

conflicting rules of public international law, such as rules of MEAs, is controversial. A generally accepted view on this relationship is yet to emerge.

With regard to the relationship between WTO law and the national law of WTO Members, note that, while some WTO scholars forcefully plead for the granting of direct effect to WTO law in the domestic legal order of WTO Members, none of the major trading nations grants such effect to WTO law. In most WTO Members, a breach of WTO law obligations cannot be challenged or invoked in national courts.

1.7. EXERCISE: GLOBAPHILES VERSUS GLOBAPOBES

Last Sunday, more than 50,000 people demonstrated in the streets of Nontes, the capital of Newland, against economic globalisation, free trade and the Government's plan to join the WTO. The Republic of Newland is a developing, lower middle income country, with a population of 30 million people. It has a booming, export-oriented toy manufacturing industry and an up-and-coming steel industry. Many of its other industries, however, are unable to compete with foreign goods or services.

The demonstration was organised by the Newland Coalition for a Better World (NCBW), representing Newland's labour unions and its main environmental, consumer and human rights organisations. When small groups of radicals, led by a moustached farmer, attacked and destroyed a McJohn's restaurant along the route, the police intervened to disperse the demonstrators with tear gas. Three hours of violent clashes between the police and a group of about 500 young demonstrators ensued, leaving several people wounded.

At an emergency cabinet meeting called on Sunday evening, the Prime Minister announced that he will invite the chairman of the NCBW to a public debate on economic globalisation, international trade and the Government's plan to join the WTO. On Monday, the chairman accepted the challenge. The debate is to be broadcast live on Wednesday evening.

You serve on the personal staff of the Prime Minister, and it is your job to prepare him for this important debate by briefing him as fully as possible on all the positive and negative aspects – economic, political and legal – of:

- economic globalisation;
- international trade; and
- WTO membership.

With regard to WTO membership, you expect the Chairman of the NCBW, a professor of constitutional law, to question, *inter alia*, why it would be in the interest of Newland to 'squander its sovereignty' and accept a host of new international obligations. You expect him to argue that the core WTO rules and disciplines are about opening foreign markets for the benefit of multinationals. From articles and speeches of the Chairman of the NCBW, you know that three issues are of particular concern to him, namely:

- whether the WTO Agreement encompasses all WTO law;
 - whether the WTO Agreement will prevail over Newland's Constitution and over other international agreements; and
 - whether WTO law will have, or should have, direct effect in Newland's courts.
- To prepare the Prime Minister well, you and your colleagues decide to stage a trial debate in which one group, Group A, takes a 'globophile' position and another group, Group B, a 'globaphobe' position.

The World Trade Organization

Contents

2.1. Introduction	77
2.2. The origins of the WTO	78
2.2.1. The General Agreement on Tariffs and Trade 1947	78
2.2.2. Uruguay Round of Multilateral Trade Negotiations	83
2.3. Mandate of the WTO	86
2.3.1. Objectives of the WTO	86
2.3.2. Functions of the WTO	88
2.4. Membership of the WTO	103
2.4.1. Current membership	103
2.4.2. Accession	109
2.4.3. Obligations of membership	115
2.4.4. Withdrawal and expulsion	119
2.5. Institutional structure of the WTO	119
2.5.1. Basic structure	120
2.5.2. Ministerial Conference	122
2.5.3. General Council, DSB and TRPRB	124
2.5.4. Specialised councils, committees and working parties	127
2.5.5. Trade Negotiations Committee	130
2.5.6. Political bodies lacking in the WTO structure	131
2.5.7. Quasi-judicial and other non-political bodies	133
2.5.8. WTO Secretariat	135
2.6. Decision-making in the WTO	141
2.6.1. Normal procedure	141
2.6.2. Special procedures	144
2.6.3. WTO decision-making in practice	148
2.6.4. Participation of developing-country Members	151

2.6.5. Involvement of NGOs	154
2.6.6. Form and legal basis of WTO decisions	162
2.7. Other issues	164
2.7.1. Status of the WTO	164
2.7.2. The WTO budget	164
2.8. Summary	166
2.9. Exercise: To join or not to join?	170

2.1. INTRODUCTION

The World Trade Organization was established and became operational on 1 January 1995. It is the youngest of all the major international inter-governmental organisations and yet it is arguably one of the most influential in these times of economic globalisation. As Marco Bronckers stated, it has ‘the potential to become a key pillar of global governance’.¹ The WTO is also one of the most controversial international organisations. It has been referred as ‘un gouvernement mondial dans l’ombre’.² Guy de Jonquieres of the *Financial Times* observed that the emergence of the WTO as a prime target for protests of many kinds reflects:

... growing public awareness – but often imperfect understanding – of its role in promoting, and formulating rules for, global economic integration.³

Many critics of the WTO claim that the WTO is ‘pathologically secretive, conspiratorial and unaccountable to sovereign States and their electorate’.⁴ According to Joseph Nye, these detractors may, to some extent, have a case. Nye wrote in November 2000:

[Anti-globalisation protesters] assert that official transnational institutions like the World Trade Organization, the World Bank and the International Monetary Fund are effectively accountable to no one. How true is their claim? Some defenders point out that the WTO, for example, is a weak organization with a small budget and staff, hardly the stuff of world government by fiat. Moreover, unlike unelected nongovernmental organizations, the WTO, the World Bank and the IMF tend to be highly responsive to national governments, which are the real source of legitimacy ... Even though these organizations are inherently weak, their rules and resources can exert powerful effects. Moreover, the protesters are right that a lack of transparency often weakens accountability ... Increased accountability for the WTO, World Bank and other official transnational organizations will address many of the legitimate

¹ M. Bronckers, ‘More Power to the WTO’, *Journal of International Economic Law*, 2001, 41 (reproduced by permission of Oxford University Press).

² M. Kohl, ‘Un gouvernement mondial dans l’ombre’, *Le Monde Diplomatique*, May 1997.

³ G. de Jonquieres, ‘The WTO’s Capacity to Arouse Controversy Highlights a Growing Public Awareness of Its Role’, *Financial Times*, 24 September 1999.

⁴ G. de Jonquieres, ‘Prime Target for Protests: WTO Ministerial Conference’, *Financial Times*, 24 September 1999.

concerns of anti-globalization protesters, while neutralizing their more dubious criticisms. International institutions are too important to be left to demagogues, no matter how well-meaning.⁵

Developing-country Members criticise the WTO and object to what they consider to be their ‘marginalisation’ within the WTO’s negotiation and rule-making processes.

This chapter deals with the WTO as the primary international intergovernmental organisation for international trade and trade-related matters. It first explores the origins of the WTO, a young institution with a long history. Subsequently, it examines:

- the mandate of the WTO, i.e., its objectives and functions;
- the membership of the WTO and the accession process;
- the institutional structure of the WTO; and
- the WTO’s decision-making procedures, with particular attention to the role of developing-country Members and NGOs therein.

In general, this chapter seeks to address the issue of the legitimacy and effectiveness of the WTO as the main international organisation for managing and regulating international trade.

2.2. THE ORIGINS OF THE WTO

The origins of the WTO lie in the GATT 1947. The study of these origins is relevant because the decisions, procedures and customary practices of the GATT guide the WTO in its actions. Article XVI:1 of the WTO Agreement states:

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.

This section will discuss:

- the genesis of the GATT 1947 and its operation as the *de facto* international organisation for international trade until the end of 1994;
- the GATT Uruguay Round of Multilateral Trade Negotiations (1986–94) and the emergence of the WTO, operational as of 1 January 1995.

2.2.1. The General Agreement on Tariffs and Trade 1947

2.2.1.1. The GATT 1947 and the International Trade Organization

The history of the GATT begins in December 1945 when the United States invited its war-time allies to enter into negotiations to conclude a multilateral

agreement for the reciprocal reduction of tariffs on trade in goods. In July 1945, the US Congress had granted President Truman the authority to negotiate and conclude such an agreement. These multilateral tariff negotiations took place in the context of a more ambitious project on international trade. At the proposal of the United States, the United Nations Economic and Social Committee adopted a resolution, in February 1946, calling for a conference to draft a charter for an ‘International Trade Organization’ (ITO).⁶ At the 1944 Bretton Woods Conference, where the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the ‘World Bank’) were established, the problems of trade had not been taken up as such, but the Conference did recognise the need for a comparable international institution for trade to complement the IMF and the World Bank.⁷ A Preparatory Committee was established in February 1946 and met for the first time in London in October 1946 to work on the charter of an international organisation for trade.⁸ The work was continued from April to November 1947 in Geneva. As John Jackson explained:

The 1947 Geneva meeting was actually an elaborate conference in three major parts. One part was devoted to continuing the preparation of a charter for a major international trade institution, the ITO. A second part was devoted to the negotiation of a multilateral agreement to reduce tariffs reciprocally. A third part concentrated on drafting the ‘general clauses’ of obligations relating to the tariff obligations. These two latter parts together would constitute the General Agreement on Tariffs and Trade. The ‘general clauses’ of the draft GATT imposed obligations on nations to refrain from a variety of trade-impeding measures.⁹

The negotiations on the General Agreement on Tariffs and Trade (GATT) advanced well in Geneva, and by October 1947 the negotiators had reached an agreement on the GATT. The negotiations on the ITO, however, were more difficult and it was clear, towards the end of the 1947 Geneva meeting, that the ITO Charter would not be finished before 1948. Although the GATT was intended to be attached to the ITO Charter, many negotiators felt that it was not possible to wait until the ITO Charter was finished to bring the GATT into force. According to Jackson, there were two main reasons for this:

- First, although the tariff concessions were still secret, the negotiators knew that the content of the concessions would begin to be known. World trade patterns could thus be seriously disrupted if a prolonged delay occurred before the tariff concessions came into force.
- Second, the US negotiators were acting under the authority of the US trade legislation which had been renewed in 1945 ... But the 1945 Act expired in mid-1948. Thus,

⁶ UN ECOSOC Res. 13, UN Doc. E/22 (1946). For an overview of the negotiations of the GATT 1947 and the ITO with references to official documents, see *Guide to GATT Law and Practice* (WTO, 1995), 3–6.

⁷ J. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Royal Institute of International Affairs, 1998), 15–16, who refers to United Nations Monetary and Financial Conference (Bretton Woods, NH, 1–22 July 1944), Proceedings and Documents 941 (US Department of State Publications No. 2866, 1948).

⁸ The work in London proceeded on the basis of a proposal by the United States entitled ‘Suggested Charter for an International Trade Organization’.

⁹ J. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Royal Institute of International Affairs, 1998), 16.

⁵ J. Nye, ‘Take Globalization Protests Seriously’, *International Herald Tribune*, 25 November 2000.

there was a strong motivation on the part of the United States to bring the GATT into force before this Act expired.¹⁰

It was therefore decided to bring the provisions of the GATT into force immediately. However, this created a new problem. Under the provisions of their constitutional law, some countries could not agree to parts of the GATT without submitting this agreement to their parliaments. Since they anticipated the need to submit the final draft of the ITO Charter to their parliaments in late 1948 or the following year, they feared that 'to spend the political effort required to get the GATT through the legislature might jeopardise the later effort to get the ITO passed'.¹¹ Therefore, they preferred to take the ITO Charter and the GATT to their legislatures as a package.

To resolve this problem, on 30 October 1947, eight of the twenty-three countries that had negotiated the GATT 1947 signed the 'Protocol of Provisional Application of the General Agreement on Tariffs and Trade' (PPA). Pursuant to this Protocol, these Contracting Parties undertook:

- a. Parts I and III of the General Agreement on Tariffs and Trade; and
- b. Part II of that Agreement to the fullest extent not inconsistent with existing legislation.¹²

As from 1 January 1948, the GATT 1947 was thus applied through the PPA. The other fifteen of the original twenty-three Contracting Parties also soon agreed to the provisional application of the GATT 1947 through the PPA. Pursuant to the PPA, Part I (containing the MFN obligation and the tariff concessions) and Part III (containing procedural provisions, the application of which could require the modification of national legislation and thus the involvement of the legislature) only applied to the extent that it was not inconsistent with existing legislation. According to the PPA, a GATT Contracting Party was entitled to retain any provision of its legislation which was inconsistent with a GATT Part II obligation.¹³ The PPA thus provided for an 'existing legislation exception', also referred to as 'grandfather rights'. This was quite convenient and explains why the GATT 1947 itself was never adopted by the Contracting Parties. Until 1995, the provisions of the GATT 1947 were applied through the PPA of 30 October 1947.

In March 1948, the negotiations on the ITO Charter were successfully completed in Havana. The Havana Charter provided for the establishment of the ITO, and sets out basic rules and disciplines for international trade and other international economic matters. The ITO Charter, however, never entered into force. While repeatedly submitted to the United States Congress, it was never approved. Therefore, in 1951, President Truman

eventually decided that he would no longer seek Congressional approval of the ITO Charter. Since no State was interested in establishing an international organisation for trade of which the United States, the world's leading economy and trading nation, would not be a member, the ITO was 'still-born'. As the ITO was intended to complete the Bretton Woods structure of international economic institutions, its demise left a significant gap in that structure.

2.2.1.2. The GATT as a *de facto* international organisation for trade

In the absence of an international organisation for trade, countries turned from the early fifties, to the only existing multilateral international institution for trade, the GATT 1947, to handle problems concerning their trade relations.¹⁴ Although the GATT was conceived as a multilateral agreement for the reduction of tariffs, and not an international organisation, it would over the years successfully 'transform' itself – in a pragmatic and incremental manner – into a *de facto* international organisation. The 'institutional' provisions in the GATT 1947 were very scant. Article XXV of the GATT 1947, entitled 'Joint Action by the Contracting Parties' stated:

1. Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.
2. The Secretary-General of the United Nations is requested to convene the first meeting of the CONTRACTING PARTIES, which shall take place not later than March 1, 1948.
3. Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.
4. Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.
5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties.

Nevertheless, over the years, through experimentation and trial and error, the GATT evolved to include some fairly elaborate procedures for conducting its business. Some of these procedures were 'contrary' to Article XXV. For example, in practice, under the GATT voting was very uncommon; decisions were taken by consensus.

In spite of its scant institutional framework,¹⁵ the GATT was very successful in reducing tariffs on trade in goods, in particular on industrial goods from

¹⁴ A second and more modest attempt in 1955 to establish an 'Organization for Trade Cooperation' also failed because the US Congress was again unwilling to give its approval.

¹⁵ On the institutional shortcomings of the GATT, see e.g., P. Van den Bossche, 'The Establishment of the World Trade Organization: The Dawn of a New Era in International Trade?', *Maastricht Journal of European and Comparative Law*, 1994, 398–400.

¹⁰ *Ibid.*, 17–18. ¹¹ *Ibid.*, 18. ¹² GATT BISD, Vol. IV, 77.

¹³ J. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Royal Institute of International Affairs, 1998), 18.

developed countries. In eight negotiating rounds between 1947 and 1994, the average level of tariffs of developed countries on industrial products was brought down from over 40 per cent to less than 4 per cent. The first five negotiating rounds ((Geneva (1947), Annecy (1949), Torquay (1951), Geneva (1956) and Dillon (1960-1)) focused on the reduction of tariffs. As from the Kennedy Round (1964-7) onwards, however, the negotiations would increasingly focus on non-tariff barriers (which were rapidly becoming a more serious barrier to trade than tariffs). With respect to the reduction of non-tariff barriers, the GATT was notably less successful than it was with the reduction of tariffs. Negotiations on the reduction of non-tariff barriers were much more complex and, therefore, required, *inter alia*, a more 'sophisticated' institutional framework than that of the GATT. The Kennedy Round produced very few results on non-tariff barriers. The Tokyo Round (1973-9) produced better results; however, a number of the agreements or codes decided upon clearly showed a lack of real consensus among the negotiators and proved to be difficult to implement. Moreover, the Tokyo Round agreements were plurilateral, rather than multilateral, in nature and did not bind many Contracting Parties.¹⁶ In the early 1980s, it was clear that a new round of trade negotiations would be necessary. As Jackson noted:

the world was becoming increasingly complex and interdependent, and it was becoming more and more obvious that the GATT rules were not satisfactorily providing the measure of discipline that was needed to prevent tensions and damaging national activity.¹⁷

The United States and a few other countries were in favour of a round with a very broad agenda including new subjects such as trade in services and the protection of intellectual property rights. Other countries objected to such a broad agenda or were opposed to the starting of a round altogether. However, in September 1986, at Punta del Este, Uruguay, the GATT Contracting Parties eventually agreed to the start of a new round.

Questions and Assignments 2.1

Briefly outline the historical origins of the GATT. Explain how the constitutional law of the United States and of other countries played a decisive role in the genesis of the GATT. Did the GATT 1947 ever enter into force? How did the PPA solve the problem faced by those countries that needed parliamentary approval of the GATT 1947? Has the GATT been a success?

developed countries. In eight negotiating rounds between 1947 and 1994, the average level of tariffs of developed countries on industrial products was brought down from over 40 per cent to less than 4 per cent. The first five negotiating rounds ((Geneva (1947), Annecy (1949), Torquay (1951), Geneva (1956) and Dillon (1960-1)) focused on the reduction of tariffs. As from the Kennedy Round (1964-7) onwards, however, the negotiations would increasingly focus on non-tariff barriers (which were rapidly becoming a more serious barrier to trade than tariffs). With respect to the reduction of non-tariff barriers, the GATT was notably less successful than it was with the reduction of tariffs. Negotiations on the reduction of non-tariff barriers were much more complex and, therefore, required, *inter alia*, a more 'sophisticated' institutional framework than that of the GATT. The Kennedy Round produced very few results; however, a number of the agreements or codes decided upon clearly showed a lack of real consensus among the negotiators and proved to be difficult to implement. Moreover, the Tokyo Round agreements were plurilateral, rather than multilateral, in nature and did not bind many Contracting Parties.¹⁶ In the early 1980s, it was clear that a new round of trade negotiations would be necessary. As Jackson noted:

the world was becoming increasingly complex and interdependent, and it was becoming more and more obvious that the GATT rules were not satisfactorily providing the measure of discipline that was needed to prevent tensions and damaging national activity.¹⁷

The United States and a few other countries were in favour of a round with a very broad agenda including new subjects such as trade in services and the protection of intellectual property rights. Other countries objected to such a broad agenda or were opposed to the starting of a round altogether. However, in September 1986, at Punta del Este, Uruguay, the GATT Contracting Parties eventually agreed to the start of a new round.

Questions and Assignments 2.1

Briefly outline the historical origins of the GATT. Explain how the constitutional law of the United States and of other countries played a decisive role in the genesis of the GATT. Did the GATT 1947 ever enter into force? How did the PPA solve the problem faced by those countries that needed parliamentary approval of the GATT 1947? Has the GATT been a success?

2.2.2. Uruguay Round of Multilateral Trade Negotiations

2.2.2.1. Ministerial Declaration of Punta del Este

The Punta del Este Declaration contained a very broad and ambitious mandate for negotiations. The Uruguay Round negotiations would cover, *inter alia*, trade in goods, including trade in agricultural products and trade in textiles and clothing, as well as - for the first time in history - trade in services. The establishment of a new international organisation for trade was not, however, among the Uruguay Round's initial objectives. The Punta del Este Declaration explicitly recognised the need for institutional reforms in the GATT system but the ambitions were limited in this respect. The Declaration stated in relevant part:

Negotiations shall aim to develop understandings and arrangements:

- i. to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral system;
- ii. to improve the overall effectiveness and decision-making of the GATT as an institution, including *inter alia*, through involvement of Ministers;
- iii. to increase the contribution of the GATT to achieving greater coherence in global economic policy-making through strengthening its relationship with other international organisations responsible for monetary and financial matters.¹⁸

2.2.2.2. Negotiations on a new international organisation for trade

During the first years of the Uruguay Round negotiations, major progress was made with respect to all of the institutional issues identified in the Ministerial Declaration. In December 1988, at the Montreal Ministerial Mid-Term Review Conference, it was decided in principle to implement, on a provisional basis, a Trade Policy Review Mechanism to improve adherence to GATT rules.¹⁹ This Mid-Term Review also resulted in an agreement attempting to create greater cooperation between the GATT, the IMF and the World Bank as 'a first step to explore ways to achieve greater coherence in global economic policy making'.²⁰ In April 1989, it was agreed that in order to improve the functioning of the GATT, the Contracting Parties would meet at least once every two years at ministerial level.²¹ At the time, however, the establishment of a new international trade organisation had not been discussed. It was the then Italian Trade Minister Renato Ruggiero (later the second Director-General of the WTO) who, in February 1990, first floated the idea of establishing a new international organisation for trade. A few months later, in April 1990, Canada formally proposed the establishment of what it called a 'World Trade Organization', a

¹⁸ Ministerial Declaration on the Uruguay Round, GATT MIN/DEC, dated 20 September 1986, Part I, Section E, 'Functioning of the GATT System'.

¹⁹ In April 1989, the Contracting Parties formally established the Trade Policy Review Mechanism.

²⁰ T. Stewart, *The GATT Uruguay Round* (Kluwer Law and Taxation, 1993), Vol. III, 1927.

²¹ See *ibid.*, 1928.

¹⁶ On the distinction between multilateral and plurilateral agreements, see above, pp. 53-4.

¹⁷ J. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Royal Institute of International Affairs, 1998), 24.

fully fledged international organisation which was to administer the different legal instruments related to international trade, including the GATT, the GATS and other multilateral instruments which were being developed in the context of the ongoing negotiations.²² Along the same lines, the European Community submitted a proposal, in July 1990, calling for the establishment of a ‘Multilateral Trade Organization’. The European Community argued that the GATT needed as sound institutional framework ‘to ensure the effective implementation of the results of the Uruguay Round’.²³

The reactions to these proposals for a new international trade organisation were mixed. The United States and most developing countries were all but enthusiastic.²⁴ At the time, the possibility of a major institutional overhaul was, in fact, thought to be unlikely. Such a major overhaul was – it was said – unlikely to gain much political support.²⁵ Fear of supranationalism, the reluctance of major trading nations to give in to voting equality and the traditional worry of national leaders about ‘tying their hands’, were thought to inhibit the possibility of reconstructing GATT into an international organisation for trade.²⁶

The December 1990 Brussels Draft Final Act, discussed at what was initially planned to be the closing conference of the Uruguay Round, did not contain an agreement with regard to a new international organisation for trade.²⁷ Albeit for very different reasons, this conference was a total failure, and the Uruguay Round was subsequently suspended.²⁸ In April 1991, however, the negotiations were taken up again, and, in November 1991, the European Community, Canada and Mexico drafted a joint proposal for an international trade organisation. This joint proposal served as the basis for further negotiations which resulted, in December 1991, in the draft *Agreement Establishing the Multilateral Trade Organization*. The latter agreement was part of the 1991 Draft Final Act, commonly referred to as the Dunkel Draft, after the then Director-General of the GATT.²⁹

For many of the reasons already referred to above, the United States remained opposed to the establishment of a Multilateral Trade Organization and actively campaigned against the idea throughout 1992. In spite of the

Questions and Assignments ??

Did the Punta del Este Ministerial Declaration recognise the need for a new international organisation for trade? Briefly outline the events between 1990 and 1993 that led to an agreement on the establishment of a new international trade organisation in December 1993. Which countries or international entities were the driving forces behind the establishment of the WTO which countries were less enthusiastic and why?

22 See *ibid.*, 1942-3.
23 See Communications

See communication from the employer community, GATT DOC. NO. MINISTRIAL/INT/14/W-12, dated 13 July 1990.

²⁴ Many developing countries were hostile to the idea of an international trade organisation, unless this organisation was instituted within the framework of the United Nations. UNCTAD tried to present itself as a possible multilateral trade organisation. See T. Stewart, *The GATT Uruguay Round* (Kluwer Law and 1990, 2.

Taxation, 1993), vol. III, 1944.

²⁵ J. Jackson, 'Strengthening the International Legal Framework of the GATT-MTN System: Reform Proposals for the New GATT Round 1991', in E. U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (Kluwer, 1991), 17, 21 and 22. See also P. Verloren van Themaat, *ibid.* 29. It is highly unlikely that the world's government leaders would be

²⁶ See J. Jackson, 'Strengthening the International Legal Framework of the GATT-MTN System: Reform willing, at this point in history, to even start serious discussions about such a new institution.'

²⁵ Proposals for the New GATT Round 1991; in *ibid.*, 21.

27 Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/INC/W/35/Rev.1, dated 3 December 1990.

28 The negotiations broke down because of the fundamental disagreement between the European Community and the United States on the issue of agricultural subsidies.

29 Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/INC/W/36/Rev.1, dated 20 December 1990.

'United States' efforts at dissuasion, by early 1993 most participants in the Round were prepared to agree to the establishment of a Multilateral Trade Organization, and the United States became increasingly isolated on this issue. This perhaps explains the turnabout in the US position in the course of 1993 when the new Clinton Administration dropped its outspoken opposition to a new international trade organisation. Nevertheless, uncertainty about US support for such a new international organisation persisted until the last days of the Round.³⁰ The United States formally agreed to the establishment of the new organisation on 15 December 1993. To the surprise of many, however, the United States demanded a change of name as a condition for giving its consent. The United States suggested that the name of the new organisation should be the 'World Trade Organization' as had originally been proposed by Canada. The proponents of an international trade organisation had opted for 'Multilateral Trade Organization', as was proposed by the European Community, in the hope that this rather technical and therefore less menacing name would appease the United States and others opposed to an international organisation perceived as a threat to national sovereignty. Reportedly, the United States did not want to give the European Community the satisfaction of having given the new organisation its name, and further considered that an organisation with such a tongue-twisting and unappealing name as the 'Multilateral Trade Organization' would have a hard time winning the hearts and minds of the American people.³¹ The Agreement Establishing the World Trade Organization was signed in Marrakesh in April 1994, and entered into force on 1 January 1995.³² A perceptive observer, Gary Sampson, noted:

Those who constructed the WTO are proud of having created what has been described as the most effective multilateral organization ever established.³³

Dunkel Draft, after the then Director-General of the GATT.²⁹ For many of the reasons already referred to above, the United States remained opposed to the establishment of a Multilateral Trade Organization and actively campaigned against the idea throughout 1992. In spite of the

2.3. MANDATE OF THE WTO

The WTO was formally established and became operational on 1 January 1995 when the *WTO Agreement* entered into force. Pursuant to the *WTO Agreement*, the WTO has a broad and ambitious mandate. This section examines two main aspects of this mandate:

- the objectives of the WTO; and
- the functions of the WTO.

2.3.1. Objectives of the WTO

The reasons for establishing the WTO and the policy objectives of this international organisation are set out in the Preamble to the *WTO Agreement*.

According to the Preamble, the Parties to the *WTO Agreement* agreed to the terms of this agreement and the establishment of the WTO:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development ...

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development ...

The ultimate objectives of the WTO are thus:

- the increase of standards of living;
- the attainment of full employment;
- the growth of real income and effective demand; and
- the expansion of production of, and trade in, goods and services.

However, it is clear from the Preamble that in pursuing these objectives the WTO must take into account the need for preservation of the environment and the needs of developing countries. The Preamble stresses the importance of *sustainable economic development* and of the *integration* of developing countries, and in particular least-developed countries, in the world trading system. Both of these aspects were absent from the Preamble to the GATT 1947.

The statements in the Preamble to the *WTO Agreement* on the objectives of the WTO are not without legal significance. In US – Shrimp, the Appellate Body stated:

accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.³⁴

[Emphasis added]

The preambular statements of the objectives of the WTO contradict the contention that the WTO is only about trade liberalisation without regard to environmental degradation and global poverty.

The Preamble also states how these objectives are to be achieved:

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations ...

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations, ...

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system ...

According to the Preamble to the *WTO Agreement*, the two main instruments, or means, to achieve the objectives of the WTO are reciprocal and mutually advantageous arrangements on:

- the reduction of trade barriers; and
- the elimination of discrimination.

These were also the two main instruments of the GATT 1947, but the *WTO Agreement* aims at constituting the basis of an *integrated, more viable and more durable* multilateral trading system.

In the Doha Ministerial Declaration of 14 November 2001, the WTO Members stated, with regard to the objectives of the WTO and its instruments for achieving these objectives:

We ... strongly reaffirm the principles and objectives set out in the Marrakesh Agreement Establishing the World Trade Organization, and pledge to reject the use of protectionism.

International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development ...

[1]The language to the Preamble to the *WTO Agreement* demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in

³⁴ Appellate Body Report, US – Shrimp, para. 153.

We strongly reaffirm our commitment to the objective of *sustainable development*, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.³⁵

[Emphasis added]

Questions and Assignments 2.3

What are the objectives of the WTO? Are development cooperation and environmental protection objectives of the WTO? Explain. What is the legal significance of the Preamble to the WTO Agreement? What are the main instruments, or means, of the WTO for achieving its objectives?

2.3.2. Functions of the WTO

In the broadest of terms, the primary function of the WTO is to:

provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to [the WTO] Agreement.³⁶

More specifically, the WTO has been assigned six widely defined functions. Article III of the WTO Agreement states:

1. The WTO shall *facilitate the implementation*, administration and operation, and further the objectives of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.
2. The WTO shall provide the *forum for negotiations* among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
3. The WTO shall administer the Understanding on Rules and Procedures Governing the *Settlement of Disputes* (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.
4. The WTO shall administer the *Trade Policy Review Mechanism* (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.
5. With a view to achieving greater coherence in global economic policy-making, the WTO shall *cooperate*, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies. [Emphasis added]

In addition to the functions of the WTO explicitly referred to in Article III of the WTO Agreement, technical assistance to developing-country Members, to

allow the latter to integrate into the world trading system is, undisputedly, also an important function of the WTO.

This section will examine the following functions of the WTO:

- the implementation of the WTO agreements;
- the negotiation of new agreements;
- the settlement of disputes;
- trade policies review;
- cooperation with other organisations; and
- technical assistance to developing countries.

2.3.2.1. Implementation of the WTO agreements

A first function of the WTO is to facilitate the implementation, administration and operation of the WTO Agreement and the manifold multilateral and plurilateral agreements annexed to it.³⁷ The WTO is also entrusted with the task of furthering the objectives of these agreements. For two concrete examples of what this function of 'facilitating' and 'furthering' entails, we refer to the work of the WTO Committee on Sanitary and Phytosanitary Measures (the 'SPS Committee') and the work of the WTO Committee on Safeguards. Article 12, paragraph 2, of the SPS Agreement states that the SPS Committee shall, *inter alia*:

encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues. The Committee shall encourage the use of international standards, guidelines or recommendations by all Members and, in this regard, shall sponsor technical consultation and study with the objective of increasing coordination and integration between international and national systems and approaches for approving the use of food additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs.

Pursuant to Article 13 of the Agreement on Safeguards, the tasks of the Committee on Safeguard include:

- a. to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement and make recommendations towards its improvement;
- b. to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods;
- c. to assist Members, if they so request, in their consultations under the provisions of this Agreement; ...

This function of facilitating the implementation, administration and operation of the WTO agreements and furthering the objectives of these agreements is an essential function of the WTO. It involves most of its bodies and takes up much of their time.³⁸

³⁵ Doha Ministerial Declaration, W/T/MIN(01)/DEC/1, 20 November 2001, paras. 1, 2 and 6.

³⁶ Article II:1 of the WTO Agreement.

³⁷ For an overview of these agreements, see above, pp. 45–54.

³⁸ For a list and a description of these WTO bodies, see below, pp. 120–30.

Pursuant to Article III:1 of the *WTO Agreement*, the WTO also provides the 'framework for the implementation, administration and operation' of the plurilateral agreements. It has been suggested that the wording of Article III:1 indicates that plurilateral agreements will not get the same level of support as the multilateral agreements but there is little evidence of this in practice.

Questions and Assignments 2.4

Give two concrete examples of how the WTO facilitates the implementation, administration and operation of the *WTO Agreement* other than the examples given in this section.

2.3.2.2. Negotiation of new agreements

A second function of the WTO is to provide a permanent forum for negotiations amongst its Members. These negotiations may concern matters already dealt with in the WTO agreements but may also concern matters currently not yet addressed in WTO law. With regard to negotiations on matters already covered, the WTO is 'the' forum for negotiations while, with regard to negotiations on matters not yet addressed, it is 'a' forum among others.

To date, WTO Members have negotiated and concluded five trade agreements, in the framework of the WTO, providing for:

- further market access commitments for specific services and service providers (on financial services in 1995 and 1997,³⁹ on basic telecommunications services in 1997⁴⁰ and on the movement of natural persons in 1995⁴¹); and
 - the liberalisation of trade in information technology products in 1996.⁴²
- Since the conclusion of these specific agreements in the first years of the WTO, no further agreements have been negotiated and concluded in the framework of the WTO. While the WTO provides a permanent forum for negotiations, in practice Members seem to require the political momentum, and the opportunity for package deals, brought by an old GATT-type round of negotiations covering a wide range of matters.

³⁹ Second Protocol to the General Agreement on Trade in Services, S/I/11, dated 24 July 1995; and Fifth Protocol to the General Agreement on Trade in Services, S/I/45, dated 3 December 1997.

⁴⁰ Fourth Protocol to the General Agreement on Trade in Services, S/I/20, dated 30 April 1996.

⁴¹ Third Protocol to the General Agreement on Trade in Services, S/I/12, dated 24 July 1995.

⁴² Protocol to the General Agreement on Trade in Information Technology Products (ITPA), adopted on 13 December 1996 and entered into force on 1 July 1997; the ITPA was agreed at the close of the Singapore Session of the Ministerial Conference in December 1996; the ITPA provides for the elimination of customs duties and other duties and charges on information technology products in IT products being implemented by the ITPA; however, was contingent on approx. 90% of world trade in IT products being covered by the ITPA; on 26 March 1997 that criterion was met; world trade in IT products was about \$ 600 billion annually, or about 10.2 per cent of world merchandise. In 2004, sixty-three Members were party to the ITPA.

After failing dismally to do so at the Seattle Session of the Ministerial Conference in November–December 1999, the WTO decided at the Doha Session of the Ministerial Conference in November 2001 to start a new round of multilateral trade negotiations, commonly referred to as the 'Doha Development Round'. In the Doha Ministerial Declaration, the WTO Members stressed their commitment to the WTO as the unique forum for global trade rule-making and liberalization.⁴³

The Ministerial Declaration provides for an ambitious agenda for negotiations. These negotiations include matters on which, in the *WTO Agreement*, WTO Members had already agreed to continue negotiations, such as:

- trade in agricultural products;⁴⁴ and
- trade in services.⁴⁵

In fact, negotiations on these matters had already started in early 2000. Furthermore, the Doha Development Round negotiations include negotiations on matters such as:

- problems of developing-country Members with the implementation of the existing WTO agreements (the so-called 'implementation issues');
- market access for non-agricultural products;
- TRIPS issues such as access for developing countries to essential medicines and the protection of geographical indications;
- rules on anti-dumping duties, subsidies and regional trade agreements;
- dispute settlement; and
- special and differential treatment for developing-country Members and least-developed-country Members.⁴⁶

Pursuant to the Doha Ministerial Declaration, the Round must be concluded no later than 1 January 2005. When the results of the negotiations in all areas have been established, a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results.⁴⁷ With respect to the negotiations, the Ministerial Declaration further stated:

With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a *single undertaking*. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.⁴⁸

[Emphasis added]

⁴³ Doha Ministerial Declaration, WT/MIN(01)/DEC/1, dated 20 November 2001, para. 4.

⁴⁴ Article 20 of the *Agreement on Agriculture*.

⁴⁵ Article XIX of the GATS.

⁴⁶ For a complete list of the matters on the agenda of the Doha Development Round, see Ministerial Conference, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, dated 20 November 2001.

⁴⁷ *Ibid.*, para. 45. ⁴⁸ *Ibid.*, para. 47.

Moreover, the Doha Ministerial Declaration provides that:

The negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.⁴⁹

The Doha Development Round negotiations are conducted by the Trade Negotiations Committee (TNC) and its negotiating bodies. The TNC is established especially for the Round and endures until its completion. It supervises the overall conduct of the negotiations under the authority of the General Council. The Director-General of the WTO chairs the TNC *ex officio*. The actual negotiations take place either in Special Sessions of existing WTO bodies⁵⁰ or in especially established negotiating groups.⁵¹ The TNC and its negotiating bodies consist of all the WTO Members and countries negotiating membership. Decisions on the results of the negotiations shall, however, be taken only by WTO Members.⁵²

All publicly available documents, reports and position papers relating to the Doha Development Round are available on the Documents Online database of the WTO as TN/... documents.⁵³

Some WTO Members, and in particular the European Communities, wanted a broader agenda for the Doha Development Round. They also wanted the WTO to start negotiations on, for example, the relationship between trade and investment, the relationship between trade and competition law and the relationship between trade and core labour standards. There was, however, strong opposition, especially among developing-country Members, to the inclusion of some or all of these matters on the agenda of negotiations. At the Doha Session of the Ministerial Conference, WTO Members decided that there will be no negotiations, within the context of the WTO, on the relationship between trade and core labour standards. However, with respect to what is commonly referred to as the 'Singapore issues',⁵⁴ namely:

- the relationship between trade and investment,
- the relationship between trade and competition law,
- transparency in government procurement, and
- trade facilitation,

the WTO Members decided in Doha that negotiations would start after they had agreed, by 'explicit consensus', on the modalities of these negotiations.⁵⁵ This agreement was to be reached at the Cancún Ministerial Conference in

September 2003. In the meantime, the relevant WTO bodies 'prepared' these negotiations by discussing, and attempting to clarify, the matters that would be addressed in the negotiations.

To date, the Doha Development Round has not been very successful. Important intermediate deadlines (for example, the modalities of the negotiations on trade in agricultural products, and on reform of the dispute settlement system) were not met.⁵⁶ The Cancún Session of the Ministerial Conference in September 2003, at which Members were to take stock of the progress made in the negotiations thus far and decide on how to proceed with the negotiations, was a failure. Nothing was agreed upon. The two principal stumbling blocks were the negotiations on trade in agricultural products and the start of the negotiations on the Singapore issues. On trade in agricultural products, the European Communities, the United States and other developed-country Members with protectionist agricultural policies were, in the opinion of developing countries, not willing to lower their import duties and export and domestic subsidies sufficiently.⁵⁷ On the Singapore issues, developing countries were unwilling to agree to the demand of the European Communities and others to start negotiations on these issues. In diplomatic language masking the deep sense of failure and disappointment, the Ministerial Statement adopted at the close of the Cancún Session on 14 September 2003 reads:

All participants have worked hard and constructively to make progress as required under the Doha mandates. We have, indeed, made considerable progress. However, more work needs to be done in some key areas to enable us to proceed towards the conclusion of the negotiations in fulfilment of the commitments we took at Doha.⁵⁸

The deadlock in the negotiations resulting from the failure of the Cancún Session was only overcome when, following weeks of intense discussions, a new Doha Work Programme was adopted by the General Council on 1 August 2004. Thus, the negotiations in the context of the WTO Doha Development Round continue. The Doha Development Round negotiations currently proceed on the basis of this new Work Programme. In its decision of 1 August 2004, the General Council called on all Members 'to redouble their efforts towards the conclusion of a balanced overall outcome of the Doha Development Agenda'. Note that the General Council agreed to continue the negotiations beyond 1 January 2005, the time originally set out in the Doha Declaration.

Questions and Assignments 2.5

Has the WTO thus far been successful as a forum for the negotiations of new multilateral trade agreements? What is on the agenda of the Doha Development Round? What is not (or not yet) on the agenda? Find out

⁴⁹ *Ibid.*, para 49.

⁵⁰ E.g., the negotiations on the DSU take place in Special Sessions of the DSB.

⁵¹ E.g., negotiations on market access for non-agricultural products take place in a Negotiating Group on Market Access established for that purpose.

⁵² For further details on the institutional arrangements for the Doha Development Round, see below, pp. 130–1.

⁵³ See http://docsonline.wto.org/gen_home.asp?language=1&_1=1, visited on 15 May 2004.

⁵⁴ At the Singapore Session of the Ministerial Conference in December 1996 these issues were first identified as possible issues for further negotiations within the WTO. For a further discussion, see below, p. 142.

⁵⁵ Note that the concept of 'explicit consensus' was a *novum* in WTO law. For a further discussion, see below, pp. 390–2, 583–6.

⁵⁶ Note that in the meantime an agreement on access to essential medicines for developing countries was reached. See below, pp. 149–50.

⁵⁷ WT/MIN(03)/20, dated 23 September 2003, para. 3.

exactly what the Doha Ministerial Declaration of November 2001 says about the relationship between trade and core labour standards.

and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system.⁶⁴ The purpose of the TPRM is:

- to achieve greater transparency in, and understanding of, the trade policies and practices of Members; and
- to contribute, in this way, to improved adherence by all Members to rules, disciplines and commitments made under the WTO agreements.⁶⁵

Under the TPRM, the trade policies and practices of all Members are subject to *periodic review*. The frequency of review is determined by reference to each Member's share of world trade in a recent representative period.⁶⁶

The four largest trading entities, i.e., the European Communities,⁶⁷ the United States, Japan and Canada, are subject to review every two years. The next sixteen are reviewed every four years. Other Members are reviewed every six years, except that a longer period may be fixed for least-developed-country Members.⁶⁸

The trade policy reviews are carried out by the Trade Policy Review Body (TPRB)⁶⁹ on the basis of two reports: a report supplied by the Member under review, in which the Member describes the trade policies and practices it pursues; and a report, drawn up by the WTO Secretariat, based on the information available to it and that provided by the Member under review.⁷⁰ These reports, together with the concluding remarks by the TPRB Chairperson on a Member's review and the minutes of the meeting of the TPRB are published shortly after the review and are a valuable source of information on a WTO Member's trade policy. The TPR reports and the minutes of the TPRB are available on the *Documents Online* database of the WTO as WT/TPR/ ... documents.⁷¹

By the end of 2003, a total of 182 reviews had been conducted, covering ninety-six Members,⁷² representing around 87 per cent of world trade.⁷³

⁶⁴ See *Trade Policy Review Mechanism*, para. A(i).

⁶⁵ Note that it is explicitly stated that the TPRM is *not* intended to be used as a basis for the enforcement of specific objectives under the WTO agreements or for dispute settlement procedures. See *ibid.*

⁶⁶ See *ibid.*, para. C(ii).

⁶⁷ It is understood that the review of entities having a common external policy covering more than one Member shall cover all components of policy affecting trade including relevant policies and practices of the individual Members.

⁶⁸ Exceptionally, in the event of changes in a Member's trade policies or practices that may have a significant impact on its trading partners, the Member concerned may be requested by the TPRB, after consultation, to bring forward its next review.

⁶⁹ See below, p. 126.

⁷⁰ The two reports cover all aspects of the Member's trade policies, including its domestic laws and regulations, the institutional framework, bilateral, regional and other preferential agreements, the wider economic needs and the external environment.

⁷¹ See http://docsonline.wto.org/gen_home.aspx?langage=1&_=_1, visited on 15 May 2004. Press releases on trade policy reviews are available as PRESS/TPRB/ ... documents.

⁷² Note that the European Communities and the Member States of the European Union are counted as one. See Report of the Trade Policy Review Body for 2003, WT/TPR/140, dated 31 October 2003, 1. The trade policies of Burundi, Bulgaria, Guyana, Haiti, Honduras, the Maldives and Niger were reviewed for the first time in 2003. The trade policies of the United States, the European Communities, Japan and Canada have been reviewed six times since 1995. For a statistical overview, see Report of the Trade Policy Review Body for 2003, WT/TPR/140, dated 31 October 2003, Annex I.

2.3.2.3. Dispute settlement

A third and very important function of the WTO is the administration of the WTO dispute settlement system. As stated in Article 3.2, first sentence, of the DSU:

- The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.
- The prompt settlement of disputes under the WTO agreements is essential for the effective functioning of the WTO and for maintaining a proper balance between the rights and obligations of Members.⁵⁹ The WTO dispute settlement system serves:
- to preserve the rights and obligations of Members under the WTO agreements; and
- to clarify the existing provisions of those agreements.⁶⁰

The dispute settlement system is explicitly proscribed from adding to or diminishing the rights and obligations provided in the WTO agreements.⁶¹

The WTO dispute settlement system, referred to as the 'jewel in the crown' of the WTO, has been operational for nine years now, and has arguably been the most prolific of all intergovernmental dispute settlement systems in that period. Since 1 January 1995, more than 314 disputes have been brought to the WTO system for resolution.⁶² Some of these disputes, involving, for example, national legislation on public health or environmental protection, were politically sensitive and have attracted considerable attention from the media. With its compulsory jurisdiction, its strict time-frames, its confidential and closed nature, the possibility of appellate review and the detailed mechanism to ensure compliance with recommendations and rulings, the WTO dispute settlement system is unique among international dispute settlement systems. Chapter 3 examines in detail the origins, basic principles, institutions and proceedings of the WTO dispute settlement system.

2.3.2.4. Trade policy review

A fourth function of the WTO is the administration of the trade policy review mechanism (TPRM).⁶³ The TPRM provides for the regular collective appreciation

⁵⁹ Article 3.3 of the DSU. ⁶⁰ Article 3.2, second sentence, of the DSU.

⁶¹ Article 3.2, last sentence, of the DSU.

⁶² See www.wto.org/english/tratop_e/dispstatus_e.htm, visited on 27 August 2004.

⁶³ Annex 3 to the WTO Agreement, entitled 'Trade Policy Review Mechanism'.

During 2003, the TPRB carried out reviews of sixteen Members. The programme for the year 2004 again includes sixteen reviews, including reviews of the trade policies of the United States and the European Communities.⁷⁴ Over the past few years, greater focus has been placed on the review of the trade policies of least-developed-country Members.

It is important to note that the TPRM is not intended to serve as a basis for the enforcement of specific obligations under the WTO agreements or for dispute settlement procedures, or to impose new policy commitments on Members. However, by publicly deplored inconsistencies with WTO law of a Member's trade policy or practices inconsistent with WTO law, the TPRM intends to 'shame' Members into compliance and to bolster domestic opposition to trade policy and practices inconsistent with WTO law. Likewise, by publicly praising WTO-consistent trade policies, the TPRM bolsters, both internationally and domestically, support for such policies.

By way of example, note the first trade policy review of Malawi, which the TPRB concluded on 6 and 8 February 2002. In his concluding remarks, the TPRB Chairperson stated:

Members welcomed Malawi's commitment to the multilateral trading system and appreciated the substantial effort this requires from Malawi, a small landlocked least-developed country with no representation in Geneva. They were encouraged by the Government's economic reforms, including trade and investment liberalization efforts to foster increased efficiency and private sector development ...
Members appreciated Malawi's on-going efforts to refrain from using non-tariff measures and its reliance on relatively low average tariffs as the main trade instrument. ...
Members expressed some concern about Malawi's dependence on tobacco, which was subject to international price fluctuations and to the adverse effects of the anti-smoking campaigns in major developed markets. Members pointed out that Malawi's agricultural policies aimed at food security and rural development. They questioned the impact of communal land ownership on agricultural development and planned reforms in the sector, mainly in land tenure.

Trade policy reviews of developing-country Members also give an opportunity to identify the needs of these countries in terms of technical and other assistance.⁷⁵

The final remarks of the TPRB Chairperson at the meeting of 23 and 25 January 2002, when the TPRB concluded the trade policy review of Pakistan, are also noteworthy:

Purely as an aside, and as much a comment on the review process as on this Review, I was struck by [Pakistan's] Secretary Beg's remarks that questions had given his delegation food for considerable thought and that sources of information had been found of which he was unaware. This goes to the heart of our work: not only do we learn a lot about the Member, but often the Member learns a lot about itself. Moreover, this is put into a multilateral setting, thus serving to strengthen our system.⁷⁶
Increasingly our work highlights the value of the Trade Policy Review Body.⁷⁶

Apart from carrying out individual trade policy reviews, the TPRB also undertakes an annual overview of developments in the international trading environment which have an impact on the multilateral trading system. To assist the TPRB with this review, the Director-General presents an annual report setting out the major activities of the WTO and highlighting significant policy issues affecting the trading system.⁷⁷

Questions and Assignments 2.6

What is the objective of the Trade Policy Review Mechanism? Is trade policy review under the WTO comparable with WTO dispute settlement? Find the latest trade policy review reports concerning the European Communities and the United States on the WTO website. Find also the latest Annual Report by the Director-General on the *Overview of Developments in the International Trading Environment*.

2.2.2.5. Cooperation with other organisations

A fifth function of the WTO is to cooperate with international organisations and non-governmental organisations.

Article III:5 of the WTO Agreement refers specifically to cooperation with the IMF and the World Bank. Such cooperation is mandated by the need for greater coherence in global economic policy-making. The 'linkages' between the different aspects of global economic policy (financial, monetary and trade) require that the international institutions with responsibilities in these areas follow coherent and mutually supportive policies. It is therefore stated in the Uruguay Round Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking, commonly referred to as the *Declaration on Coherence*, that the WTO should:

pursue and develop cooperation with the international organizations responsible for monetary and financial matters, while respecting the mandate, the confidentiality requirements and the necessary autonomy in decision-making procedures of each institution, and avoiding the imposition on governments of cross-conditionality or additional conditions. Ministers further invite the Director-General of the WTO to review with the Managing Director of the International Monetary Fund and the President of the World Bank, the implications of the WTO's responsibilities for its cooperation with the Bretton Woods institutions, as well as the forms such cooperation might take, with a view to achieving greater coherence in global economic policymaking.⁷⁸

⁷⁴ *Ibid.*, Annexes II and III.
⁷⁵ See e.g. Trade Policy Review Body – Review of Malawi – TPRB's Evaluation, PRESS/TPRB/189, dated 8 February 2002.
⁷⁶ Trade Policy Review Body – Review of Pakistan – TPRB's Evaluation, PRESS/TPRB/187, dated 25 January 2002.

⁷⁷ See e.g. *Overview of Developments in the International Trading Environment*, Annual Report by the Director-General (2002), WTPR/IOV/8, dated 15 November 2002.
⁷⁸ Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, para. 5.

The WTO has concluded agreements with both the IMF and the World Bank to give form to the cooperation required by Article III:5 of the *WTO Agreement*.⁷⁹ These agreements provide for consultations and the exchange of information between the WTO Secretariat and the staff of the IMF and the World Bank. The WTO, the IMF and the World Bank now cooperate quite closely on a day-to-day basis, in particular in the area of technical assistance to developing countries. Along with three other international organisations,⁸⁰ the IMF and the World Bank participate actively in a WTO-led Integrated Framework to help the least-developed countries expand their exports.⁸¹ Furthermore, the IMF and the World Bank have observer status in the WTO and the WTO attends the meetings of the IMF and the World Bank. Officials of the three organisations meet regularly to discuss issues of global economic policy coherence.

Pursuant to Article V:1 of the *WTO Agreement*, the WTO is also to cooperate with other international organisations. Article V, which is entitled 'Relations with Other Organizations', states in its first paragraph:

The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.

The WTO has made cooperation arrangements with, *inter alia*, the World Intellectual Property Organization (WIPO) and the United Nations Conference on Trade and Development (UNCTAD). In these and other international organisations the WTO has observer status.⁸² The WTO and UNCTAD cooperate in a joint venture, the International Trade Centre (ITC). The ITC works with developing countries and economies in transition to set up effective trade promotion programmes to expand their exports and improve their import operations.

In addition, the WTO Secretariat has concluded a large number of so-called Memoranda of Understanding (MOUs) with other international secretariats. These MOUs provide mainly for technical assistance from the WTO to these other secretariats or the geographical regions in which they work. In September 2003, for example, the WTO Director-General, Supachai Panitchpakdi, and the Secretary General of the ACP Group, Jean-Robert Gouloungana, signed an MOU committing both organisations to cooperate more closely to provide training, technical assistance and support to negotiators of the ACP member states in the Doha Development Round.⁸³

⁷⁹ Agreement between the International Monetary Fund and the World Trade Organization, contained in Annex II to WT/GC/W/43, dated 4 November 1996; and the Agreement between the International Bank for Reconstruction and Development and the World Trade Organization, contained in Annex II to WT/GC/W/43, dated 4 November 1996.

⁸⁰ UNCTAD, the ITC and the UNDP.

⁸¹ See below, p. 101.

⁸² See WTO Annual Report 2003, Annex III:3(B) and (C), 124–5.

⁸³ The ACP (African, Caribbean and Pacific) Group comprises seventy-nine members, forty of which are least-developed countries, most of them from Africa. The objective of the ACP Group is to contribute to the economic development and social progress of its member States. See also below, pp. 107–8.

International governmental organisations are also invited to attend sessions of the WTO Ministerial Conference. Representatives of seventy-six international governmental organisations therefore attended the Cancun Session of the Ministerial Conference in September 2003.⁸⁴

In addition to cooperating with intergovernmental international organisations, the WTO also cooperates with non-governmental organisations (NGOs). Article V:2 of the *WTO Agreement* states:

The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

On 18 July 1996, the General Council therefore adopted a set of guidelines clarifying the framework for relations with NGOs.⁸⁵ In these guidelines, the General Council:

recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities ...

It is important for the WTO to maintain a positive dialogue with the various components of civil society. To date, 'cooperation' with NGOs has essentially focused on:

- the attendance by NGOs at sessions of the Ministerial Conference;
- symposia for NGOs on specific issues;⁸⁶
- regular briefings for NGOs on the work of WTO committees and working groups; and
- the frequent contact between the WTO Secretariat and NGOs.

The WTO Secretariat also regularly forwards a list to WTO Members of documents, position papers and newsletters submitted by NGOs. This list is made available on a special section of the WTO's website, devoted to NGOs' issues and WTO activities organized for the benefit of NGOs.⁸⁷ In the Doha Ministerial Declaration, Members stated:

we are committed to making the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public.⁸⁸

The extent and focus of cooperation between the WTO and NGOs is discussed in more detail later in this chapter.⁸⁹

⁸⁴ WTO Annual Report 2004, 77 and Table III:9.

⁸⁵ Guidelines for Arrangements on Relations with Non-Governmental Organizations, Decision adopted by the General Council on 18 July 1996, WT/L/162, dated 23 July 1996. See below, pp. 157–8.

⁸⁶ The WTO Secretariat organised symposia for NGOs on issues such as the relationship between trade and the environment.

⁸⁷ See http://www.wto.org/english/forums_e/ngo_e.htm, visited on 6 February 2004.

⁸⁸ Ministerial Conference, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, dated 20 November 2001, para. 10.

⁸⁹ See below, pp. 154–62.

Questions and Assignments 2.7

Why and how does the WTO cooperate with international organisations?

Why and how does the WTO cooperate with NGOs? Find out about the next WTO/NGO event on the WTO website.

2.3.2.6. Technical assistance to developing countries

The functions of the WTO listed in Article III of the WTO Agreement do not explicitly include technical assistance to developing-country Members. Yet this is, in practice, an important function of the WTO. Of course, it could be argued that this function is implied in the other functions discussed above, in particular the function of facilitating the implementation, administration and operation, and of furthering the objectives, of the WTO Agreement. However, in view of its importance, it deserves to be mentioned separately.

In order to exercise their rights and obligations under the WTO Agreement, to reap the benefits of their membership of the WTO and to participate fully and effectively in trade negotiations, most developing-country Members need to have significantly more expertise in the area of trade law and policy. This is recognised in many WTO agreements, including the SFS Agreement, the TBT Agreement, the TRIPS Agreement, the Customs Valuation Agreement and the DSU, which all specifically provide for technical assistance to developing-country Members. This technical assistance may take the form of bilateral assistance, given by developed-country Members, or multilateral assistance, given by the WTO Secretariat.⁹⁰

At its Doha Session in November 2001, the Ministerial Conference declared that:

technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system.⁹¹

As an essential element of the Doha Development Agenda, in 2002, the WTO embarked on a programme of greatly enhanced support for developing countries.⁹²

In his 2003 report on technical cooperation and capacity-building at the Cancún Session of the Ministerial Conference, the WTO Director-General, Supachai Panichpakdi, stated:

the challenges for the Secretariat in the area of technical cooperation and training were unprecedented. This was due to the high number of requests for assistance, the ever expanding priorities, increasing cooperation with all stakeholders, an ever growing interest in the WTO on the part of all layers of society, a rapidly evolving multilateral

trading system, and the complexity of the subject matter of the negotiations and work programme.⁹³

As from 2002, there was a notable increase in the WTO's budget to allow for more technical co-operation and capacity-building activities.⁹⁴ Furthermore, in 2002, WTO Members contributed almost 20 million Swiss Francs to the Doha Development Agenda Global Trust Fund.⁹⁵ In 2003 and 2004, Members continued to make contributions to the Global Trust Fund.⁹⁶ The Global Trust Fund has significantly complemented the regular budget as a source of funding for the WTO Secretariat's training and technical assistance activities.⁹⁷ The WTO has also significantly improved co-ordination with other international organisations (World Bank, IMF, UNCTAD, etc.), with regional banks and regional organisations and with bilateral governmental donors. The coordination with the World Bank, the IMF and other international organisations takes place in the context of the Integrated Framework for Trade-Related Technical Assistance (IF). The IF has two objectives:

- to integrate trade priorities into LDCs' national development plans and poverty reduction strategies; and
- to assist in the coordinated delivery of trade-related assistance.

The IF currently applies to nineteen least-developed countries and a number of other least-developed countries have expressed an interest in joining the IF.⁹⁸ The WTO also takes a leading role in the Joint Integrated Technical Assistance Programme (JTAP) for Selected African and Least-Developed Countries. The JTAP is a major capacity-building programme put in place by the WTO, UNCTAD and the ITC to address trade-related capacity constraints of African countries. Sixteen African countries are currently involved in the JTAP.⁹⁹

The WTO Secretariat organises, mostly in response to a specific request from one or more developing-country Members:

- general seminars on the multilateral trading system and the WTO;
- technical seminars and workshops focusing on a particular area of trade law or policy; and

⁹³ WT/MIN(03)/3, dated 14 August 2003, para. 7.
⁹⁴ See below, pp. 164–5. For the latest information on WTO technical co-operation and capacity building, see WTO, Annual Report 2003 on Training and Technical Cooperation, WT/COMTD/WI/27, dated 17 April 2004.

⁹⁵ WT/MIN(03)/3, dated 14 August 2003, Annex II.
⁹⁶ For example, on 13 September 2003, Belgium committed itself to contribute €2 million over four years (2004–7) to the Global Trust Fund. See http://www.wto.org/english/news_e/pr359_e.htm, visited on 6 February 2004. On 19 November 2003, the Netherlands pledged a contribution of €1.4 million to the Global Trust Fund. See http://www.wto.org/english/news_e/pr367_e.htm, visited on 6 February 2004.

⁹⁷ See below, p. 166.
⁹⁸ See WT/MIN(03)/3, dated 14 August 2003, paras. 18 and 19.

⁹⁹ See WT/MIN(03)/3, dated 14 August 2003, paras. 20–2. An evaluation carried out in April 2002 concluded that JTAP had made an important contribution by enabling many of the participating countries to play a fuller role in the multilateral trading system and the ongoing negotiations, and that it had also contributed to developing a more holistic and comprehensive view of trade issues in participating countries. It was viewed as a model for possible replication elsewhere. See *ibid.*

⁹⁰ Note that Article 9 of the SPS Agreement also refers to assistance by other international organisations.

⁹¹ Ministerial Conference, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, dated 20 November 2001, para. 38.

⁹² *Ibid.*, para. 41.

- technical missions to assist developing-country Members on specific tasks related to the implementation of obligations under the WTO agreements (such as the adoption of trade legislation or notifications) and to provide support to mainstream trade into national plans for economic development and to assist in their strategies for poverty reduction.

In 2003, the WTO Secretariat organised 451 technical cooperation activities.¹⁰⁰ In 2002 and the first half of 2003, some 700 technical assistance and training activities, covering all topics and all regions, were implemented involving thousands of mission days of WTO staff members and other officials of partner institutions, and reaching an audience of approximately 25,000 participants.¹⁰¹

Furthermore, the WTO Secretariat organises training courses for developing-country government officials at the WTO headquarters in Geneva. These courses, introductory, general or advanced in nature, run from a few days to three months and cover the full range of WTO issues. In view of the interest in the three-month-long, general WTO *Trade Policy Course*, the WTO decided, in 2002, to organise this course not only in Geneva but also in developing countries in cooperation with local universities. The first of such trade policy courses took place in Africa: two in Nairobi for English-speaking African countries and one in Casablanca for French-speaking African countries.¹⁰² While in general highly regarded, note that one African diplomat reportedly stated, with respect to those WTO training courses and seminars:

the Secretariat attempts to put us through university in a period of three days; as a result I come out even more confused than when I started. These are complex issues that must be addressed in layers. We can't do the whole thing together.¹⁰³

The WTO also organises a programme known as ‘Geneva Week’, a special week-long event bringing together representatives of developing-country Members and Observers that do not have permanent missions in Geneva.¹⁰⁴ The objectives of the Geneva Week are to introduce participants to WTO issues and work processes, and to provide information about the range of technical assistance available. During their stay in Geneva, participants have an opportunity to be involved in the work of WTO bodies; they also have the opportunity to interact with officials from other Geneva-based agencies, and with Geneva-based delegations. Geneva Week was initiated in 1999, and has since been held at least once a year.

Since 1997, the WTO Secretariat has set up ‘Reference Centres’ in developing countries.¹⁰⁵ These Reference Centres allow government officials, as well as the local business and academic communities, to access essential documents instantly via the WTO’s website. To date, more than 140 Reference Centres have been established all over the world. Priority has been given to least-developed countries.¹⁰⁶

In November 2002, the OECD and the WTO established a database which gives details of the trade-related technical-assistance and capacity-building activities of all donors (bilateral, regional and multilateral). This database gives an overall picture of technical development activities, which helps the coordination of such activities and aims to avoid costly overlap.¹⁰⁷

For a detailed overview of the WTO’s current efforts regarding technical assistance to developing countries, refer to the Technical Assistance and Training Plan 2004.¹⁰⁸

Questions and Assignments 2.8

Give a brief overview of the technical assistance efforts of the WTO. How does the WTO coordinate its technical assistance efforts with the efforts of other organisations and donors? Look up how much of the 2004 WTO budget was earmarked for technical co-operation, trade policy courses and the WTO contribution to the ITC.

2.4. MEMBERSHIP OF THE WTO

On 1 September 2004, the WTO had 147 Members and more than 25 countries were negotiating their accession to the WTO. This section will examine:

- the universality and diversity of the current membership;
- accession to the WTO;
- the obligations of WTO membership; and
- withdrawal and expulsion from the WTO.

2.4.1. Current membership

The membership of the WTO is quasi-universal. It includes all major trading powers and most developing countries. The Members of the WTO represent 92 per cent of the global population and 95 per cent of world trade. On 15 October 2004, the 148 Members of the WTO included:

¹⁰⁰ The WTO Secretariat provides governments with computers and other hardware, software and the training required for the operation of these Reference Centres.

¹⁰¹ See WT/MIN(03)/3, dated 14 August 2003, para. 11. Reportedly, the evaluation and feedback mechanisms that have been established clearly suggest that, in most cases, the set objectives of the assistance and training provided were attained (*ibid.*).

¹⁰² See WT/MIN(03)/3, dated 14 August 2003, para. 13.

¹⁰³ Reported by Shefali Sharma, *WTO Decision Making: A Broken Process*, WTO Cancún Series Paper No. 4 (Institute for Agriculture and Trade Policy, 2003), 10.

¹⁰⁴ See below, p. 109.

¹⁰⁵ See WTO Annual Report 2004, 5.

¹⁰⁶ See WT/MIN(03)/3, dated 14 August 2003, para. 13.

¹⁰⁷ See <http://itcibab.wto.org>.

¹⁰⁸ WT/COM/TD/W/119Rev.3, dated 18 February, 2004. See also below, pp. 700–2.

Albania, 8 September 2000; **Angola**, 23 November 1996; **Antigua and Barbuda**, 1 January 1995; **Argentina**, 1 January 1995; **Armenia**, 5 February 2003; **Australia**, 1 January 1995; **Austria**, 1 January 1995; **Bahrain**, 1 January 1995; **Bangladesh**, 1 January 1995; **Barbados**, 1 January 1995; **Belgium**, 1 January 1995; **Belize**, 1 January 1995; **Benin**, 22 February 1996; **Bolivia**, 12 September 1995; **Botswana**, 31 May 1995; **Brazil**, 1 January 1995; **Brunei Darussalam**, 1 January 1995; **Bulgaria**, 1 December 1996; **Burkina Faso**, 3 June 1995; **Burundi**, 23 July 1995; **Cambodia**, 13 October 2004; **Cameroon**, 13 December 1995; **Canada**, 1 January 1995; **Central African Republic**, 31 May 1995; **Chad**, 19 October 1996; **Chile**, 1 January 1995; **China**, 11 December 2001; **Colombia**, 30 April 1995; **Congo**, 27 March 1997; **Costa Rica**, 1 January 1995; **Côte d'Ivoire**, 1 January 1995; **Croatia**, 30 November 2000; **Cuba**, 20 April 1995; **Cyprus**, 30 July 1995; **Czech Republic**, 1 January 1995; **Democratic Republic of the Congo**, 1 January 1997; **Denmark**, 1 January 1995; **Djibouti**, 31 May 1995; **Dominica**, 1 January 1995; **Dominican Republic**, 9 March 1995; **Ecuador**, 21 January 1996; **Egypt**, 30 June 1995; **El Salvador**, 7 May 1995; **Estonia**, 13 November 1999; **European Communities**, 1 January 1995; **Fiji**, 14 January 1996; **Finland**, 1 January 1995; **Former Yugoslav Republic of Macedonia**, 4 April 2003; **France**, 1 January 1995; **Gabon**, 1 January 1995; **The Gambia**, 23 October 1996; **Georgia**, 14 June 2000; **Germany**, 1 January 1995; **Ghana**, 1 January 1995; **Greece**, 1 January 1995; **Grenada**, 22 February 1996; **Guatemala**, 21 July 1995; **Guinea**, 25 October 1995; **Guinea Bissau**, 31 May 1995; **Guyana**, 1 January 1995; **Haiti**, 30 January 1996; **Honduras**, 1 January 1995; **Hong Kong, China**, 1 January 1995; **Hungary**, 1 January 1995; **Iceland**, 1 January 1995; **India**, 1 January 1995; **Indonesia**, 1 January 1995; **Ireland**, 1 January 1995; **Israel**, 21 April 1995; **Italy**, 1 January 1995; **Jamaica**, 9 March 1995; **Japan**, 1 January 1995; **Jordan**, 11 April 2000; **Kenya**, 1 January 1995; **Korea, Republic of**, 1 January 1995; **Kuwait**, 1 January 1995; **Kyrgyz Republic**, 20 December 1998; **Latvia**, 10 February 1999; **Lesotho**, 31 May 1995; **Liechtenstein**, 1 September 1995; **Lithuania**, 31 May 2001; **Luxembourg**, 1 January 1995; **China**, 1 January 1995; **Madagascar**, 17 November 1995; **Malawi**, 31 May 1995; **Malaysia**, 1 January 1995; **Maldives**, 31 May 1995; **Mali**, 31 May 1995; **Malta**, 1 January 1995; **Mauritania**, 31 May 1995; **Mauritius**, 1 January 1995; **Mexico**, 1 January 1995; **Moldova**, 26 July 2001; **Mongolia**, 29 January 1997; **Morocco**, 11 January 1995; **Mozambique**, 26 August 1995; **Myanmar**, 1 January 1995; **Namibia**, 1 January 1995; **Nepal**, 23 April 2004; **Netherlands** (including the Netherlands Antilles), 1 January 1995; **New Zealand**, 1 January 1995; **Nicaragua**, 3 September 1995; **Niger**, 13 December 1996; **Nigeria**, 1 January 1995; **Norway**, 1 January 1995; **Oman**, 9 November 2000; **Pakistan**, 1 January 1995; **Panama**, 6 September 1997; **Papua New Guinea**, 9 June 1996; **Paraguay**, 1 January 1995; **Peru**, 1 January 1995; **Philippines**, 1 January 1995; **Poland**, 1 July 1995; **Portugal**, 1 January 1995; **Qatar**, 13 January 1996; **Romania**, 1 January 1995; **Rwanda**,

22 May 1996; **Saint Kitts and Nevis**, 21 February 1996; **Saint Lucia**, 1 January 1995; **Saint Vincent and the Grenadines**, 1 January 1995; **Senegal**, 1 January 1995; **Separate Customs Territory of Taiwan**, **Penghu, Kinmen and Matsu**, 1 January 2002; **Sierra Leone**, 23 July 1995; **Singapore**, 1 January 1995; **Slovak Republic**, 1 January 1995; **Slovenia**, 30 July 1995; **Solomon Islands**, 26 July 1996; **South Africa**, 1 January 1995; **Spain**, 1 January 1995; **Sri Lanka**, 1 January 1995; **Suriname**, 1 January 1995; **Swaziland**, 1 January 1995; **Sweden**, 1 January 1995; **Switzerland**, 1 July 1995; **Tanzania**, 1 January 1995; **Thailand**, 1 January 1995; **Togo**, 31 May 1995; **Trinidad and Tobago**, 1 March 1995; **Tunisia**, 29 March 1995; **Turkey**, 26 March 1995; **Uganda**, 1 January 1995; **United Arab Emirates**, 10 April 1996; **United Kingdom**, 1 January 1995; **United States of America**, 1 January 1995; **Uruguay**, 1 January 1995; **Venezuela**, 1 January 1995; **Zambia**, 1 January 1995; **Zimbabwe**, 5 March 1995.¹⁰⁹

2.4.1.1. States and customs territories

The WTO membership does not include only States. Separate customs territories possessing full autonomy in the conduct of their external commercial relations and in the other matters covered by the WTO Agreement can also be WTO Members.¹¹⁰ Two examples of such WTO Members, which are not States but separate customs territories, are Hong Kong, China (commonly referred to as Hong Kong), and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (commonly referred to as Chinese Taipei).

2.4.1.2. The European Communities

The European Communities is also a WTO Member but this is a case apart, specifically provided for in the WTO Agreement.¹¹¹ Both the European Communities and all the Member States of the European Union are Members of the WTO. This reflects the division of competence between the European Communities and the Member States in the various areas covered by the WTO Agreement (trade in goods; trade in services; and the protection of intellectual property rights). As is clear from Articles IX, XI and XIV of the WTO Agreement, it

¹⁰⁹ See http://www.wto.org/english/trewto_e/whatis_e/rif_e/org6_e.htm, visited on 1 September 2004. The date after the name of the country or separate customs territory refers to the date on which the country or separate customs territory became a Member of the WTO. Note that, on 11 September 2003, at the Cancún Session of the Ministerial Conference, the WTO Members approved the Protocols of Accession of Cambodia and Nepal. Nepal became the 147th Member in April 2004 and Cambodia became the 148th Member in October 2004.

¹¹⁰ See Article XII of the WTO Agreement. The Explanatory Notes attached to the WTO Agreement stipulate that the terms 'country' or 'countries' as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO. In the case of a separate customs territory Member of the WTO where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term 'national', such expression shall be read as pertaining to that customs territory, unless otherwise specified.

¹¹¹ See Article XI of the WTO Agreement.

is the European Communities, and not the European Community or the European Union, which is a Member of the WTO. The reason for this also lies in EU constitutional law. The European Communities, and not the European Community, is a WTO Member because at the time of the negotiations it was unclear whether the European Community, one of the then three Communities, had the necessary competence to conclude the *WTO Agreement*. In *Opinion 1/94*, the European Court of Justice established that, of the then three European Communities (EC, ECSC and Euratom), only the European Community needed to be involved in the WTO. However, the ECJ's clarification of the legal situation came after the *WTO Agreement* had been signed. The European Communities, and not the European Union, is a WTO Member, because in 1994 – the time of the conclusion of the *WTO Agreement* – the European Union did not yet have any competence to conclude international agreements. Note that both the European Communities and all Member States of the European Union are full Members of the WTO and that all obligations of the *WTO Agreement* apply equally to all of them. Irrespective of the internal division of competence between the European Communities and the Member States of the European Union, they can all be held responsible for compliance with all the obligations under the *WTO Agreement*.

2.4.1.3 Developing-country Members

Three-quarters of the 148 Members of the WTO are developing countries. There is no WTO definition of a 'developing country'. The status of 'developing-country Member' is based, to a large extent, on self-selection. Members announce whether they are 'developed' or 'developing' countries.

In recent years, and in particular since the failure of the Seattle Session of the Ministerial Conference at the end of 1999, developing-country Members have played an increasingly important role in the WTO, not only because of their numbers but also because of their increasing importance in the global economy.¹¹² Because of the size of their economies and the fact that they often act as spokespersons for other developing countries, China, Brazil, India and South Africa are today undoubtedly the most influential and 'activist' Members among the developing-country Members. While their interests do not always converge, these countries are formidable champions of the cause of the developing-country Members within the WTO.

As discussed further in this book, developing-country Members benefit from special and differential treatment under many of the WTO agreements and receive WTO technical assistance.¹¹³ Other Members can, and occasionally do, challenge the decision of a Member to make use of special and differential treatment provisions available to developing countries.¹¹⁴

¹¹² See above, p. 8.

¹¹³ See e.g. below, pp. 660–1, 665–6, 669–70, 700–2.

¹¹⁴ Note that, for the Generalised System of Preferences (GSP), it is the preference-giving Member that decides which countries qualify for the preferential tariff treatment.

On 1 June 2004, there were thirty-one least-developed countries among the developing-country Members. The WTO recognises as least-developed countries those countries which have been designated as such by the United Nations.¹¹⁵ Least-developed countries benefit from additional special and differential treatment. The least-developed countries among the WTO Members are Angola, Bangladesh, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Cambodia, Guinea, Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda and Zambia.¹¹⁶

2.4.1.4 Groups and alliances within the WTO

The developing-country Members and the least-developed-country Members are not the only distinguishable groups within the WTO membership. Other formal or informal groups and alliances exist in the WTO.

Some of these groups have been formed to defend common interests and advance common positions; they coordinate (or try to coordinate) positions and, when appropriate, speak in unison. This category of groups includes the Association of South East Asian Nations (ASEAN);¹¹⁷ the Caribbean Community (CARICOM) and the African, Caribbean and Pacific Group (ACP). However, the North American Free Trade Agreement (NAFTA)¹¹⁸ and the Southern Common Market (MERCOSUR),¹¹⁹ while constituting significant efforts at regional economic integration, have not, or have hardly ever, spoken with one voice within the WTO. A well-known and quite effective alliance of a different kind is the Cairns group of seventeen agricultural-produce-exporting developed and developing countries.¹²⁰ This group was set up in the mid-1980s to campaign for agricultural trade liberalisation and is an important force in negotiations on trade in agricultural products. However, at the Cancún Session of the Ministerial Conference in September 2003, the Cairns group seemed to have all but disappeared. In the run-up to, and at, the Cancún Session, a new influential group of developing countries, including China, India, Brazil, Egypt, Argentina and South Africa, emerged. This group, commonly referred to as the 'G-20', forcefully demanded the dismantling of the trade distorting and protectionist agricultural policies of the European Communities, the

¹¹⁵ Note that the share of world trade of the least-developed countries is around 0.5 per cent of the total and, therefore, marginal. See also above, p. 8.

¹¹⁶ Nine other least-developed countries are in the process of accession to the WTO and therefore have Observer status. They are: Bhutan, Cape Verde, Ethiopia, Laos, Samoa, Sudan, Vanuatu and Yemen. See http://www.wto.org/english/thewto_e/whtas_e.htm, visited on 1 June 2004.

¹¹⁷ I.e. Cambodia, Malaysia, Myanmar, Indonesia, Singapore, the Philippines, Thailand and Brunei Darussalam. Other Members of ASEAN, namely Laos and Vietnam, are negotiating their accession to the WTO.

¹¹⁸ I.e. Canada, the US and Mexico.

¹¹⁹ I.e. Brazil, Argentina, Paraguay and Uruguay.

¹²⁰ I.e. Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, the Philippines, South Africa, Thailand and Uruguay. See <http://www.cairnsgroup.org/introduction.htm>, visited on 6 February 2004.

United States and other industrialised countries. Also in Cancún, a new group known as the ACP/LDC/AU alliance (an alliance made up of the ACP countries, the least-developed countries and the countries of the African Union), emerged as the 'representative' of the interests of the poorest countries.¹²¹

Other groups have been formed to allow for discussion in small(er) groups of Members, to agree on new initiatives, to break deadlocks and to achieve compromises. The best-known example of such a group is the Quad, the group of the four largest trading entities, i.e. Canada, the European Communities, Japan and the United States. The Quad plays a central role in any negotiation in the context of the WTO. In the summer of 2004, a new key grouping, referred to as the 'Five Interested Parties', consisting of Australia, Brazil, the European Communities, India and the United States, played a crucial role in breaking the deadlock in the Doha Development Round negotiations and reaching an agreement on the new Doha Work Programme.

2.4.1.5. Observers

The WTO also has thirty Observer Governments. With the exception of the Holy See, these Observer Governments must start accession negotiations within five years of becoming an Observer. Occasionally, the decision on granting Observer status leads to controversy. For example, in January 2004, the European Communities agreed to back a US-sponsored request by Iraq's Governing Council for Observer status. However, the European Communities stressed that it also wanted to extend this status to Iran and Syria, an initiative opposed by the United States.¹²² At its meeting on 11 February 2004, the General Council granted Iraq Observer status.¹²³ At the same meeting, the General Council also considered Iran's request to begin accession negotiations. The European Communities, China, India, Indonesia and other Members supported this request. However, as the United States was opposed, the General Council decided to postpone a decision on Iran's request.¹²⁴

In 1997, the General Council granted permanent Observer status to the UN, UNCTAD, the FAO, WIPO and the OECD.¹²⁵ The IMF and the World Bank have permanent Observer status under their respective agreements with the WTO.¹²⁶ Other international organisations have Observer status in the WTO bodies that deal in particular with the matters within their mandate. As such, the WHO/FAO Joint Codex Alimentarius Commission has Observer status in the WTO SPS Committee; and the Convention on International Trade in

¹²¹ This group is also referred to as the 'G-90'.

¹²² See T. Buck and G. de Jongquieres, 'EU Backs Iraqi Plea for WTO Status', *Financial Times*, 26 January 2004.

¹²³ See BRIDGES, *Weekly Trade News Digest*, 12 February 2004.

¹²⁴ See *ibid.*

¹²⁵ See WT/GC/M/18. Also, the ITC, a joint subsidiary of the WTO and UNCTAD, was granted permanent Observer status. See WT/GC/M/25.

¹²⁶ See above, pp. 97–8.

Endangered Species (CITES) in the WTO Committee on Trade and Environment.¹²⁷

2.4.1.6. Representation in Geneva

Most Members have a permanent diplomatic mission in Geneva.¹²⁸ This is often a mission to all Geneva-based international organisations; however, some Members have a separate mission to the WTO. This is the case, for example, for the United States, the European Communities, India, Honduras, Hungary and Malaysia. The meetings of WTO bodies are attended by diplomats from the mission, but, increasingly, government officials specialising in a specific matter are flown in to attend meetings in Geneva and present their governments' views.

Questions and Assignments 2.9

Can non-State entities become Members of the WTO? Explain why both the European Communities and all the Member States of the European Union are Members of the WTO? Why is the European Communities, and not the European Community or the European Union, a Member of the WTO? When will a country 'qualify' as a developing-country Member or as a least-developed-country Member? Discuss briefly the various groups and alliances that exist within the WTO membership.

2.4.2. Accession

Becoming a Member of the WTO is not an easy matter. This section discusses the accession process and looks at some recent and future accessions.

2.4.2.1. The accession process

The WTO Agreement initially provided for two ways of becoming a WTO Member. The first, 'original membership', was provided for in Article XI of the WTO Agreement, and allowed Contracting Parties to the GATT 1947 (and the European Communities) to join the WTO by:

- accepting the terms of the WTO Agreement and the Multilateral Trade Agreements; and

¹²⁷ For an exhaustive list of all international organisations having Observer status in the WTO and in one or more WTO bodies, see WTO Annual Report 2004, Tables II.9(A) and (B), 79–82. These tables also list the many international organisations that have requested Observer status but have not yet been granted this status. Table II.9(C) lists the international organisations that were granted Observer status in committees under the Plurilateral Trade Agreements. Table II.9 lists the international organisations that were granted Observer status at the Doha Session of the Ministerial Conference.

¹²⁸ There are, however, twenty-four WTO Members (and twelve Observers) that do not have any form of representation in Geneva. See also above, p. 102.

- making concessions and commitments for both trade in goods and services (embodied in national schedules annexed to the GATT 1994 and the GATS respectively).¹²⁹ This way of becoming a WTO Member was only available until March 1997.¹³⁰ All but one of the GATT Contracting Parties became WTO Members in this way.¹³¹ Of the 148 WTO Members, 123 are ‘original Members’ in that they became Members pursuant to Article XI. It should be stressed, however, that ‘original Members’ have exactly the same membership rights as other Members.

The second way of becoming a WTO Member is through accession, and this way is open indefinitely. The procedure for accession is set out in Article XII of the *WTO Agreement*. This provision states:

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.

To become a WTO Member through accession, a country or customs territory has to negotiate the terms of accession with those countries and customs territories that are already Members. The candidate for membership must always accept the terms of the WTO Agreement and all Multilateral Trade Agreements. This is not up for negotiation. The subject of the accession negotiations are the market access commitments and concessions the candidate for membership has to make. A ‘ticket of admission’ is negotiated. When a State or customs territory accedes to the WTO, it instantly benefits from all the efforts that WTO Members have undertaken to date to reduce barriers to trade and increase market access. In return for the access to the markets of current Members that a new Member will obtain, that new Member will itself have to open up its market for the current Members. The extent of the market access commitments and concessions that a candidate for membership will be expected to make will depend to a large extent on its economic development.

Generally speaking, there are four phases in the accession process. In the first phase – the ‘tell us about yourself’ phase – the country or customs territory applying for membership has to report on all aspects of its trade and economic policies that are relevant to the obligations under the WTO agreements, and to

¹²⁹ The term ‘original membership’ is an unfortunate misnomer. It suggests that there are two sorts of membership with different rights. This is not the case. All Members have the same membership rights (and obligations). The term ‘original membership’ is used merely to distinguish between the different ways of acquiring membership.

¹³⁰ The General Council had initially set the deadline for becoming a WTO Member in this way at 1 January 1997 but later agreed on a short extension.

¹³¹ Yugoslavia is the only GATT Contracting Party which did not become a WTO Member in this way.

submit a memorandum on these policies to the WTO. A WTO working party established especially to deal with the request for accession, will examine this memorandum.¹³²

When the working party has made satisfactory progress with its examination of the trade and economic policies, the second phase is initiated. In this phase – the ‘work out with us individually what you have to offer’ phase – parallel bilateral negotiations on market access begin between the candidate for membership and individual Members. These negotiations are bilateral because different Members have different trading interests, but it should be recalled that the new Member’s market access commitments and concessions will eventually apply equally to all WTO Members as a result of the MFN treatment obligation. These bilateral market access negotiations can be very difficult.

Once the working party has fully completed its examination of the trade and economic policies of the candidate, and the parallel bilateral market access negotiations are successfully concluded, the third phase of the accession process can start. In this phase – the ‘let’s draft membership terms’ phase – the working party finalises the terms of accession which are set out in a report, a draft membership treaty (‘protocol of accession’) and lists (‘schedules’) of the market access commitments and concessions of the candidate for membership. This package is submitted to the Ministerial Conference or the General Council.

In the fourth and final phase of the accession process – the ‘decision’ phase – the Ministerial Conference or the General Council decides by consensus or, if consensus cannot be achieved, by a two-thirds majority of WTO Members on the application for membership. In case of a positive decision, the candidate for membership accedes to the WTO thirty days after it has deposited its instrument of ratification of the membership treaty (i.e. the protocol of accession).

Even when no major problems are encountered, accession negotiations are typically long. The shortest accession process to date took just under three years. The accession negotiations with Algeria have now been going on since 1987. The delays in completing accession negotiations have been severely criticised. However, this situation is not only the result of hard bargaining on the part of WTO Members or political facts. It is also a result of the tardy supply of information and making the necessary policy adjustments on the part of the candidate for membership. Adapting to WTO rules usually requires significant changes in national legislation and practices. It can take years to draft, approve and apply new legislation required for accession to the WTO. Least-developed countries, in particular, often lack the administrative capacity to conduct the complex negotiations and to develop and apply the necessary changes in national legislation and practices. In December 2002, the General Council

¹³² See *Members and Accession: Becoming a Member of the WTO, Cancún WTO Ministerial 2003 Briefing Notes*. See http://www.wto.org/english/trewto_ej/minist_ejbrieft23_e.htm, visited 12 February 2004.

agreed on guidelines to facilitate the accession of least-developed countries to the WTO, in accordance with a mandate given at the Doha Session of the Ministerial Conference in November 2001.¹³³ These guidelines concern, *inter alia*, technical assistance and capacity-building.

2.4.2.2. Past and future accessions

On 1 September 2004, there were more than twenty-five countries negotiating their accession to the WTO. The most important ongoing accession negotiations, in both economic and political terms, are those with Russia, Ukraine and Saudi Arabia.¹³⁴ In March 2002, Robert Cotrell and Stefan Wagstyl of the *Financial Times* reported on the accession of Russia:

Russian President Vladimir Putin's bid to take his country into the World Trade Organization as early as next year has split the country's business community.

While few business leaders dare to openly criticise the president, a strong lobby has formed seeking to delay accession to give Russian industry more time to prepare for international competition.

A major issue in the negotiations on accession was the low energy prices in Russia. The European Communities considered these low energy prices to be the result of an unfair State subsidy which distorts global competition. It required Russia to raise its energy prices. In October 2003, President Putin reportedly said on this divisive issue:

EU bureaucrats either don't understand it or deliberately put unacceptable conditions for Russia to join the WTO. We cannot move to world energy prices in a single day. It will ruin the country's economy.¹³⁵

In response, a spokesperson for Trade Commissioner Lamy stated:

the WTO's adhesion process is not political, it's a process that consists in fulfilling rules and regulations that exist already at the WTO ... When a country doesn't meet them, it doesn't join.¹³⁶

In addition to the sensitive issue of Russia's domestic energy prices, progress in the accession negotiations was, and is, hindered by issues such as Russia's restrictions on imported beef, pork and poultry and its reluctance to open up its services market to foreign firms.¹³⁷ On 21 May 2004, Russia reached a bilateral agreement on market access concessions with the European Communities, its biggest trade partner, thus clearing a major hurdle in the accession process. Currently, Russia is still in bilateral negotiations with its other main trading partners.

On the accession of Saudi Arabia, Supachai Panitchpakdi stated in January 2004, that:

After over ten years of negotiations, the prospect of Saudi Arabia's accession to the WTO is no longer a dim light at the end of the tunnel, but an imminent reality. If all goes well, there is a realistic chance that Saudi Arabia will accede to the WTO before the end of this year.¹³⁸

As of the end of August 2004, the United States was the only WTO Member country with which Saudi Arabia had not yet concluded a bilateral agreement.¹³⁹ Sticking points in the market access negotiations with these countries reportedly are issues related to insurance, financial services, telecommunications, intellectual property protection and non-tariff barriers.¹⁴⁰

Since 2000, Albania, Armenia, Cambodia, China, Croatia, the Former Yugoslav Republic of Macedonia, Georgia, Jordan, Lithuania, Moldova, Oman, Nepal and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu successfully completed their accession negotiations.¹⁴¹ In 2003, Cambodia and Nepal became the first least-developed countries to successfully complete accession negotiations.

The most difficult and most important accession negotiations ever conducted were those with the People's Republic of China.¹⁴² China was one of the twenty-three original signatories of the GATT 1947 but after China's revolution in 1949, the Chinese nationalist government in Chinese Taipei announced that China would leave the GATT system. The government of the People's Republic of China in Beijing never recognised this withdrawal decision and, in 1986, it notified the GATT of its wish to resume its status as a GATT Contracting Party. The GATT Contracting Parties considered, however, that China would have to negotiate its re-accession. In 1987, a GATT Working Party on the Accession of China was established and in 1995 this Working Party was converted into a WTO Working Party. On 16 November 1999, Frances Williams and Neil Buckley of the *Financial Times* reported at a crucial moment of these protracted negotiations as follows:

Completion of negotiations with Washington does not mean China can now join the WTO, though it is an essential step in the process. Beijing has to conclude market-opening negotiations on goods and services with each of its main trading partners and its terms of entry must then be approved by all WTO members. The first half of 2000 is the earliest realistic date for entry ... China has now completed membership talks with 13 nations, including Japan, Australia, Chile and Hungary. However, it has yet to

¹³⁸ Speech by Supachai Panitchpakdi, 'The Future of the WTO and Its Role in Global Economic Growth', Jeddah Economic Forum, 19 January 2004, see http://www.wto.org/english/news_e/pasp_e/pasp20_e.htm, visited on 27 August 2004.

¹³⁹ See P. K. Abdul Ghafour, 'Saudi Team in US for WTO Talks', at www.arabnews.com, visited on 27 August 2004.

¹⁴⁰ See BRIDGES, *Weekly Trade News Digest*, 4 March 2004, 9.

¹⁴¹ Source: www.wto.org, visited on 1 September 2003.

¹⁴² See E. Wu, 'China Today: Why its Accession to the World Trade Organization is Inevitable and Good for the International Community', *Journal of International Economic Law*, 2002, 689-718 (reproduced by permission of Oxford University Press); and Q. Kong, 'China's WTO Accession: Commitments and Implications', *Journal of International Economic Law*, 2000, 655-90 (reproduced by permission of Oxford University Press).

¹³³ Interim Report by the Director-General; Paragraph 43 of the Doha Ministerial Declaration, Decision of the General Council, WT/GC/W/485, dated 4 December 2002.

¹³⁴ For an overview of the accession negotiations in 2002, see the Annual Report of the General Council (2002), WT/GC/70, dated 14 February 2003, 28ff.

¹³⁵ See WTO Forum, *WTO Newsletter*, 10 October 2003, ¹³⁶ *Ibid.*

¹³⁷ BRIDGES, *Weekly Trade News Digest*, 12 February 2004, 8.

conclude negotiations with the European Union and 23 other trading partners, among them Canada, Brazil, India and Switzerland. Of those, the EU is the most crucial for China's hopes of entry. Officials suggested yesterday that senior European Commission negotiators might depart for China within days, followed later by Pascal Lamy, the EU's new trade commissioner. The deal with the US was broadly welcomed in Brussels yesterday, where officials said about 80 per cent of the package was in common with the EU's aims... In the 20 per cent of the package where the EU has differences, officials said there were three main areas of concern. First, there are differences on certain tariffs. The EU has specific requirements on between 300 and 400 lines where it exports more than the US, including some agricultural equipment, as well as ceramics and glassware, cosmetics, leather goods and shoes. In some areas where the EU and US have similar interests, Brussels has been pressing for bigger tariff reductions, such as on cars. Secondly, the EU has particular demands in services. In life insurance, seen as a big growth area, it wants to secure the same number of operating licences as the US, and a similar possibility to set-up wholly-owned operations in China – something Beijing has so far not been prepared to give. In telecoms, it wants to ensure the possibility of eventually owning more than 50 per cent of operators, not just in fixed-line services, but in mobile telephony, paging and satellite phones... The EU also has concerns on some "horizontal" issues, such as export performance requirements – where foreign companies manufacturing in China are required to export as much as 70 per cent of turnover – and conditions on technology transfer. It is pressing for commitments to non-discrimination and transparency in government procurement. Under the WTO's Most Favoured Nation rule the best terms negotiated by any one member must be extended to all. So the US, which has wide-ranging trade interests in China, can set the pace for the rest. However, other countries may want to hold out for a better deal in certain sectors to which they attach more importance than the US.¹⁴³

The accession negotiations with China eventually took almost fifteen years and resulted in a legal text of some 900 pages. At its Doha Session in November 2001, the Ministerial Conference approved by consensus the text of the agreement for China's entry into the WTO. On 11 December 2001, China formally became a Member of the WTO.¹⁴⁴

In order to join the WTO, China has agreed to undertake a series of important market access commitments and concessions and to offer a more predictable environment for trade and foreign investment in accordance with WTO rules. While China reserves the right of exclusive State trading for products such as cereals, tobacco, fuels and minerals and maintains some restrictions on transportation and distribution of goods inside the country, many of the restrictions on foreign companies, currently imposed by China, were to be eliminated or considerably eased after a three-year phase-out period.

During a twelve-year period starting from the date of accession, a special transitional safeguard mechanism applies. This mechanism allows other WTO Members to restrict – more easily than under the normal rules on safeguard measures¹⁴⁵ – imports of products of Chinese origin that cause or threaten to cause market disruption to their domestic producers. On the other hand,

prohibitions, quantitative restrictions or other measures maintained against imports from China, in a manner inconsistent with the WTO Agreement, are phased out or otherwise dealt with in accordance with mutually agreed terms and timetables specified in an annex to the Protocol of Accession.¹⁴⁶

Questions and Assignments 2.10

Is the country of which you are a national an 'original Member' of the WTO? Does it matter whether it is or not? Why does the WTO, as do other international organisations, not automatically allow any country willing to accept the obligations of membership to join the WTO? Discuss the various steps in the process of accession to the WTO.

2.4.3. Obligations of membership

Article XVI:4 of the WTO Agreement provides that:

Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

Article XIV:5 of the WTO Agreement provides that:

No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

One should note, however, the possibility of obtaining a waiver of obligations under the WTO agreements (Article IX:3 and 4 of the WTO Agreement) and the 'non-application' clause, both discussed below.¹⁴⁷

2.4.3.1. Waiver of WTO obligations

When a Member finds it difficult, if not impossible, to meet an obligation under one of the WTO agreements, that Member can request the WTO to waive the 'problematic' obligation. Pursuant to Article IX:3 of the WTO Agreement, 'exceptional circumstances' may justify such a waiver.¹⁴⁸ The decision of the Ministerial Conference (or the General Council) granting the waiver shall state the exceptional circumstances, the terms and conditions governing the

¹⁴⁶ 'WTO Successfully Concludes Negotiations on China's Entry', WTO Press/243, dated 17 September 2001.

¹⁴⁷ Note that there are a number of exceptions to the general rule of Article XI:5 of the WTO Agreement that no reservations can be made to the provisions of the Multilateral Trade Agreements. See, e.g., Article 15.1 of the TRT Agreement and Article 32.2 of the SCM Agreement. To date, however, no reservation has been made under these exceptions.

¹⁴⁸ Note that, for waivers of GATT 1994 obligations, provisions of the *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994* also apply.

¹⁴³ F. Williams, 'Europe the Next Stop on the Negotiation Trail', Financial Times, 16 November 1999.
¹⁴⁴ China Accession Protocol, WT/ACC/CHN/49, dated 1 October 2001.
¹⁴⁵ See below, pp. 633-49.

application of the waiver and the date on which the waiver shall be terminated.¹⁴⁹ The procedure for taking this decision is examined below.¹⁵⁰

As is provided in Article IX:4 of the WTO Agreement, any waiver granted for a period of more than one year shall be reviewed annually. The General Council shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. On the basis of this annual review, the waiver may be extended, modified or terminated. Until now, these annual reviews have, however, been largely *pro forma*.¹⁵¹

One of the most important waivers currently in force is a waiver of the MFN treatment obligation under Article I:1 of the GATT 1994, granted to the European Communities, with respect to preferential tariff treatment given to products of African, Caribbean and Pacific countries under the terms of the Cotonou ACP-EC Partnership Agreement.

Another waiver worth noting is the waiver granted to Australia, Brazil, Canada, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, the United Arab Emirates and the United States to allow these Members to take domestic measures under the Kimberley Process aimed at banning trade in conflict diamonds, also referred to as 'blood diamonds'.¹⁵² The WTO waiver decision of the General Council of 15–16 May 2003 exempts – from 1 January 2003 until 31 December 2006 – trade measures taken under the Kimberley Process by these eleven Members (and other Members that join subsequently) from the MFN treatment obligation (Article I:1 of the GATT 1994), from the prohibition of quantitative restrictions (Article XI:1 of the GATT 1994) and from the obligation of non-discriminatory administration of quantitative restrictions (Article XIII:1 of the GATT 1994).

With regard to trade in essential medicines for HIV, malaria and other life-threatening diseases, note the Decision of the General Council of 30 August 2003, which waives obligations under Article 31(f) and (h) of the TRIPS Agreement to give developing countries access to these essential medicines.

The Annual Report of the General Council gives an overview every year of all Article IX:3 decisions on new waivers and Article IX:4 reviews of existing waivers.¹⁵³

In EC – Bananas III, the European Communities argued that the Lomé Waiver, which waived the provisions of Article I:1 of the GATT 1994, should also be interpreted to waive the provisions of Article XIII of the GATT 1994. In that case, the Panel accepted this argument to the extent that 'the scope of

¹⁴⁹ Article IX:4 of the WTO Agreement.

¹⁵⁰ See below, pp. 145–6.

¹⁵¹ For an overview of waivers granted and reviewed in 2002, see the Annual Report of the General Council (2002), WT/GC/70, dated 14 February 2003, 33ff.

¹⁵² Decision of the General Council of 15–16 May 2003, WT/GC/W/498, dated 13 May 2003. In November 2002, the participants in the Kimberley Process issued the Interlaken Declaration expressing their intent to implement an international scheme of certification for rough diamonds to help break the link between armed conflict and the trade in rough diamonds. The Kimberley Process provides that each participant should 'ensure that no shipment of rough diamonds is imported or exported to a non-Participant'.

¹⁵³ See e.g. General Council, Annual Report (2003), WT/GC/76, dated 6 January 2004, 6–7.

Figure 2.1 Decision of 14 November 2001 of the Ministerial Conference on a Waiver for the ACP-EC Partnership Agreement.¹⁵⁴

World Trade Organization	
Ministerial Conference	
Fourth Session	
Doha, 9–14 November 2001	
European Communities – The ACP-EC Partnership Agreement	
Decision of 14 November 2001	
The Ministerial Conference,	
<i>Having regard to paragraphs 1 and 3 of Article IX of the Marrakech Agreement Establishing the World Trade Organisation (the "WTO Agreement"), the Guiding Principles to be followed in considering applications for waivers adopted on 1 November 1996 (BIS/1996/25), the Understanding in Respect to Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, paragraph 3 of Article IX of the WTO Agreement, and Decision-Making Procedures under Articles IX and XII of the WTO Agreement agreed by the General Council (WT/L/95);</i>	
<i>Taking note of the request of the European Communities (EC) and of the Governments of the ACP States which are also WTO members (hereinafter also the "Parties to the Agreement") for a waiver from the obligations of the European Communities under paragraph 1 of Article I of the General Agreement with respect to the granting of preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement (hereinafter also referred to as "the Agreement")¹⁵⁵</i>	
<i>Considering that, in the field of trade, the provisions of the ACP-EC Partnership Agreement requires preferential tariff treatment by the EC of exports of products originating in the ACP States;</i>	
<i>Considering that the Agreement is aimed at improving the standard of living and economic development of the ACP States, including the least developed among them;</i>	
<i>Considering also that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is designed to promote the expansion of trade and economic development of beneficiaries in a manner consistent with the objectives of the WTO and with the trade, financial and development needs of the beneficiaries and not to raise undue barriers or to create undue difficulties for the trade of other members;</i>	
<i>... Considering that, in light of the foregoing, the exceptional circumstances justifying a waiver from paragraph 1 of Article I of the General Agreement exist;</i>	
<i>Decides as follows:</i>	
1. Subject to the terms and conditions set out hereunder, Article I, paragraph 1 of the General Agreement shall be waived, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement, without being required to extend the same preferential treatment to like products of any other member ...	

Article XIII:1 is identical with that of Article I.¹⁵⁶ The Appellate Body reversed this finding and noted, with regard to the nature and the interpretation of waivers, the following:¹⁵⁷

Although the *WTO Agreement* does not provide any specific rules on the interpretation of waivers, Article IX of the *WTO Agreement* and the *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*, which provide requirements for granting and renewing waivers, and its Protocols of the ACP-EC Partnership Agreement (*G/C/W/254* dated 4 March 2000; Request for a WTO Waiver – New ACP-EC Partnership Agreement (*G/C/W/254* dated 12 March 2001; and Council for Trade in Goods – Requests for a GATT Article I and a GATT Article XIII Waiver – New ACP-EC Partnership Agreement, *G/C/W/269*, dated 27 June 2001).

¹⁵⁴ WT/MIN(01)/15, dated 14 November 2001.

¹⁵⁵ As contained in the following documents: Request for a WTO Waiver – New ACP-EC Partnership Agreement, *G/C/W/187*, dated 2 March 2000; Request for a WTO Waiver – New ACP-EC Partnership Agreement, *G/C/W/204*, dated 4 March 2000; Request for a WTO Waiver – New ACP-EC Partnership Agreement (*G/C/W/254* dated 12 March 2001; and Council for Trade in Goods – Requests for a GATT Article I and a GATT Article XIII Waiver – New ACP-EC Partnership Agreement, *G/C/W/269*, dated 27 June 2001).

¹⁵⁶ Panel Reports, *EC – Bananas III*, para. 7.107.

¹⁵⁷ Appellate Body Report, *EC – Bananas III*, para. 185.

2.4.3.2. 'Non-application' clause

For political or other reasons (including economic reasons), certain Members may not want the WTO rules to apply between them. Article XIII of the WTO Agreement, entitled 'Non-Application of Multilateral Trade Agreements between Particular Members', states:

1. This Agreement and the Multilateral Trade Agreements in Annexes I and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.
2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.
3. Paragraph 1 shall apply between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.
4. The Ministerial Conference may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations.
5. Non-application of a Plurilateral Trade Agreement between parties to that Agreement shall be governed by the provisions of that Agreement.

It is thus possible for a Member to prevent WTO rules from applying to its trade relations with another Member. However, the 'non-application' or 'opt-out' clause has to be invoked at the time that this Member, or the other, joins the WTO. The 'opt-out' clause cannot be invoked at any later time. The decision to opt out must be notified to the Ministerial Conference (or the General Council) before the latter decides on the accession.¹⁵⁸

In practice, the importance of the 'non-application' clause under the WTO Agreement has been limited. Only the United States has made use of this clause in respect of some former Communist countries.¹⁵⁹ Currently, no WTO Member invokes the 'non-application' clause.

Questions and Assignments 2.11

What is a 'waiver' of WTO obligations and under what conditions can it be granted? Find out how many and which waivers currently apply in favour of the European Communities. Can the European Communities invoke the 'non-application' clause against a WTO Member that is guilty of gross violations of human rights or acts of aggression against other countries?

2.4.4. Withdrawal and expulsion

Article XV of the WTO Agreement states:

1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.
2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Any Member may, at any time, unilaterally withdraw from the WTO. A withdrawal only takes effect, however, upon the expiration of six months from the notification of the decision to withdraw.¹⁶⁰ It should be noted that, when a Member withdraws from the WTO, it cannot remain a party to the Multilateral Trade Agreements. To date, no Member has ever withdrawn from the WTO. A group of Caribbean banana-producing countries, very disappointed with the outcome of the EC – Bananas III dispute, 'threatened' at one point to withdraw from the WTO but did not do so.

The WTO Agreement does not provide for a general procedure for the expulsion of a Member. There is no procedure to exclude States from the WTO that systematically breach their obligations under the WTO agreements. There are also no rules or procedures for the expulsion of Members that are guilty of gross violations of human rights or acts of aggression.¹⁶¹ The expulsion of a Member is, however, provided for as a possibility in the specific case of the non-acceptance of an amendment.¹⁶²

Questions and Assignments 2.12

Can a Member withdraw from the WTO? If so, how? Has any Member ever withdrawn from the WTO? Can a WTO Member, guilty of gross violations of human rights or acts of aggression against other countries, be expelled from the WTO?

2.5. INSTITUTIONAL STRUCTURE OF THE WTO

To carry out the functions and tasks entrusted to the WTO, the WTO Agreement provides for a manifold of bodies. This section examines:

¹⁵⁸ Between the Contracting Parties of the GATT 1947 which joined the WTO as original Members, an opt-out is only possible to the extent that such opt-out already existed under the GATT 1947. Note, however, that the UN Security Council could impose trade sanctions or a trade embargo on such Members and that, pursuant to Article XXI of the GATT 1994 and Article XIV bis of the GATS, other Members would be able to apply these sanctions or that embargo. See below, pp. 628–33.

¹⁵⁹ Between 1 January 1995 and 30 June 2001, the United States invoked the 'non-application' clause of Article XIII:1 of the WTO Agreement with respect to Georgia, Kyrgyz Republic, Moldova, Mongolia and Romania. See WTO Analytical Index, Vol. 1, 97.

¹⁶⁰ The notification to withdraw is made to the WTO Director-General.
¹⁶¹ Note, however, that the UN Security Council could impose trade sanctions or a trade embargo on such Members and that, pursuant to Article XXI of the GATT 1994 and Article XIV bis of the GATS, other Members would be able to apply these sanctions or that embargo. See below, pp. 628–33.
¹⁶² See below, pp. 146–7.

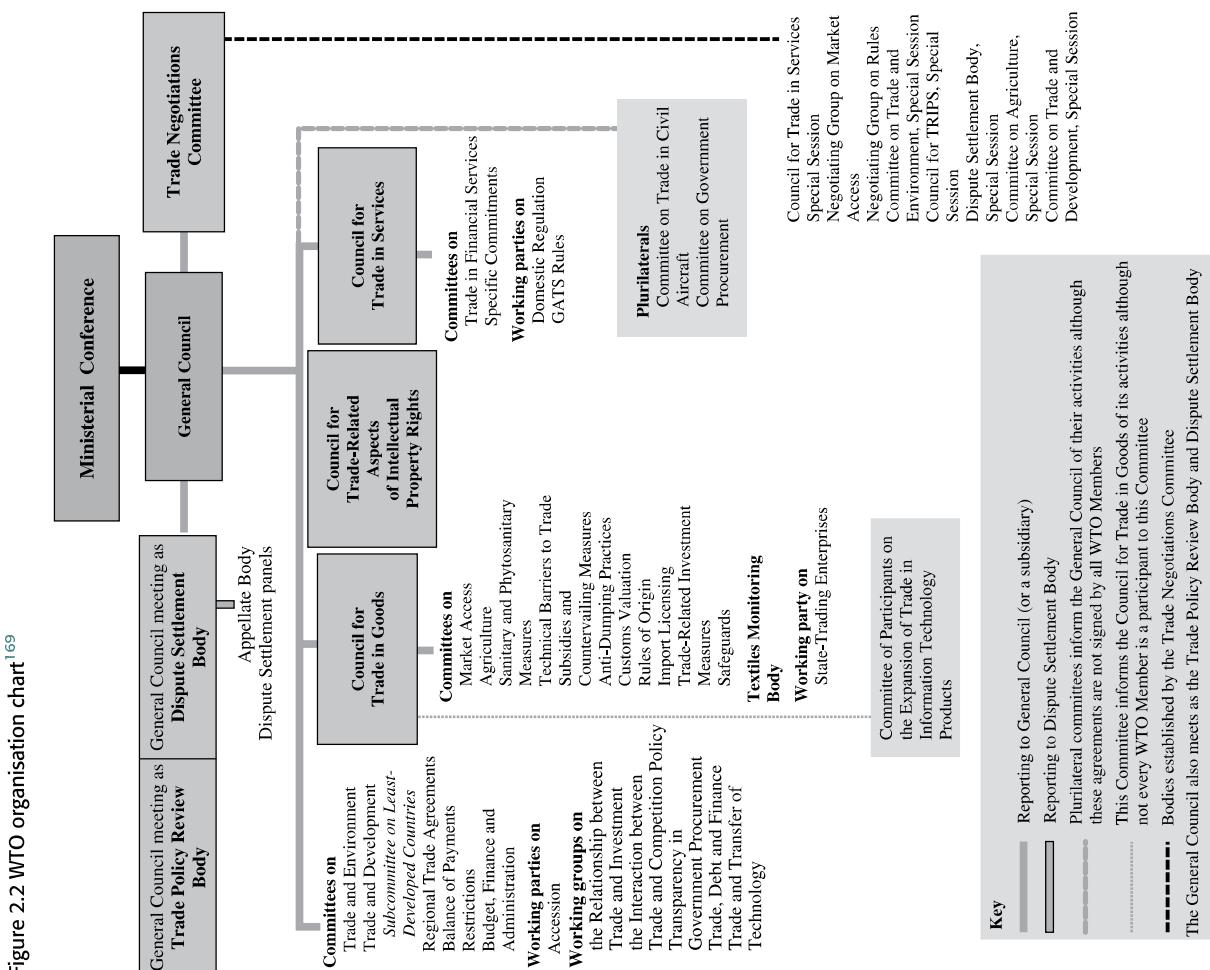
- the basic institutional structure;
 - the Ministerial Conference;
 - the General Council, the DSB and the TPRB;
 - specialised councils, committees and working parties;
 - the Trade Negotiating Committee;
 - political bodies lacking in the WTO structure;
 - quasi-judicial and other non-political bodies of the WTO; and
 - the WTO Secretariat

2.5.1 Basic structure

The basic institutional structure of the WTO is set out in Article IV of the WTO Agreement. Subordinate committees and working groups have been added to this structure by later decisions.

There are, at present, a total of seventy WTO bodies, of which thirty-four are standing bodies.¹⁶³ Many of these WTO bodies meet on a regular basis, making for a heavy workload for WTO diplomats. In 2001, WTO bodies held nearly 1,000 formal and informal meetings.¹⁶⁴ Sometimes as many as four or five formal meetings were convened at the same time.¹⁶⁵ For many developing-country Members, with no or a very small permanent delegation in Geneva, this is a serious problem.¹⁶⁶ The schedule of meetings at the WTO is posted on the WTO's website.¹⁶⁷ Consider the schedule of meetings for March 2003, as this structure by sector accords.

The institutional structure of the WTO includes, at the highest level, the Ministerial Conference, at a second level, the General Council, the DSB and the TRPRB and, at lower levels, specialised councils, committees and working parties. Furthermore, this structure includes quasijudicial and other non-political bodies, as well as the WTO Secretariat. We note, however, that, unlike other international organisations, the WTO does not have any permanent body through which the ‘dialogue’ between the WTO, NGOs and civil society can take place.¹⁶⁸ Furthermore, the WTO does not have an executive body, comprising of only a core group of WTO Members, to facilitate the process of deliberation and decision-making.



¹⁶³ See Statement by Miguel Rodriguez Mendoza, WTO Deputy Director-General, to the General Council on 13 February 2002, WT/GC/M/73. This number includes the TNC and the two negotiating groups established by the TNC. See below pp. 130-1. The *ad hoc* bodies (i.e. the non-standing bodies) are comprised of the TNC, the two TNC negotiating groups, twenty-eight accession working groups and five plurilateral bodies.

¹⁶⁴ See *ibid*. In 2001, there were nearly 400 formal meetings, 500 informal meetings and some 90 other meetings such as symposia, workshops and seminars organised under the auspices of WTO bodies. The

¹⁶⁴ See *ibid.* In 2001, there were nearly 400 formal meetings, 500 meetings such as symposia, workshops and seminars organised by NGOs.

¹⁶⁴ See *Ibid.* In 2001, there were nearly 40 formal meetings, 500 informal meetings and some 90 meetings such as symposia, workshops and seminars organised under the auspices of WTO bodies. The number of meetings is calculated on the basis of half-day units.

¹⁶⁵ See *Ibid.*

¹⁶⁶ See below, p. 109.

¹⁶⁷ See http://www.wto.org/english/news_e/news_e.htm#whatson, visited on 7 February 2004.

¹⁶⁸ On the role of NGOs and civil society in WTO decision-making, see below, pp. 154–62.

¹⁶⁹ See <http://www.wto.org>, visited on 13 August 2003.

Figure 2.3 Programme of meetings in March 2003¹⁷⁰

Date	Time	Meeting
3	10:00	Special Session of the Council for Trade in Services Working Group on Trade and Transfer of Technology Trade Negotiations Committee
3 & 5	10:00 15:00	Special Session of the Council for Trade in Services Working Party on the Accession of the Russian Federation Committee on Trade and Development Committee on Trade and Development on Small Economies Special Session of the Dispute Settlement Body
6	10:00	WTO Introduction Day
7	10:00	Council for Trade in Goods – Trade Facilitation
10	09:30	Trade Policy Review Body – Canada
10 & 11	10:00 09:30	Council for Trade in Goods Integrated Framework Steering Committee
11	10:00	Trade Policy Review Body – Canada
12 & 13	10:00 09:30	Dispute Settlement Body Workshop on Technical Barriers to Trade Committee on Technical Barriers to Trade Special Session of the Committee on Agriculture Textiles Monitoring Body
12	10:00	Committee on Market Access Special Session of the Committee on Agriculture Textiles Monitoring Body
13	10:00	Special Session of the Committee on Agriculture Working Group on Trade, Debt and Finance Special Session of the Committee on Agriculture Working Group on the relationship between Trade and Investment
14	09:30	
18		
18		It is as yet unclear whether this is taken by Members as laying down a political or a legal commitment. ¹⁷⁴
20		
24 & 25	10:00	In addition to this very broad decision-making power, the Ministerial Conference has been explicitly granted a number of specific powers, such as:
24 & 25		<ul style="list-style-type: none"> ● adopting authoritative interpretations of the WTO agreements;¹⁷⁵ ● granting waivers;¹⁷⁶ ● adopting amendments;¹⁷⁷ ● decisions on accession;¹⁷⁸ and ● appointing the Director-General and adopting staff regulations.¹⁷⁹
26		
26	10:00	
26		
27		
28		
28		
31		
31 & 1		

Questions and Assignments 2.13

Briefly describe the basic institutional structure of the WTO. Is the list of WTO bodies prescribed in Article IV of the *WTO Agreement* an exhaustive list? Look up the programme of meetings at the WTO for this month. Which of these meetings would you definitely want to attend if you were a small, sugar-exporting, least-developed-country Member (with a diplomatic staff of two for all international organisations in Geneva)?

2.5.2. Ministerial Conference**Article IV:1 of the WTO Agreement states:**

There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member,

¹⁷⁰ Article IX:2 of the WTO Agreement. See below, pp. 144–5.¹⁷¹ Article X of the WTO Agreement. See below, pp. 145–6.¹⁷² Article XII of the WTO Agreement. See below, p. 146–7.¹⁷³ Article XI:5(b) and XI:6 of the GATS. The Ministerial Conference also has the power to establish certain procedures in connection with balance-of-payments restrictions (see below, pp. 667–75). Pursuant to Article 64:3 of the TRIPS Agreement, the Ministerial Conference has the power to extend the non-application of non-violation complaints to the TRIPS Agreement (see below, p. 192).¹⁷⁴ For the Ministerial Declarations adopted at the Singapore Session of the Ministerial Conference in 1996, see WT/MIN(96)/DEC, dated 18 December 1996 and WT/MIN(96)/16, dated 13 December 1996.¹⁷⁵ For the Ministerial Declarations adopted at the Geneva Session of the Ministerial Conference in 1998, see WT/MIN(98)/DEC/1 and WT/MIN(98)/DEC/2.¹⁷⁶ No Ministerial Declaration was adopted at the Doha Session of the Ministerial Conference in 1999.¹⁷⁷ For the Ministerial Declarations and Decisions adopted at the Seattle Session of the Ministerial Conference in 2003, see WT/MIN(01)/DEC/1, WT/MIN(01)/DEC/2, WT/MIN(01)/15, WT/MIN(01)/16 and WT/MIN(01)/17.

in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

The Ministerial Conference is the 'supreme' body of the WTO. It is composed of minister-level representatives from all Members and has decision-making powers on all matters under any of the multilateral WTO agreements.¹⁷¹ However, it is not clear whether this very broad power to make decisions, in fact, enables the Ministerial Conference to take decisions which are legally binding on WTO Members.¹⁷² With regard to the Decision of 15 December 2000 regarding Implementation-Related Issues and Concerns,¹⁷³ a decision based, *inter alia*, on Article IV:1 and containing several clauses which begin with the words 'Members shall . . .', Pieter-Jan Kuijper, then Director of the WTO Legal Affairs Division, noted that:

It is as yet unclear whether this is taken by Members as laying down a political or a legal commitment.¹⁷⁴

In addition to this very broad decision-making power, the Ministerial Conference has been explicitly granted a number of specific powers, such as:

- adopting authoritative interpretations of the WTO agreements;¹⁷⁵
- granting waivers;¹⁷⁶
- adopting amendments;¹⁷⁷
- decisions on accession;¹⁷⁸ and
- appointing the Director-General and adopting staff regulations.¹⁷⁹

The Ministerial Conference is not often in session. Since 1995, there have only been five sessions of the Ministerial Conference, each lasting only a few days: Singapore (1996),¹⁸⁰ Geneva (1998),¹⁸¹ Seattle (1999),¹⁸² Doha (2001).¹⁸³

¹⁷¹ For the Rules of Procedure for the Ministerial Conference, see WT/J/161.¹⁷² See, in this respect, P. J. Kuijper, 'Some Institutional Issues Presently Before the WTO', in D. Kennedy and J. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press, 2002), 82.¹⁷³ General Council, *Implementation-Related Issues and Concerns*, Decision of 15 December 2000, WT/J/384, dated 19 December 2000. This was a Decision by the General Council exercising the authority of the Ministerial Conference in between sessions of the Ministerial Conference. See below, p. #. P. J. Kuijper, 'Some Institutional issues Presently Before the WTO', in D. Kennedy and J. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press, 2002), 82, footnote 3.¹⁷⁴ Article IX:2 of the WTO Agreement. See below, pp. 144–5.¹⁷⁵ Article IX:3 of the WTO Agreement. See below, pp. 145–6.¹⁷⁶ Article XII of the WTO Agreement. See below, p. 146–7.¹⁷⁷ Article XI:5(b) and XI:6 of the GATS. The Ministerial Conference also has the power to establish certain procedures in connection with balance-of-payments restrictions (see below, pp. 667–75). Pursuant to Article 64:3 of the TRIPS Agreement, the Ministerial Conference has the power to extend the non-application of non-violation complaints to the TRIPS Agreement (see below, p. 192).¹⁷⁸ For the Ministerial Declarations adopted at the Singapore Session of the Ministerial Conference in 1996, see WT/MIN(96)/DEC, dated 18 December 1996 and WT/MIN(96)/16, dated 13 December 1996.¹⁷⁹ For the Ministerial Declarations adopted at the Geneva Session of the Ministerial Conference in 1998, see WT/MIN(98)/DEC/1 and WT/MIN(98)/DEC/2.¹⁸⁰ No Ministerial Declaration was adopted at the Doha Session of the Ministerial Conference in 1999.¹⁸¹ For the Ministerial Declarations and Decisions adopted at the Seattle Session of the Ministerial Conference in 2003, see WT/MIN(01)/DEC/1, WT/MIN(01)/DEC/2, WT/MIN(01)/15, WT/MIN(01)/16 and WT/MIN(01)/17.

and Cancún (2003).¹⁸⁴ The next session of the Ministerial Conference will be held in Hong Kong, China.

Sessions of the Ministerial Conference are major media events and therefore focus the minds of the political leaders of WTO Members on the current challenges to, and the future of, the multilateral trading system. They offer a much needed bi-annual opportunity to give political leadership and guidance to the WTO and its actions.

Questions and Assignments 2.14

Discuss the composition and the scope of the decision-making competence of the Ministerial Conference.

2.5.3. General Council, DSB and TPRB

2.5.3.1. General Council

Article IV:2 of the WTO Agreement states:

There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph 7.

The General Council is composed of ambassador-level diplomats and normally meets once every two months.¹⁸⁵ All WTO Members are represented in the General Council. As with all other WTO bodies, except the Ministerial Conference, the General Council normally meets on the premises of the WTO Secretariat in Geneva. Each year, the General Council elects its Chairperson from the members of the Council. The Chairperson of the General Council holds the highest elected office within the WTO. In February 2004, the General Council elected Ambassador Shotaro Oshima of Japan as its Chairperson for 2004.¹⁸⁶

The General Council is responsible for the continuing, ‘day-to-day’ management of the WTO and its many activities. In between sessions of the Ministerial Conference, the General Council exercises the full powers of the Ministerial Conference.¹⁸⁷

¹⁸⁴ No Ministerial Declaration was adopted at the Cancún Session of the Ministerial Conference in 2003. However, the Ministerial Conference did issue a Ministerial Statement. See WT/MIN(03)/20.

¹⁸⁵ For the Rules of Procedures of the General Council, see WT/L/161.

¹⁸⁶ The list of the 2004 chairpersons of all WTO bodies can be found on the WTO’s website, at http://www.wto.org/english/thewto_e/whatis_e/tif_e.htm, visited on 13 February 2004.

¹⁸⁷ Note that, when the Ministerial Conference is in session, it will typically focus on other issues than the exercise of the specific powers entrusted to it. See also P.J. Kuijper, ‘Some Institutional Issues Presently Before the WTO’, in D. Kennedy and J. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press, 2002), 83.

Figure 2.4 Excerpt from the minutes of the meeting of the General Council of 21 October 2003¹⁸⁸

RESTRICTED WT/GC/M/83 17 November 2003 (03-6154)	WORLD TRADE ORGANIZATION
General Council	
	21 October 2003
	MINUTES OF MEETING
	Held in the Centre William Rappard on 21 October 2003 Chairman: Mr. Carlos Pérez del Castillo (Uruguay)
	[...]
	Subjects discussed
	1. Iran – Request for Accession
	2. Work Programme on Small Economies – Report by the Chairman of the Dedicated Sessions of the Committee on Trade and Development
	3. Report by the Chairman of the Trade Negotiations Committee
	4. Review of Chairmanships of WTO bodies under the TNC – Statement by the Chairman
	5. Sixth Session of the Ministerial Conference – Communication from Hong Kong, China
	6. Widening of EC textiles quota restrictions following accession of new member States
	7. Eleventh APEC Economic Leaders’ Declaration
	8. Trade in textiles and clothing – Developing Members’ concerns about potential reduction in market (quota) access in 2004
	9. Review of the exemption provided under Paragraph 3 of GATT 1994
	10. Chairmanship of the Working Party on the Accession of Kazakhstan

In addition, the General Council also carries out some functions specifically assigned to it. The General Council is responsible for:

- adopting the annual budget and the financial regulations; and¹⁸⁹
- making appropriate arrangements for effective cooperation with international organisations and NGOs.¹⁹⁰

By way of example of the matters dealt with by the General Council, consider the list of matters discussed at the General Council meeting of 21 October 2003, set out in Figure 2.4.

Rule 37 of the *Rules of Procedure for the Meetings of the General Council* states:

The meeting of the General Council shall ordinarily be held in private. It may be decided that a particular meeting or meetings should be held in public.

In practice, the General Council always meets behind closed doors. After the meeting, the Chairperson may issue a *communiqué* to the press.¹⁹¹ The Chairperson and/or the Director-General, assisted by the WTO spokesperson, usually hold a press conference after the meeting. The minutes of a meeting of the General Council (as are the minutes of meetings of all WTO bodies except the TPRB) are ‘restricted’ documents, i.e. not available to the public, until they are ‘de-restricted’ under the rules on the de-restriction of official

¹⁸⁸ See WT/GC/M/83, dated 17 November 2003, 1-2.

¹⁸⁹ Article VII:3 of the WTO Agreement.

¹⁹⁰ Rule 38 of the *Rules of Procedure for the Meetings of the General Council*.

documents.¹⁹² Later in this chapter, the alleged lack of transparency and openness of the General Council and other WTO bodies is discussed in more detail.¹⁹³

2.5.3.2. DSB and TPRB

The functions specifically assigned to the General Council also cover dispute settlement and trade policy review.

Article IV: 3 and 4 of the *WTO Agreement* state respectively:

3. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.
4. The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

The General Council, the Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB) are, in fact, the same body. The DSB and the TPRB are the *alter ego* of the General Council; they are two emanations of the General Council. When the General Council administers the WTO dispute settlement system, it convenes and acts as the DSB. When the General Council administers the WTO trade policy review mechanism, it convenes and acts as the TPRB. To date, the DSB and the TPRB have always had a different Chairperson than the General Council, and both the DSB and the TPRB have developed their own Rules of Procedure, which take account of the special features of their work.¹⁹⁴

The DSB has a regular meeting once a month, but may have additional meetings in between. In 2003, the DSB met twenty-two times.¹⁹⁵ The TPRB also meets at least once a month. In February 2004, Ambassadors Amina Mohamed of Kenya and Puangrat Asavapist of Thailand were elected as Chairpersons for 2004 of the DSB and the TPRB respectively.

Questions and Assignments 2.15

What is the relationship between the Ministerial Conference and the General Council? What is the relationship between the General Council and the DSB? Look up who serves this year as the Chairperson of the General Council, the DSB and the TPRB. Find the minutes of the last

¹⁹² Procedures for the Circulation and Derestriction of WTO Documents, W/T/L/452, dated 16 May 2002.

¹⁹³ For a discussion on the rules of derestriction, see below, p. 161.

¹⁹⁴ See below, pp. 152-4, 159-62.

¹⁹⁵ For the Rules of Procedure for the TPRB, see W/T/TPR/6. For the Rules of Procedure for the DSB, see below, pp. 228-31. Note that the TPRB and the DSB follow *mutatis mutandis* and with certain deviations, the Rules of Procedure for the General Council (W/T/L/160).

meeting of the General Council. What issues were on the agenda of this meeting?

2.5.4. Specialised councils, committees and working parties

2.5.4.1. Specialised councils

At the level below the General Council, the DSB and the TPRB, there are three so-called specialised councils: the Council for Trade in Goods (CTG),¹⁹⁶ the Council for Trade in Services (CTS),¹⁹⁷ and the Council for TRIPS.¹⁹⁸ Article IV:5 of the *WTO Agreement* states:

There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex I.A. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

In 2003, for example, the CTG met five times in formal session and so did the CTS.¹⁹⁹ Furthermore, these specialised councils also met informally. All WTO Members are represented in these specialised councils although some Members, in particular developing-country Members, may find it difficult to attend all of the meetings. Under the general guidance of the General Council, these specialised councils oversee the functioning of the multilateral agreements in Annex 1A, 1B and 1C respectively. They assist the General Council and the Ministerial Conference in carrying out their functions. They carry out both:

- the tasks which the General Council delegates to them; and
- the tasks which the WTO Agreement, the GATS or the *TRIPS Agreement* explicitly confer on them.

For example, in May 2000, the General Council decided:

to direct the Council on Trade in Goods to give positive consideration to individual requests presented in accordance with Article 5.3 by developing countries for extension to transition periods for implementation of the TRIMs Agreement.²⁰⁰

¹⁹⁶ For the Rules of Procedure for the CTG, see W/T/L/79.

¹⁹⁷ For the Rules of Procedure for the CTS, see S/L/15.

¹⁹⁸ For the Rules of Procedure for the Council for TRIPS, see IP/c/1.

¹⁹⁹ WTO Annual Report 2004, 37 and 48.

²⁰⁰ See W/T/GC/M/55, section 8(b) and Annex II, third bullet point.

The WTO Agreement itself explicitly stipulates, for example, that the Ministerial Conference and the General Council may only exercise their authority to adopt authoritative interpretations of the multilateral trade agreements of Annex 1 on the basis of a recommendation from the specialised council overseeing the functioning of the agreement at issue.²⁰¹ The specialised councils also play a role in the procedure for the adoption of waivers and the amendment procedure.²⁰² The GATS explicitly empowers the CTS to develop disciplines on domestic regulation under Article VI:4 and the power to establish rules and procedures for the rectification and modification of schedules under Article XXI. The TRIPS Agreement empowers the TRIPS Council to extend, upon a duly motivated request, the ten-year transition period for the implementation of the TRIPS Agreement granted to the least-developed-country Members.²⁰³

Overall, however, few specific powers have been entrusted to the specialised councils, and their general power to oversee the functioning of relevant agreements does not explicitly include the power to take any decision, political or legal.²⁰⁴

There are instances in which WTO bodies go beyond their powers. An often cited example is the extension of the deadline for the entry into force of the result of negotiations on emergency safeguard measures in the field of services, adopted by the CTS. Article X of the GATS sets this deadline explicitly at 'not later than three years from the date of entry into force of the WTO Agreement', i.e. on 1 January 1998. This treaty-mandated deadline was extended three times by three successive decisions by the CTS although the CTS clearly did not have any legal mandate to do so.²⁰⁵ The political need to extend the deadline prevailed over any concern about the CTS acting *ultra vires*.

2.5.4.2. Committees and working parties

In addition to the three specialised councils, there are a number of committees and working parties that assist the Ministerial Conference and the General Council in carrying out their functions. The committees include the important Committee on Trade and Development. Article IV:7 of the WTO Agreement states in relevant part:

The Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration, which shall carry out the functions assigned to them by this Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional

²⁰¹ Article IX:2 of the WTO Agreement.

²⁰² Article IX:3(b) and Article X:1 of the WTO Agreement.

²⁰³ Article 66.1 of the TRIPS Agreement.
See also P. J. Kuijper, 'Some Institutional Issues Presently Before the WTO', in D. Kennedy and J. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press, 2002), 84.

²⁰⁴ See Decision on Negotiations on Emergency Safeguard Measures, S/I/43, dated 2 December 1997; Second Decision on Negotiations on Emergency Safeguard Measures, S/I/73, dated 5 July 1999; and Third Decision on Negotiations on Emergency Safeguard Measures, S/I/90, dated 8 December 2000.

Committees with such functions as it may deem appropriate. . . . Membership in these Committees shall be open to representatives of all Members.

In exercising the power conferred on it in Article IV:7, the General Council established:

- the Committee on Trade and Environment in 1995;²⁰⁶ and
- the Committee on Regional Trade Agreements in 1996.²⁰⁷

Furthermore, all but one of the Multilateral Agreements on Trade in Goods provide for a committee to carry out certain functions relating to the implementation of the particular agreement.²⁰⁸ All of these committees are under the authority of, and report to, the CTG. In practice, however, they tend to be relatively independent, arguably due to the technical nature of their work. Note, by way of example, the SCM Committee. Article 24.1 of the SCM Agreement states:

There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.²⁰⁹

Note that under Article 27.4 of the SCM Agreement, the SCM Committee has the power to determine whether a request to extend the special transitional period, for the maintenance of export subsidies by developing countries, is justified.²¹⁰ Such specific decision-making powers to add to, or diminish, the obligations of certain Members are, however, quite exceptional.²¹¹

Furthermore, Article IV:6 of the WTO Agreement provides that the specialised Councils may also establish subsidiary bodies as required. For example, the Council for Trade in Services created the Working Party on Professional Services. A number of committees also have this power to establish subordinate bodies where necessary.²¹²

²⁰⁶ This Committee was established at the same meeting of the General Council on 31 January 1995, at which the Committee on Trade and Development, the Committee on Balance-of-Payments Restrictions and the Committee on the Budget, Finance and Administration were established (see WT/GC/M/1). The establishment of the Committee on Trade and Development was provided for in the Marrakesh Ministerial Decision on Trade and Development.

²⁰⁷ See WT/GC/M/10, para. 11.

²⁰⁸ The exception is the Agreement on Preshipment Inspection. However, the CTG established a Committee on Preshipment Inspection.

²⁰⁹ The powers of the Committee on Anti-Dumping (AD) Practices, the Committee on Customs Valuation (CV) and the Committee on Technical Barriers to Trade (TBT) are worded in similar terms.

²¹⁰ Furthermore, Article 29.4 of the SCM Agreement gives the SCM Committee the power to allow Members in the process of transformation into a market economy to derogate from their notified programmes and measures and their timeframes.

²¹¹ Another example is the power given to the TBT Committee under Article 12.8 of the TBT Agreement relating to granting exceptions from TBT obligations to developing country Members.

²¹² See e.g. Article 13.2 of the TBT Agreement.

Temporary subsidiary bodies, set up to study and report on a particular issue, are usually referred to as ‘working parties’. In February 2002, there were twenty-eight working parties on the accession of candidate Members.

When a working party, a committee or a specialised council is called upon to take a decision but is unable to do so, the applicable Rules of Procedure commonly require the matter to be referred to a higher body if a Member so requests.

The Plurilateral Agreements, the *Agreement on Trade in Civil Aircraft* and the *Agreement on Government Procurement*, provide for a Committee on Trade in Civil Aircraft and a Committee on Government Procurement respectively. These bodies carry out the functions assigned to them under those agreements. They operate within the institutional framework of the WTO, keeping the General Council informed of their activities on a regular basis.²¹³

Questions and Assignments 2.16

What role do the specialised councils have? Which committees are explicitly provided for in the *WTO Agreement*?

Temporary subsidiary bodies, set up to study and report on a particular issue, are usually referred to as ‘working parties’. In February 2002, there were twenty-eight working parties on the accession of candidate Members.

When a working party, a committee or a specialised council is called upon to take a decision but is unable to do so, the applicable Rules of Procedure commonly require the matter to be referred to a higher body if a Member so requests.

The Plurilateral Agreements, the *Agreement on Trade in Civil Aircraft* and the *Agreement on Government Procurement*, provide for a Committee on Trade in Civil Aircraft and a Committee on Government Procurement respectively. These bodies carry out the functions assigned to them under those agreements. They operate within the institutional framework of the WTO, keeping the General Council informed of their activities on a regular basis.²¹³

Questions and Assignments 2.16

What role do the specialised councils have? Which committees are explicitly provided for in the *WTO Agreement*?

2.5.5. Trade Negotiations Committee

The Doha Development Round negotiations are conducted by the Trade Negotiations Committee (TNC) and its subordinate negotiating groups. The TNC was established by the Ministerial Conference at its Doha Session in November 2001.²¹⁴ This body supervises the overall conduct of the negotiations under the authority of the General Council. The TNC reports on the progress of the negotiations to each regular meeting of the General Council. The ‘detailed’ negotiations take place either in special sessions of standing WTO bodies or in specially created negotiating groups. At its first meeting on 28 January and 1 February 2002, the TNC established two such new negotiating groups, one on market access and one on rules. Most of the negotiations, however, take place in special sessions of standing WTO bodies (such as the Dispute Settlement Body, the Council for Trade in Services and the Committee on Agriculture). The TNC and its negotiating bodies consist of all the WTO Members and all countries negotiating membership. However, decisions on agreements that would result from the negotiations are taken by WTO Members only.

On 1 February 2002, the TNC elected the WTO Director-General *ex officio* to chair the TNC. The TNC is the only political WTO body chaired by an international official, rather than a diplomat of a Member country. Note that the

choice of the WTO Director-General as Chairperson of the TNC was controversial among WTO Members.

Questions and Assignments 2.17

What is the composition and function of the TNC? To whom does the TNC report?

2.5.6. Political bodies lacking in the WTO structure

Unlike other international organisations, such as the IMF or the World Bank, the WTO does not have an executive body or organ consisting of the most important Members and a selection of other Members. In other international organisations having such a large membership, an executive body facilitates decision-making by concentrating discussions in a smaller but representative group of members.²¹⁵ Also, unlike other international organisations such as the OECD and the ILO, the WTO does not have any permanent body in which entities other than governments are represented.

2.5.6.1. A WTO executive body?

As discussed above, all political WTO bodies are comprised of the 147 WTO Members. However, it is clear that it is impossible to negotiate effectively with such a large number. Therefore, in the GATT 1947 and now the WTO, mechanisms have been developed to reduce the number of countries actively participating in the deliberations of WTO bodies. Hoekman and Kostecki noted in this respect:

The first and most important device is to involve only ‘principals’, at least initially. To some extent this is a natural process – a country that has no agricultural sector is unlikely to be interested in discussions centering on the reduction of agricultural trade barriers. In general the quad – Canada, the EU, Japan and the US – are part of any group that forms to discuss any topic. They are supplemented by countries that have a principal supplying interest in a product, and the major (potential) importers whose policies are the subject of interest. Finally a number of countries that have established a reputation as spokespersons tend to be involved in most major meetings. Historically, such countries have included India … Egypt, and the former Yugoslavia.²¹⁶

In the days of the GATT 1947, contentious issues were often hotly debated in ‘green room meetings’, named after a conference room next to the office of the Director-General. These green room meetings, bringing together about twenty or so delegations at the invitation of the Director-General,

²¹³ See Article IV:8 of the *WTO Agreement*.

²¹⁴ Doha Ministerial Declaration, WT/MIN(01)/DEC/1, dated 20 November 2001, para. 46.

²¹⁵ B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, 2nd edition (Oxford University Press, 2001), 60.

²¹⁶ *Ibid.*

were part of a consultative process through which the major countries and a representative set of developing countries ... tried to hammer out the outlines of acceptable proposals or negotiating agendas. Such meetings generally involved the active participation and input of the Director-General ... Once a deal has emerged, it is submitted to the general ... membership. Although amendments may be made, these are usually marginal.²¹⁷

Green room meetings (i.e. inner circle meetings) comprise of usually no more than twenty Members, including the Quad, Members deemed to have a vital interest in the issue under discussion and developing-country Members that play a leading role such as Brazil, India, China and South Africa. The least-developed-country Members are frequently represented by Bangladesh.

After the establishment of the WTO, the practice of green room meetings continued. However, this practice was one of the reasons for the dismal failure of the Seattle Session of the Ministerial Conference in 1999. At Seattle, major trading powers and selected developing countries tried to agree on the agenda for a new round in green room meetings. Many developing-country Members, excluded from these meetings, revolted because they felt that they were not kept informed and that their views were not considered. The problem of full and effective participation of developing countries in the WTO decision-making process is discussed in more detail below.²¹⁸

In this context, the Heads of Delegation Meetings (HODs) should also be mentioned. These are informal meetings which ambassadors alone (i.e., the heads of delegation) are invited to attend. However, as all ambassadors are invited, these meetings may still be too 'crowded' for effective deliberation.²¹⁹ There have been a number of proposals to create an executive body, or a 'Security Council for Trade' type of body, within the WTO institutional structure to facilitate decision-making. To date, however, such proposals have not received much support from WTO Members.²²⁰

2.5.6.2. WTO consultative bodies

The WTO does not have any permanent consultative body in which representatives of national parliaments or NGOs are represented. As is the case in other international organisations, such a body could serve as a forum for 'dialogue' between the WTO and civil society.

The European Communities has proposed the establishment of a WTO Parliamentary Consultative Assembly. While there seems to be little support for the establishment of such an assembly, it should be noted that, in recent years, contacts with national parliamentarians have been greatly enhanced through regular visits to capitals by the WTO Director-General and through various seminars and briefings with the Inter-Parliamentary Union, the European Parliament and the US Congress.

²¹⁷ Ibid., 60–1.

²¹⁸ See below, pp. 151–4.

²¹⁹ The 'HOD plus One' are meetings where the ambassador can also select another senior diplomat to attend the meeting with him or her.

²²⁰ See General Council, Minutes of Meeting, WT/GC/M/57, dated 14 September 2000, paras. 132–70.

While strongly supporting the principle that only WTO Members have the authority to make decisions in the WTO, Canada, for example, has argued that 'outside voices', such as expert NGOs, can provide valuable advice to Members. To manage this process of obtaining specialised advice, the WTO could set up ad hoc advisory boards to provide non-binding advice on WTO-related issues. These boards could be composed of individuals and/or NGOs, and should reflect a broad range of views and interests. However, suggestions to establish such consultative bodies comprising of representatives of NGOs have received little support from members to date.

In 2003, the WTO Director-General established the Consultative Board on the Future of the Multilateral Trading System, composed of eminent persons, chaired by Peter Sutherland, the former GATT and WTO Director-General. This Board advises Supachai Panitchpakdi on the challenges and opportunities confronting the organisation and the multilateral trading system.²²¹

In 2003, the WTO Director-General also established two other advisory bodies: the Informal NGO Advisory Body and the Informal Business Advisory Body. The Informal NGO Advisory Body, which is made up of eleven high-level representatives from NGOs, provides a platform for dialogue with NGOs from around the world. The Informal Business Advisory Body, which comprises fourteen captains of industry, provides a platform for dialogue with international business organisations and leading companies from developed as well as developing-country Members. Both advisory bodies advise the WTO Director-General, channel the positions and constraints of civil society and global business on trade issues to the WTO and ultimately aim at facilitating mutual understanding. These advisory bodies are expected to meet twice a year.²²²

Questions and Assignments 2.18

In your opinion, should the WTO have an executive body and/or a consultative assembly?

2.5.7. Quasi-judicial and other non-political bodies

All the WTO bodies discussed above are political in nature. The WTO also has a number of quasi-judicial and other non-political bodies. The most prominent among the quasi-judicial bodies are the *ad hoc* dispute settlement panels and the standing Appellate Body, which are discussed in detail in Chapter 3.

The WTO also has other non-political bodies. An example of such a body is the Textile Monitoring Body (TMB). The TMB is a non-political body in view of its mandate and the fact that its members discharge their function

²²¹ See WTO Press/345, 19 June 2003, www.wto.org/English/news_e/pr345_e.htm, visited on 1 September 2004.

²²² Note that the WTO website does not yet include any information on these advisory bodies. See www.wto.org, visited on 1 September 2004.

independently and on an *ad personam* basis (not as the representative of a WTO Member). Article 8.1 of the Agreement on Textiles and Clothing states:

In order to supervise the implementation of this Agreement, to examine all measures taken under this Agreement and their conformity therewith, and to take the actions specifically required of it by this Agreement, the Textiles Monitoring Body ("TMB") is hereby established. The TMB shall consist of a Chairman and 10 members. Its membership shall be balanced and broadly representative of the Members and shall provide for rotation of its members at appropriate intervals. The members shall be appointed by Members designated by the Council for Trade in Goods to serve on the TMB, discharging their function on an *ad personam* basis.²²³

At the request of any WTO Member, the TMB shall promptly review any particular matter which that Member considers to be detrimental to its interests under the *Agreement on Textiles and Clothing*. The TMB may formulate recommendations, findings and observations as it deems appropriate. Pursuant to Article 8.9 of the *Agreement on Textiles and Clothing*, WTO Members must 'endeavour' to accept, in full, the recommendations of the TMB. The TMB supervises the implementation of such recommendations. If a Member considers itself unable to comply with the recommendations of the TMB, it must provide the TMB with valid reasons. Following a thorough consideration of the reasons given, the TMB shall immediately issue any further recommendations it considers appropriate. If, following such further recommendations, the matter remains unresolved, either Member may request the Dispute Settlement Body to establish a panel to hear and decide the dispute.²²⁴ Note that, when the implementation of the *Agreement on Textiles and Clothing*, i.e. the elimination of all quantitative restrictions on textiles, is achieved at the end of 2004, the TMB would normally cease to exist.

Another non-political body which deserves to be mentioned is the Permanent Group of Experts provided for under the *SCM Agreement*. Paragraphs 3 and 4 of Article 24 of the *SCM Agreement* state:

1. The [SCM] Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.
2. The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

²²³ Note that para. 1.4 of the *Working Procedures for the Textiles Monitoring Body* states: 'In discharging their functions in accordance with paragraph 1.1 above, TMB members and alternates undertake not to solicit, accept or act upon instructions from governments, nor to be influenced by any other organisations or undue extraneous factors. They shall disclose to the Chairman any information that they may consider likely to impede their capacity to discharge their functions on an *ad personam* basis.' See *Working Procedures for the Textiles Monitoring Body*, adopted on 26 July 1995, G/T/MBR/1. Note also para. V of the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTI/DSB/RC/1, dated 11 December 1996.

²²⁴ See Article 8.10 of the *Agreement on Textiles and Clothing*.

It should be noted that to date no use has been made of this Permanent Group of Experts.

Questions and Assignments 2.19

How is the TMB composed and what is its function? Find the latest annual report of the TMB.

2.5.8. WTO Secretariat

The WTO Secretariat is based in Geneva, and has a staff of about 600 persons.²²⁵ This makes it undoubtedly the smallest Secretariat of any of the major international organisations. Note that in the mid-1990s the FAO cut staff, at its headquarters in Rome, by more jobs than there were at the time in the whole WTO Secretariat.²²⁶ However, as Hoekman and Kostecki observed:

The small size of the secretariat is somewhat misleading ... [The WTO is a network-based organization. The WTO secretariat and the national delegates in Geneva work in close cooperation with numerous civil servants in their respective capitals ... The total size of the network is impossible to determine, but certainly spans at least 5,000 people].²²⁷

As discussed below, the Secretariat's prime function is to keep the WTO network operating smoothly.

2.5.8.1. Appointment of the Director-General

The Secretariat is headed by a Director-General, who is appointed by the Ministerial Conference.²²⁸ The Ministerial Conference adopts regulations setting out the powers, duties, conditions of service and the term of office of the Director-General.

In the brief history of the WTO, the appointment of the Director-General has often been a contentious matter.²²⁹ In particular, the appointments of the current Director-General, Dr Supachai Panitchpakdi, and his predecessor, J. Madeley, UN Farm Aid Agency Wins Renewed Pledges of Funding', *Financial Times*, 25 February 1997.

²²⁵ Article VI.1 of the *WTO Agreement*. The WTO Secretariat has its offices in Geneva at the Centre William Rappard (154, rue de lausanne), along the lac Léman. Note that the Secretariat of the WTO Appellate Body, which is independent of the WTO Secretariat, is also housed in the Centre William Rappard. See below, pp. 248-9.

²²⁶ J. Madeley, UN Farm Aid Agency Wins Renewed Pledges of Funding', *Financial Times*, 25 February 1997.

²²⁷ The FAO cut more than 560 jobs at its Rome headquarters.

²²⁸ B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System*, 2nd edition (Oxford University Press, 2001), 55.

²²⁹ Article VI.2 of the *WTO Agreement*.

²²⁹ Only the appointment of Mr Peter Sutherland, the last Director-General of the GATT, to become the first Director-General of the WTO was not contentious. To date, the following persons have served as WTO Director-General:

- Mr Peter Sutherland from Ireland (January 1995–April 1995);
- Mr Renato Ruggiero from Italy (May 1995–April 1999);
- Mr Mike Moore from New Zealand (September 1999–August 2002); and
- Dr Supachai Panitchpakdi from Thailand (September 2002–August 2005).

Mr Mike Moore, were divisive. In March 1999, Frances Williams of the *Financial Times* reported on the search for a replacement for Mr Renato Ruggiero, the WTO's second Director-General, as follows:

The search for a new head of the World Trade Organization appeared to have reached an impasse yesterday, raising fears of an interregnum when Renato Ruggiero, the present director-general, steps aside at the end of April. After missing two deadlines for the selection of Mr. Ruggiero's successor, the WTO members last week set March 12 as their new target date, but this, too, looks in danger of slipping. Consultations with members over the past months have not changed the rankings of the four candidates, according to a report yesterday to the WTO's general council. Among the 118 members which have now expressed a view, Supachai Panitchpakdi, Thailand's deputy prime minister, continues to lead the field with 39 first preferences, followed closely by Hassan Abouyoub, a former Moroccan trade minister, who has significantly improved his relative position at 35. Roy MacLaren, former Canadian trade minister, is third with 23 first preferences, just in front of Mike Moore, former New Zealand premier, with 21. However, Mr. Moore had the most second preferences (32) compared with 23 for Mr. Supachai, 11 for Mr. Abouyoub and eight for Mr. MacLaren. Several countries yesterday called for weaker candidates to drop out to make it easier to reach consensus, while some developing countries urged a vote if consensus is not achieved by the end of the month. A vote is opposed by many WTO members, however, because they argue that the next director-general should clearly be acceptable to all 134 member countries. On a purely arithmetic basis, Mr. MacLaren would seem to be in the weakest position but he has some influential backers including the US which claims to be supporting him alongside Mike Moore, Sir Leon Brittan, the European Union trade commissioner, also favours Mr. MacLaren though EU Members are split between all four candidates.²³⁰

After a year-long effort to appoint a successor to Renato Ruggiero, WTO Members finally agreed on 22 July 1999 to an unprecedented term-sharing arrangement under which Mr Moore, of New Zealand, was appointed as Director-General for a term of three years, beginning on 1 September 1999, and Dr Supachai Panitchpakdi, of Thailand, was appointed for a three-year term beginning 1 September 2002.²³¹ Mike Moore, a former printer, social worker and trade union researcher, was the youngest member of Parliament ever elected in New Zealand. In the 1980s, he served six years as New Zealand's Minister of Overseas Trade and Marketing, and was New Zealand's Prime Minister for a brief period in 1990. When he took office as Director General of the WTO, a few weeks before the fated Seattle Session of the Ministerial Conference, Mr Moore, the first non-European to head the WTO (or the GATT), stated that he intended to defend the WTO as an organisation 'where the little guy not only has a say but where he can protect and defend his trading rights', and pledged to make the expansion of trading opportunities for the world's poorest countries a top priority during his three-year term.²³²

²³⁰ F. Williams, 'Impasse in Search for World Trade Chief', *Financial Times*, 2 March 1999.

²³¹ In its decision on this 'double' appointment, the General Council stressed that this arrangement did not constitute a precedent for future appointments of the Director-General and agreed to work towards establishing 'a comprehensive set of rules and procedures for such appointments' by the end of September 2000.

²³² F. Williams, 'Moore Takes up WTO Post with Pledge on Poor', *Financial Times*, 2 September 1999.

On 1 September 2002, Dr Supachai Panitchpakdi took over from Mr Moore. Dr Supachai held a range of senior government positions in Thailand and was directly in charge of Thailand's participation in the final stages of the Uruguay Round negotiations. At the time of his appointment to the post of WTO Director-General for the period 2002-5, Dr Supachai served as Thailand's Deputy Prime Minister and Minister of Commerce.

At its meeting of 10-11 November 2002, the General Council adopted new procedures for the appointment of a Director-General.²³³ Under these new procedures, the appointment process shall start nine months prior to the expiry of the term of an incumbent Director-General. The various steps of the process are carefully set out. The process shall be conducted by the Chair of the General Council, assisted by the Chairs of the Dispute Settlement Body and the Trade Policy Review Body acting as facilitators. Only WTO Members may nominate candidates. Candidates should have extensive experience in international relations, encompassing economic, trade and/or political experience; a firm commitment to the work and objectives of the WTO; proven leadership and managerial ability; and demonstrable communications skills. The overriding objective of Members is to reach a decision on the appointment of a Director-General by consensus. However, note that the new procedures explicitly state:

If, after having carried out all the procedures set out above, it has not been possible for the General Council to take a decision by consensus by the deadline provided for the appointment, Members should consider the possibility of recourse to the deadline provided for the appointment. Members should consider the possibility of recourse to a vote as a last resort by a procedure to be determined at that time. Recourse to a vote for the appointment of a Director-General shall be understood to be an exceptional departure from the customary practice of decision-making by consensus, and shall not establish any precedent for such recourse in respect of any future decisions in the WTO.²³⁴

2.5.8.2. Role of the Director-General and the WTO Secretariat

The WTO is a 'Member-driven' organisation. The Members – and not the Director-General or the WTO Secretariat – set the agenda and take decisions. Neither the Director-General nor the WTO Secretariat has any decision-making powers. The Director-General and the WTO Secretariat act primarily as an 'honest broker' in, or a 'facilitator' of, the decision-making processes within the WTO. They seldom act as initiators of proposals for action or reform. In such a seemingly modest role, the Director-General and the WTO Secretariat can, however, make an important contribution to helping Members to come to an agreement or decision. Note, in this respect, that in February 2002 the Trade Negotiations Committee (TNC), the body overseeing the Doha Development Round negotiations, elected the Director-General *ex officio* to chair the TNC.

In a speech in January 2003, Dr Supachai Panitchpakdi, speaking about his role and that of the WTO Secretariat, noted:

²³³ Procedures for the Appointment of Directors-General – Communication from the Chairman, WT/GC/W/482, dated 28 November 2002.

²³⁴ *Ibid.*, para. 21.

As you know the WTO is, if I may use the cliché, a ‘member-driven’ organization. In the negotiations, Member governments negotiate directly with each other. As Chairman of the TNC, I shall be doing my utmost to keep all Members on board, facilitate their discussions, mediate in their problems and consult with all. And the WTO Secretariat, through its technical assistance work programme, is working hard to help developing and least-developed-country Members prepare effectively for the negotiations. But we cannot make any decisions on behalf of Members, we cannot unplug blockages when Members’ positions are intractable and we cannot force consensus. It is Members who have the very difficult responsibility of developing policy positions, negotiating concessions and deciding how far they are able to go in any given area.²³⁵

However, developing-country Members are reported to be apprehensive regarding the role of the Director-General and the WTO Secretariat. In a joint communication, addressing, *inter alia*, the issue of their role at sessions of the Ministerial Conference, fifteen developing-country Members, led by India, stated:

The Secretariat and the Director-General of the WTO ... should assume a neutral/impartial and objective role. They shall not express views explicitly or otherwise on the specific issues being discussed in the Ministerial Conference.²³⁶

The main duties of the WTO Secretariat are:

- to provide technical and professional support for the various WTO bodies;
- to provide technical assistance to developing-country Members;
- to monitor and analyse developments in world trade;
- to advise governments of countries wishing to become Members of the WTO; and
- to provide information to the public and the media.

Furthermore, the Secretariat also provides administrative support and legal assistance for WTO dispute settlement panels. The Appellate Body has its own Secretariat which is independent of the WTO Secretariat but which shares the same facilities and makes use of the general support services of the WTO Secretariat (translation, library, etc.).

With regard to the status of the Director-General and WTO staff as independent and impartial international officials, Article VI:4 of the *WTO Agreement* states:

The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

²³⁵ Supachai Panichpakdi, *Build Up: The Road to Mexico*, speech on 8 January 2003 at Plenary Session XI of the Partnership Summit 2003 in Hyderabad: see www.wto.org/english/news_e/sp09_e.htm, visited on 1 September 2004.

²³⁶ Preparatory Process in Geneva and Negotiating Procedure at the Ministerial Conferences – Communication from Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe, WTI/GC/W/471, dated 24 April 2002, para. i.

2.5.8.3. The structure and composition of the WTO Secretariat

As noted above, the WTO Secretariat is headed by the WTO Director-General. The Director-General is assisted by four Deputy Directors-General (DDGs), also political appointees, serving for a limited period of time. They are appointed by the Director-General – in consultation with WTO Members – and form, together with the Director-General, the senior management of the WTO Secretariat. Currently, Roderick Abbott (a former EC ambassador to the WTO), Kipkorir Aly Azad Rana (a former ambassador of Kenya to the UN and the WTO), Francisco Thompson-Flóres (a former ambassador of Brazil) and Rufus H. Yerxa (a former US ambassador to the GATT) serve as DDGs under Dr Supachai. The number of DDGs has been the subject of discussions in the General Council.²³⁷ While it is argued that the number could be less than four, having four DDGs makes it possible for the main regions of the world to be represented in senior management.

The WTO Secretariat is organised into Divisions with a functional role (e.g. the Rules Division, the Services Division and the Market Access Division), an information and liaison role (e.g. the Information and Media Relations Division) and a supporting role (e.g. the Administration and General Services Division and the Language Services and Documentation Division). Divisions are normally headed by a Director who reports to one of the WTO’s four Deputy Directors-General or directly to the Director-General. In addition to Divisions, the WTO Secretariat also includes the Institute for Training and Technical Cooperation (ITTC), often referred to as the Training Institute, which was established in 2003 to ensure a coherent and coordinated approach to capacity-building and technical assistance.²³⁸

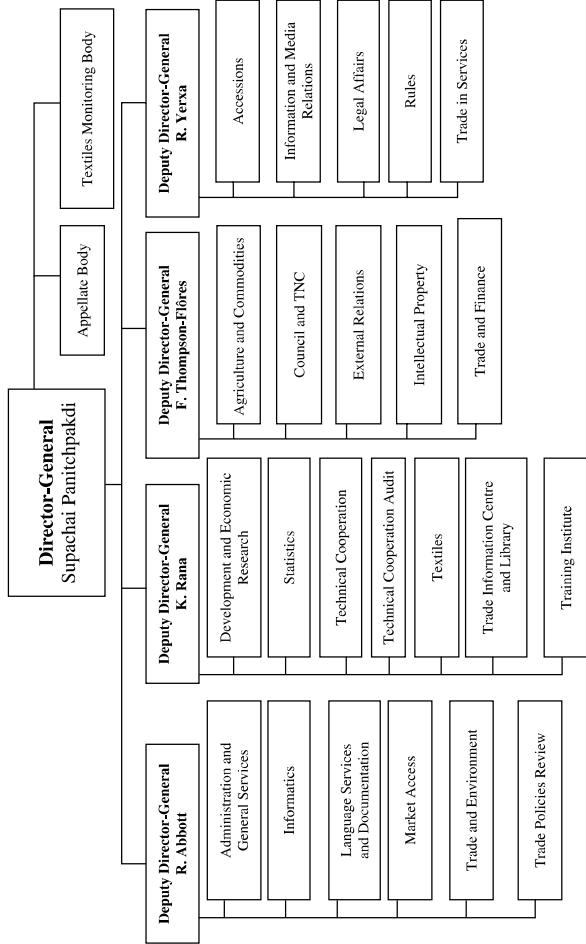
The Director-General appoints the staff and determines their duties and conditions of service in accordance with the *Staff Regulations* adopted by the Ministerial Conference.²³⁹

About sixty different nationalities are represented in the staff of the WTO Secretariat. Nationals of France, the United Kingdom, Spain, Switzerland, Canada and the United States (in order of importance) are best represented among the staff. The representation of developing-country nationals in the staff is growing but remains a matter of concern. Only nationals of WTO Members can be officials of the WTO Secretariat but there are no formal or informal national quotas.²⁴⁰ Most of the professional staff relevant WTO Divisions are represented.

²³⁷ See Statement by Ambassador Ali Mchumo, Chairman of the General Council at the Meeting on 6 October 1999, WTI/GC/27, dated 12 October 1999.

²³⁸ Also note in this respect the Technical Assistance Management Committee (TAMC) in which all Article VI:3 of the WTO Agreement. According to the Staff Regulations, the paramount objective in the implementation of conditions of service is to secure staff members of the highest standards of competence, efficiency and integrity and to meet the requirements of the WTO taking into account the needs and aspirations of the staff members. The Director-General has established and administers Staff Rules. The Staff Rules implement the provisions of the Staff Regulations. The Director-General furthermore issues Staff Administrative Memoranda in elaboration of the Staff Rules.

²⁴⁰ Vacancies are the subject of open competition. The final selection of professional staff is done on the basis of a written exam and an interview. The recruitment process is highly competitive. Vacancies

Figure 2.5 WTO Secretariat organisation chart²⁴¹

are lawyers or economists. The working languages within the WTO Secretariat are English, French and Spanish, with English being the language most frequently used.

The WTO Secretariat has an internship programme for postgraduate university students wishing to gain practical experience and deeper knowledge of the activities of the WTO and the multilateral trading system. Only a limited number of such internship posts are available. The eligibility requirements, as well as the terms and conditions of the internship and the application procedure, are set out on the WTO's website.

Questions and Assignments 2.20

Is the WTO controlled by 'faceless international bureaucrats'? Discuss the role and the powers of the WTO Director-General and the WTO Secretariat.

are advertised by means of vacancy notices, the distribution of which is made to all WTO Members. They are also posted on the WTO's website (www.wto.org) and where appropriate advertised in the international press.

²⁴¹ See http://www.wto.org/english/thewto_e/whtaris_e/tif_e/org4_e.htm.