms of independent monetary policies and to establish one's own currency in order to become a member of the WTO. In state practice, the case of the Principality of Liechtenstein (operating under the Swiss franc) is an example in point.

### C. Resource-related Rights

Rights over resources (human, natural and capital) are an essential requirement for international trading activities. Yet, it is a profound feature of WTO that, apart from intellectual property rights, these issues of primarily domestic law are not yet, or merely partly, addressed by WTO rules.

#### 1. Migration

It was seen that regulation of labor has been partly addressed in the field of services. While there is obligation to make commitments in market access, the issue of liberalizing labor of natural persons nevertheless is on the agenda of WTO and requires the right to negotiate. Market access of labor, however, needs to be distinguished from migration and movement of the population at large. Settlement and resettlement issues cannot be claimed as necessary jurisdiction under WTO rules.

WTO rules do not contain labor standards. Except for trade restrictions imposed on exports produced by prison labor<sup>111</sup>, no minimal standards exist at the time to foster freedom of association and collective bargaining, elimination of exploitative forms of child labor, prohibition of forced labor, and forms of slavery and compulsory labor, non-discrimination in

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<sup>111</sup> GATT 1994, Art. XX:e.

employment. The matter is currently considered to be the business of the International Labour Organization, and not so much of the WTO.<sup>112</sup> Again, as industrialized countries have been advocating the linkage of such minimal standards to trade sanctions, the situation may change over time, as the matter might again be put on the agenda in the future and will then require authority to negotiate by state and non-state members alike.

## 2. Fundamental Rights

Fundamental rights - a main legitimatizing factor for states and a tool of paramount importance to protect human resources - is still virtually absent in explicit WTO rules. Linkages of human rights and trade sanctions have been frequently discussed in academia, but are far from being established in the World trading system. However, an increasing number of procedural guarantees in WTO agreements express nothing less than fundamental requirements of due process which hardly could be separated from human rights any longer. To this extent, human rights have become part of WTO rules, albeit in relation to the scope of the WTO Agreement only, and not in a general manner.

## 3. Property and Real Estate

While the TRIPS Agreement addresses the protection of intellectual property (being an economic resource of increasing importance) the WTO has not addressed more traditional areas of resource allocation, so far. The GATT presupposes ownership of traded goods, but does not rely upon it. Except for IPRs, the essential point for defining the application of GATT rules has not been the ownership (or the nationality of the owner) of a widget, but its geographical origin. Regulation of real estate ownership and of ownership of the means of production is not a matter addressed by WTO rules except for requirements imposed on state trading entities and monopolies.<sup>113</sup> A part of this, the system has been neutral on private or public capital cumulation.

In the present context, this finding is of particular importance in terms of rights over land and water resources. WTO rules are silent and do not require jurisdiction over these resources in the first place even if they are of paramount importance to realize rights protected by WTO rules. The best guarantees for market access are invalid in the face of shortage of land and irrigation rights.

## 4. Protection of Foreign Investment

WTO rules do not provide, at this stage, for comprehensive protection of foreign investments. The Agreement on Trade-Related Investment Measures (TRIMs)<sup>114</sup> does not essentially reach beyond the scope of national treatment and seeks to avoid buy national policies; moreover it is limited to goods and does not extend to services. Efforts to bring about a multilateral

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<sup>112</sup> See Singapore Ministerial Declaration para. 4, adopted 13 December 1996 (Core Labour Standards), *reprinted in* 15 WTO Focus 7 (January 1997).

<sup>113</sup> See GATT 1994, 1994, Art. XVII, GATS, Art. VIII.

<sup>114</sup> The Legal Texts at 163.

agreement in OECD<sup>115</sup> of may eventually result in disciplines in WTO which then would need to fall under the authority of the separate customs territory.

#### 5. Direct Taxation (Income taxes)

While jurisdiction over indirect taxes and fees clearly falls within the ambit of WTO rules in order to assure national treatment and non-discriminatory taxation of like products (goods, and gradually also services), taxation unrelated to these products generally remains without World trade rules. The situation may perhaps be different with regard to direct taxes imposed on natural and juridical persons (companies) established under GATS rights granted and rightholders under the TRIPs Agreement, since here the obligation to national treatment includes the person as such. Such obligations only arise as respective concessions are made. But it may be argued that the very prospects of negotiating national treatment obligations is an important procedural aspects and implies, from the point of view of market access, jurisdiction to negotiate on tax treatment of services providers. We are faced with a new issue still short of authoritative guidance.

### D. Other Economic Regulatory Matters

#### 1. Contracts, Torts and Anti-Trust

While the laws of contracts and torts (in particular product liability) are an essential prerequisite to trading activities, the WTO rules do not address this side of the trading regime. It has been essentially focusing on trade regulation (essentially as a matter of public law), including the issue of anti-competitive practices and compulsory licensing in GATS and TRIPs Agreement, respectively.<sup>116</sup> With the reduction of tariffs and non-tariff barriers, private barriers to trade in terms of cartels and dominant positions are increasingly discussed and it is likely that the WTO shall address these issues in the future. The trend supports the argument to obtain full jurisdiction over matters of anti-trust. For the time being, however, jurisdiction is not yet required for a separate customs territory.

#### 2. Corporate Law and Securities' Regulation

Finally, we note that corporate law and securities trading are not directly addressed by WTO rules. The structure of corporations and securities regulation, however, may be affected by market access rights for foreign companies under the GATS Agreement. Future obligations to national treatment will affect rules relating to the control and takeover of companies. Similar arguments to those made in the field of direct taxation may be developed.

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<sup>115</sup> See The Multilateral Agreement on Investment: The MAI Negotiating Text (as of 14 February 1998), <http://www.oecd.org>

<sup>116</sup> GATS., Art. IX, TRIPs Agreement, Art. 31, 40.

## E. Foreign Policy and External Relations

### 1. National Security

An assessment of foreign policy prerogatives of the separate customs territory results from the blend and complex mix of jurisdictions under WTO rules and those still outside the realm of the world trade system.

Security arrangements under the jurisdiction of a different state (whether or not a member of the WTO) are compatible with WTO membership, as both the examples of Hong-Kong and of the European Communities demonstrate. We recall that this prerogative historically has been the main driving force in allowing non-state territories to become members of the GATT. The exercise of sovereign rights over the separate customs territory for the purpose of preserving a powerful position vis-à-vis third countries is compatible with WTO rules, as much as the use of these rights to preserve internal law and order of the territory.

The list of economically relevant areas discussed above further indicates that there are fields in external commercial relations which do not necessarily fall under the jurisdiction of the separate customs territory, but may continue to stay with a separate state. Moreover, additional activities in foreign affairs, such as development and financial assistance programs may not necessarily come under the jurisdiction of a separate customs territory.

This suggests that foreign policy – except for trade policy covered by WTO rules - may be left to, or shared with, another power. Distinctions between trade and economic policy, however, are increasingly formal and difficult to implement for matters other than those closely related to security and military affairs. Foreign policy increasingly amounts to trade and economic policy, and other activities are increasingly difficult to separate from this umbrella. Realistically, all but military and security interests should be vested into the separate customs territory.

### 2. The Impact of Third Party Interests

The allocation of full autonomy to a separate customs territory not only is in the interest of the territory itself. It is equally of importance to the trading interests of third party WTO members. These interests are likely to play an important role in negotiations of a final settlement, given the importance of guaranteeing powers, in particular the United States and the European Communities. The allocation of powers to the separate customs territory therefore should also take into account these interests.

The grey areas of what would not be required to meet the requirement of full autonomy may legitimately depend on whether the supporting the customs territory is also a member of the WTO. This stems from the interest in securing the benefits other members could reasonably expect from the territory's accession. If the metropolitan power is also a member of the WTO, other members have a more complete protection of their interests, as recourse could be found within the WTO itself for violations of the Agreement due to lack of requisite competence by the territory. In fact, this is the case of the shared-competence of the European Communities and its Member States. It contrasts with the constellation of the fully autonomous customs territories of Hong Kong and Macau in relation to the People's Republic of China as a state still outside the WTO. The allocation of powers may therefore be more flexible in cases

where both the metropolitan state and the separate customs territory are members of the WTO.

From this point of view, it may be argued that the exercise of full autonomy of Palestine as a separate customs territory would not be of paramount importance due to WTO membership of the State of Israel and of Jordan.

Yet, even with all parties concerned being members of the WTO, third members share an interest in granting jurisdiction to the territory as wide as possible in all matters directly or indirectly affecting market access and conditions of competition, beyond of what is required to meet the legal conditions of full autonomy in terms of Article XII of the Marrakesh Agreement. This is a matter of clarity and legal security. But there is also a legal argument to this effect. The idea of overlapping, complementary jurisdiction only works within the scope of the WTO rules. Third parties may find redress with the customs territory or with the metropolitan power, yet market access and conditions of competition may be impaired by measures which are not *per se* incompatible with WTO rules. Nevertheless they may frustrate legitimate expectations created with the accession of the territory to the WTO. For example, it is conceivable that market access for service providers will be frustrated due to new restrictions, say, in the field of property ownership. For example, market access rights granted in the field of agriculture may be impaired and nullified by unexpected restrictive practices in allocating and administering of scarce water resources. Despite the fact that irrigation is not a matter under jurisdiction of WTO, such measures may be challenged by invoking so called non-violation complaints under the rules of WTO dispute settlement.<sup>117</sup>

The remedy may be successful, provided the measures could not be anticipated at the time when market access rights were granted. The complaint is normally directed to the member which granted the trade concession and eventually introduces the new and frustrating measure. It is apparent that the remedy is much more complex, if not impossible, if it has to be directed against a metropolitan power which was not responsible for granting the trade concession. Such constellations have not yet arisen in GATT/WTO dispute settlement. But it is likely that these constellations of dual or split jurisdictions will be difficult to solve, and should be avoided in the first place.

The effect of allocating maximum jurisdiction is, of course, that distinctions to full statehood are increasingly difficult to discern and such solutions may politically not be possible for reasons extraneous to the trading regime. It is at this point that the concept of shared jurisdiction within a regional customs union of two members of the WTO may become attractive in order to overcome the dilemma of blending economic and security interests in a meaningful manner.

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<sup>117</sup> See generally T. Cottier & K. Nadakavukaren Schefer, Non-Violation Complaints in WTO/GATT 1994 Dispute Settlement: Past, Present and Future, in: E.U. Petersmann, ed., *International Trade Law and the GATT/WTO Dispute Settlement System* 143-183 (Kluwer Law: the Hague 1997).

## XI. Conclusions

The WTO rules provide important guidance for future negotiations on a final settlement between the P.A. and the State of Israel, and for further negotiations in the region. The survey of the membership provisions and state practice in international trade law, however, also reveals that the definition of separate customs territories under the GATT, and now the WTO, is not a domain governed by rigid rules. Aiming to foster freer trade, the WTO admits of flexibility in interpreting its accession provisions and allows for a consideration of policy arguments in particular cases. The analysis we set out is based on the legal framework of the trade system as it was in the past and as it could presently be interpreted. One must remember the close connection that this system has with what the members of the WTO feel is the correct path to take in light of the policies of liberalizing trade on a global level and within a particular region. The interpretations we highlight and those we propose are open to modification, and should be seen as a beginning rather than as a definitive statement of "The Law". In the end, the allocation of autonomy, of jurisdictions and of accession to the WTO depends on a political will to allow an applicant to join the trading system in its own right.

Having said so, WTO rules and membership provide an important yardstick to set out necessary prerogatives of an separate customs territory enjoying full autonomy, yet being less of a sovereign state due to limitations in particular for geopolitical security interests. The goal of creating a WTO-compatible trading system and building blocks upon which regional trade relations should operate in accordance with WTO rules for regional economic integration, argues in favor of jurisdiction in many key areas of economic regulation. This paper lists the minimum requirements in order to met the conditions of full autonomy. With the expansion of WTO rules, as they increasingly affect and determine domestic regulations, distinctions between full sovereignty and statehood and the quality of a mere separate customs territory are decreasing. In fact, it may be questioned whether the term of customs territory still adequately reflects the wide scope of jurisdiction required under the WTO rules.

At the same time, it is important to recall that WTO rules do not comprehensively cover the public policies inherent to statehood. Yet, the fact that WTO rules to limit state intervention are affecting increasing numbers of areas of law, the dynamics of legal development, make clear distinctions of what is and what is not required to comply with the conditions of full autonomy in Article XII of the Marrakesh Agreement increasingly difficult.

The arguments set out speak in favor of clear and comprehensive solution in allocating jurisdictions. They can and should be used in final peace negotiations with the State of Israel in order to back claims to jurisdiction. They also pose, of course, the risk and dilemma that a comprehensive allocation may not be achievable for political reasons. It will be necessary to widen one's options. With the distinction between full statehood and a separate customs territory somewhat anachronistic, alternative solutions may be found in forming a customs union with all participants, and perhaps even the union itself, becoming independent members of the WTO. The path should be further explored.

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