A. Introduction

1. Since the beginning of written history, interregional trade and its legal regulation (ubi commercium, ibi ius) have been recorded as means for supplying citizens with more, better, or a larger variety of scarce goods and services. Most people earn their living by trading the fruits of their labour for the products they need. Hence, all civil societies are also economic and legal societies. As voluntary international trade tends to be mutually beneficial for all trading countries, private and public trade law is among the oldest fields of national and international law. For example, particular rules for interregional commerce were already present in the Babylonian Code of Hammurabi, in the laws and trade agreements of ancient Greek cities, in Roman law and in the treaties of commerce between Rome and Carthage. The Marrakesh Agreement Establishing the World Trade Organization regulates more than 90% of world trade among 153 WTO Members by means of comprehensive legal rules intended ‘to preserve the basic principles … underlying this multilateral trading system’ (preamble Marrakesh Agreement; → World Trade Organization (WTO)). The explicit recognition and distinction of principles, objectives, and rules, and their progressive clarification through successive ‘Rounds’ of multilateral trade negotiations (see eg → Doha Round; → Uruguay Round), as well as through hundreds of dispute settlement rulings adopted by the WTO Dispute Settlement Body (‘DSB’; → World Trade Organization, Dispute Settlement) and under the → General Agreement on Tariffs and Trade (1947 and 1994) (‘GATT’), have contributed to a dynamic evolution of international trade law since World War II. Yet, as all agreements remain incomplete, the customary law requirement of settling international disputes ‘in conformity with the principles of justice and international law’, including ‘respect for, and observance of, human rights and fundamental freedoms for all’—as recalled in the preamble and in Art. 31 → Vienna Convention on the Law of Treaties (1969) (1155 UNTS 331; ‘VCLT’)—has proven of crucial importance for the legal and judicial interpretation and progressive development of regional and worldwide trade law in conformity with other fields of international law, such as the human rights obligations of all WTO Members (→ Trade and Human Rights).

2. Rules are either applicable or not, depending on whether the social facts meet the ‘if-then’ conditions of rules. → General principles of law such as the → precautionary approach/principle referred to by the WTO Appellate Body in the → EC-Hormones Case embody more general values or regulatory purposes, whose relevance for interpreting rules may require balancing and weighing of competing principles, such as in the interpretation of the specific ‘precautionary rules’ in Art. 5 WTO Agreement on Sanitary and Phytosanitary Measures (signed 15 April 1994, entered into force 1 January 1995; 187 UNTS 493). Principle-oriented interpretations may rationalize and legitimize rules, for example by explaining the textual meaning, systemic interrelationships, and ‘object and purpose’ of rules (see Art. 31 VCLT), justifying their ‘dynamic interpretation’ in conformity with agreed changes of the law, eg the recognition of price-fixing cartel practices as ‘anti-competitive practices’, or by demonstrating that restrictions of freedom are suitable, necessary, and proportionate means for realizing public interests. Interpretative arguments often depend on who interprets trade rules for whom and in which legal context; for instance, European courts protect the customs union rules of the European Union as individual freedoms of trade, but accept power-oriented arguments of trade politicians that the underlying customs union rules in GATT 1947 should be construed only as intergovernmental rights and obligations of WTO Members based on political principles of reciprocity rather than on economic principles of consumer welfare and constitutional principles of → rule of law for the benefit of citizens. The requirement of interpreting international treaties with due regard to ‘any relevant rules of international law applicable in the relations between the parties’ (Art. 31 (3) (c) VCLT), similar to the widespread constitutional requirements of interpreting domestic laws in conformity with the international legal obligations of the country concerned, reflect presumptions against conflicting obligations. The broad principles, like → sustainable development as WTO objective, ‘exceptions’, and ‘public interest clauses’ in trade agreements have so far enabled the more than 400 GATT and WTO dispute settlement rulings over the past 60 years, like the case-law of the European Court of Justice and of other regional courts, to avoid conflicts between international trade rules and non-economic legal obligations of trading countries.

B. Economic, Political, and Legal Principles of World Trade

3. International trade law cannot be understood without the economic principles of comparative advantage, competition, and ‘optimal trade
intervention’ underlying WTO rules and the more than 250 → regional trade agreements (‘RTAs’). Just as GATT liberalizes and limits discriminatory border restrictions in order to promote ‘trade under fully competitive conditions’ (Art. VII GATT), the → General Agreement on Trade in Services (1994) (‘GATS’) and the WTO Agreement on Trade-Related Intellectual Property Rights (‘TRIPS’; → Intellectual Property, International Protection) promote market-driven division of labour and prevention of ‘anti-competitive practices’, eg in Art. VIII GATS, in the Basic Telecommunications Agreement, and in Art. 8 TRIPS. The WTO objective of ‘mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade’ (preamble Marrakesh Agreement) rests on the theory of comparative advantage as first developed by David Ricardo (1772–1823). International trade liberalization tends to increase the economic welfare of every trading nation, eg by reducing the prices of consumer goods, enhancing productivity through specialization, creating new job opportunities, and enabling governments to redistribute part of the ‘gains from trade’ for helping the poor, assisting workers to shift from import-competing to export sectors of the economy, or protecting the environment. The additional WTO objective of ‘elimination of discriminatory treatment in international trade relations’ (preamble Marrakesh Agreement), and GATT’s legal ranking of trade policy instruments according to their economic efficiency (eg legal admissibility of tariffs and non-distorting subsidies, prohibition of → non-tariff barriers to trade), rest on the economic theory of ‘optimal intervention’: ‘market failures’ should be corrected directly at their source by means of non-discriminatory regulations (eg prohibitions of cartels and other abuses of market power), without distorting citizen-driven offer, demand, and market competition for scarce goods and services. Also the WTO requirements of most-favoured-nation treatment (→ Most-Favoured-Nation Clause) and national treatment (→ National Treatment, Principle) of goods, services, and intellectual property rights are primarily aimed at avoiding competitive distortions and ‘protection of domestic production’ (Art. III GATT) rather than at protecting sovereign equality of States.

4 Even though voluntarily agreed trade transactions tend to be mutually beneficial, economic theory alone cannot explain the reality of trade laws and trade policies. While the gains from trade tend to be distributed among large numbers of consumers (eg in terms of lower prices) and industries (eg in terms of enhanced productivity and competition) the adjustment costs tend to be concentrated on import-competing producers, who have rational self-interests in opposing trade liberalization (eg in order to benefit from protection rents). Hence, notwithstanding economic demonstration that unilateral liberalization of trade barriers tends to enhance consumer welfare and productivity in the liberalizing country, countries prefer reciprocal traders to reduce protectionist pressures from import-competing producers by offering additional export opportunities and jobs in the export sector). The WTO objective of ‘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’ (preamble Marrakesh Agreement) reflects these economic and political principles of trade policies. The WTO rules on ‘fair trade’ (eg in Arts VI and XVI GATT on ‘dumping’, subsidies, and countervailing duties), on safeguard measures (eg Art. XIX GATT), on ‘general exceptions’ reserving sovereign rights to protect public interests (eg Arts XX and XXI GATT and Art. XIV GATS) and on preferential treatment of less-developed countries (eg Part IV GATT, the ‘Enabling Clause’ of 1979 authorizing trade preferences for less-developed countries) are likewise determined by political rather than by economic reasons.

5 In conformity with the economic theories of ‘optimal intervention’, GATT permits non-discriminatory internal regulations (Art. III) and production subsidies (Art. XVI) that prescribe discriminatory non-tariff barriers to trade (Arts III and X) and market-distorting export subsidies (Art. XVI) which are only in very exceptional cases a means of maximizing national welfare, eg if a country with market power can manipulate its ‘terms of trade’ in its favour at the expense of its trading partners. WTO law respects national sovereignty, eg in terms of freedom to decide on the level of national tariffs, non-discriminatory national regulation of protection of human health, the environment, and other public interests. Hence, the function of most WTO rules is not to reconcile conflicts among national economic interests but to help countries to pursue welfare-increasing trade policies and collectively supply international public goods beneficial for all trading countries, eg in terms of transparent policy-making, international rule of law, and global division of labour offering consumers access to the best world markets.

C. Principles of Private Transnational Commercial Law

6 From time immemorial, international trade has mainly been carried out by private merchants and has given rise to uniform commercial usages, principles, and rules for the allocation of commercial risks concerning the sale, carriage, insurance, delivery, and payment of goods. As sellers and buyers reside in different countries, they often avail themselves of generally recognized legal principles—such as freedom of contract, → good faith (bona fide), → pacta sunt servanda, use of commercial customs and corporations (→ Corporations in International Law) with separate legal personality, commercial arbitration, and recognition of commercial arbitral awards (→ Commercial Arbitration, International)—so as to apply customary commercial and contract practices rather than submit their contracts exclusively to the domestic laws and courts of one party to the possible disadvantage of the foreign party. Since the medieval law merchant, contract practices for the export and import of goods, related payments, and commercial arbitration exhibit a high degree of uniformity and were increasingly recognized as optional rules in domestic laws and commercial agreements, eg establishing the Hanseatic League among over 70 cities.

7 The medieval → lex mercatoria had not only been a lex mercatoria but also a customary law approved by governmental authorities. With the advent of mercantilism and → colonialism, this law merchant became increasingly influenced by government interventions, eg granting trade monopolies and privileges for the English, Dutch, and French East India Companies, and by national codifications of commercial laws, such as Colbert’s Ordinance sur le commerce de 1673 and the Grande Ordonnance sur la marine of 1681 in France. In England, the law merchant continued to be recognized as a universal body of law separate from common law and equity until 1796 when, under Lord Mansfield CJ of the King’s Bench and specially created juries of merchants, the customary merchant and maritime law was recognized as an integral part of English common law. The successive codifications of commercial laws (eg the French Code de commerce of 1807, the German Allgemeines Deutsches Handelsgebetesbuch of 1811, and the English Sale of Goods Act of 1893) regulated commercial transactions as part of civil law. Modern private transnational commercial law is increasingly influenced by public and private international organizations, such as the → United Nations Commission on International Trade Law (UNCITRAL) and the → International Chamber of Commerce (ICC), which elaborate international conventions, standard contracts, and model laws, and costly commercial usages. The principles of transnational law are founded on the principle of the autonomy of the parties’ will and its recognition as optional law in national legal systems; they substitute national conflict of law rules aimed at ‘nationalizing’ disputes—eg by localizing the ‘seat of the obligation’ and consigning the case to one municipal law—by uniform substantive principles of commercial law and arbitration which, while dependent on State authority for enforcement purposes, aim at limiting State control over transnational business, eg by private arbitration clauses based on UNCITRAL’s 1985 Model Law on International Commercial Arbitration, in order to reduce transaction costs. The International Commercial Arbitration between private and public, national and international principles of trade law are illustrated by the WTO Agreement on Pre-Shipment Inspection [signed 15 April 1994, entered into force 1 January 1995 1868 UNTS 368], whose ‘independent review procedures’ (Art. 4) offer private parties direct access to commercial arbitration in the WTO.
D. Principles of National Constitutions and Foreign Trade Legislation

8 Since the consolidation of nation States, the power of trade regulation has passed from the towns to the States. Governmental trade policies operate through regulation of economic freedoms and property rights by means of constitutional, legislative, administrative, and international rules and administrative as well as judicial decisions. Most States protect freedom of trade inside States by constitutional rules. Trade policy instruments, like tariffs, quantitative restrictions, other non-tariff trade barriers, → anti-dumping duties, other safeguard measures, subsidies, State trading, and government procurement are regulated in ever more comprehensive national laws that are interlinked with international trade rules co-ordinated by GATT and WTO rules. Multilevel trade governance (eg → GATT, → WTO) and in the WTO Agreement on Tobacco (→ Technical Barriers to Trade) and in the WTO Agreement on Sanitary and Phytosanitary Measures (→ Sanitary and Phytosanitary Standards) for providing for presumptions of WTO consistency of technical and sanitary regulations based on such standards. The ‘internationalization of constitutional principles’ (eg due to the universal recognition of human rights, fundamental freedoms, judicial review, and → proportionality balancing of competing rights and public interest regulations) has promoted an increasing ‘constitutionalization’ of multilevel trade governance (eg international judicial review of whether national trade restrictions comply with international guarantees of freedom, non-discrimination, rule of law, proportionality of public interest restrictions of private rights, separation of powers). GATT disciplines, WTO law, and RTAs can serve ‘constitutional functions’ by promoting mutually ‘consistent interpretations’ of national and international guarantees of freedom (including economic freedoms), non-discrimination, and → rule of law. WTO freedoms and the WTO’s rule of law requirements go far beyond the autonomous guarantees of freedom of trade in national laws; hence, they can strengthen the ‘domestic policy functions’ of multilevel trade governance—by eg constraining protectionist abuses of international trade policy powers if international ‘market freedoms’ are judicially protected—as well as their ‘foreign policy functions’—eg by promoting legal and judicial accountability of foreign governments for the adverse ‘external effects’ of their protectionism vis-à-vis foreign citizens, enabling governments to challenge and limit protectionist abuses of trade policy-making in other countries.

9 The complex interrelationships between national and international economic regulation differ among countries. In the United States, the protectionist abuses of parliamentary powers (eg in the Smoot-Hawley Tariff Act, 48 Statutes at Large 580 [1930]) prompted the US Congress to delegate limited trade policy powers to the Executive since the Reciprocal Trade Agreements Act (48 Statutes at Large 943 [1934]), whose exercise continues to be closely controlled by Congress. The Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) and the AulRenwiertschaftsgesetz (German Foreign Trade Law) responded to the German experiences of protectionist abuses of government powers by providing for strong procedural and substantive controls over limitation of freedom of trade. Multilevel trade governance in the → European (Economic) Community as well as in the → European Economic Area (EEA) has become constitutionally restrained by European common market law and multilevel, judicial protection of ‘market freedoms’ and other fundamental rights by the EU Courts (→ European Union, Court of Justice and General Court), the → European Free Trade Association (EFTA) Court, and national courts for the benefit of some 500 million European citizens as legal subjects of European law. Most RTAs outside Europe, by contrast, continue to be governed by intergovernmental institutions with less comprehensive judicial review and individual, judicial remedies, such as under Chapters 11 and 19 → North American Free Trade Agreement (1993). As most national parliaments, courts, and citizens do not effectively control intergovernmental rule-making and rule-administration in distant international organizations, welfare-reducing protectionist abuses of trade policy powers and international collusion—eg for the exemption of export cartels from domestic competition laws,—remain frequent in international trade relations. Hence, there are increasing demands from civil society for enhancing transparency, democratic accountability, and public access to international institutions—eg by holding inter-parliamentary meetings during WTO ministerial conferences, making WTO dispute settlement hearings open to the public, admitting amicus curiae submissions, and by regular WTO meetings with civil society representatives.

E. Principles of Public International Trade Law

10 Private law merchant and national trade laws developed before the emergence of regional systems of international trade agreements, notably since the Golden-Chevallerie Trade Agreement among England and France (signed 23 January, 1800), which ushered in a period of liberal trade in Europe based on reciprocal bilateral trade agreements interconnected by most-favoured-nation clauses. → Treaties of friendship, commerce and navigation dealt more generally with economic relations among States, such as treatment of foreign investments, shipping, and rights of foreigners. → Commercial treaties focused on customs duties and other treatment accorded to goods originating in the contracting parties. Many provisions of GATT 1947 were modelled on standard clauses used in the European system of bilateral trade agreements (1880-92) and in the more than 30 bilateral trade agreements concluded under the Trade Agreements Act of 1934. The principle of → sovereignty reserves the right to regulate foreign trade by means of national law and international agreements without general international law obligations to grant freedom of commerce or navigation (→ see Railway Traffic between Lithuania and Poland [Advisory Opinion] [PCU Series A/B No 42]). Among the various ‘standards’ used in the practice of international trade agreements, only a few—like the minimum standard for the treatment of aliens, freedom of the → high seas, the principles of pacta sunt servanda, and good faith—evolved into → customary international law. International market access commitments remain based on reciprocal treaties.

11 Numerous WTO provisions distinguish between rules and principles (eg Arts III, VII, X, XIII, XX, XXX GATT) or objectives (eg Arts XXXVIII GATT and 7 TRIPS) and are committed to preserve the basic principles and to further the objectives underlying this multilateral trading system (eg → preamble Marrakesh Agreement). Legal principles and objectives cannot be understood as legal requirements to ‘ optimize’ their respective values in the application of more specific rules, eg by means of interpreting and ‘balancing’ competing principles in the judicial review of the ‘necessity’ and ‘proportionality’ of trade restrictions under WTO exception clauses for protecting public interests. The numerous principles and objectives of WTO law, like its preamble commitment to ‘sustainable development, seeking both to protect and preserve the environment’, and the compulsory jurisdiction of WTO dispute settlement bodies have promoted dynamic, institutionalized dialogues, eg prior to adoption of dispute settlement reports in the DSB, about the clarification and potential revision of WTO rules and principles. The systemic character of this multilateral trading system is explicitly acknowledged also in the WTO ‘Understanding on Rules and Procedures Governing the Settlement of Disputes’ (DSU) regulating the ‘dispute settlement system of the WTO [as] a central element in providing security and predictability to the multilateral trading system’ (Art. 3 DSU). Art. 3 DSU also stipulates that the ‘Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing
provisions of those agreements in accordance with customary rules of interpretation of public international law (para. 2). Yet, Members also affirm their adherence to the principles for the management of disputes herebefore applied under Articles XXII and XXIII of GATT 1947 (para. 1). Art. 3 DSU further specifies additional principles—eg for the ‘prompt’ (para. 3) and ‘satisfactory settlement’ (para. 4) of disputes, preferably concluding at ‘a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements’ (para. 7)—which may limit recourse to customary law rules or GATT 1947 ‘principles for the management of disputes’. In addition to principles of WTO law and the principles underlying the customary methods of treaty interpretation (like lex specialis, lex posterior, lex superior), WTO dispute settlement bodies have also been increasingly applying other principles of customary international law (like respect for State sovereignty to determine autonomously national levels of health and environmental protection) and general principles of law (like good faith, due process of law, and — proportionality). As WTO rules, like any other complex legal system, change, it is no clear text to the frequent disputes among WTO Members over the correct interpretation and application of WTO rules. WTO dispute settlement bodies must duly respect the customary rules of treaty interpretation and the customary law requirement ‘that disputes concerning treaties, like other international disputes, should be settled… in conformity with the principles of justice and international law’, including ‘the principles of… universal respect for, and observance of, human rights and fundamental freedoms for all’ (preamble VCLT).

12 A descriptive-inductive approach to identifying principles of world trade could consist of generalizing the basic values underlying WTO rules. For example, most WTO rules protect market access (eg Arts II, XI, XXVIII GATT), most-favoured-nation treatment, and national treatment designed to promote non-discriminatory conditions of competition (eg Arts I, III, XVI GATT), rule of law, and procedural fairness to be protected by domestic courts and GATT/WTO dispute settlement bodies (eg Arts X, XXII GATT), reciprocity (eg Arts XVIII, XXIII bis GATT), transparent and — good governance (eg Art. X GATT), a rules-based trading and dispute settlement system respecting the sovereign rights of WTO Members to regulate their economy (eg Arts III, XVIII–XXI, XXV GATT), as well as special and differential treatment of less-developed countries (eg Part IV GATT). The principles underlying the thicket of WTO rules could thus be summarized as principles of market freedom for a mutually beneficial, international division of labour; non-discriminatory treatment so as to avoid distortions of trade and competition; rule of law in order to reduce transaction costs and promote market-driven self-governance; and respect for sovereign rights to non-discriminatory market regulation and other public interest legislation.

13 A normative-deductive approach to identifying principles of world trade could examine, for example, the legal consequences of the WTO objectives of ‘sustainable development’ and ‘mutually advantageous arrangements’ (WTO preamble), or of the requirement of settling WTO disputes ‘in conformity with principles of justice and international law’ (preamble VCLT), for the interpretation of WTO rules by political and quasi-judicial WTO bodies. For example, the WTO Appellate Body inferred from the WTO principle of reciprocity and the WTO prohibition of ‘a disguised restriction on international trade’ (Art. XX GATT) that Art. XX GATT ‘embraces the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations’ (WTO Panel, Import prohibition of certain shrimp and shrimp products, A/23898/2000, para. 26). Similarly, the WTO in its trade liberalization goals, which neither trump other public interest provisions (eg in Art. XX GATT) nor justify their ‘narrow interpretation which must take into account also general principles of law, such as respect for human rights, good faith, and prohibition of abuse of rights. Like other international tribunals, WTO dispute settlement bodies have often interpreted rules—eg on special and differential treatment of less-developed countries, fair price comparisons in the calculation of anti-dumping duties—in the light of general principles of law and have inferred from their dispute settlement functions important powers—eg for preliminary rulings on procedural objections, allocation of burden of proof (eg International Courts and Tribunals: Evidence, admission of amicus curiae briefs (eg International Courts and Tribunals: Amicus Curiae), and opening of panel proceedings to the public at the request of all parties to the dispute—that were considered necessary for the proper administration of justice on the basis of the incomplete DSU rules.

F. Principles of Multilevel Judicial Trade Governance

14 International trade law protects the rule of law through more legal and judicial remedies at private and public, national, regional, and worldwide levels than other fields of international law. The WTO provisions on adoption of WTO dispute settlement reports and ‘authoritative interpretations’ (see Art. IX Marrakesh Agreement) by the political WTO bodies reserve important sovereign rights of WTO Members. Yet, the compulsory and quasi-judicial jurisdiction of WTO panels, of the WTO Appellate Body and of WTO arbitrators protects the right of every WTO Member to submit disputes over the interpretation and application of WTO rules to independent, judicial clarification (‘in conformity with principles of justice and international law’ (preamble VCLT)); for the interpretation of WTO rules by political and quasi-judicial WTO bodies. For example, the WTO Appellate Body inferred from the WTO principle of reciprocity and the WTO prohibition of ‘a disguised restriction on international trade’ (Art. XX GATT) that Art. XX GATT ‘embraces the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1944, on the other hand’ (WTO Panel, Import prohibition of certain shrimp and shrimp products, A/23898/2000, para. 26). Similarly, the WTO in its trade liberalization goals, which neither trump other public interest provisions (eg in Art. XX GATT) nor justify their ‘narrow interpretation which must take into account also general principles of law, such as respect for human rights, good faith, and prohibition of abuse of rights. Like other international tribunals, WTO dispute settlement bodies have often interpreted rules—eg on special and differential treatment of less-developed countries, fair price comparisons in the calculation of anti-dumping duties—in the light of general principles of law and have inferred from their dispute settlement functions important powers—eg for preliminary rulings on procedural objections, allocation of burden of proof (eg International Courts and Tribunals: Evidence, admission of amicus curiae briefs (eg International Courts and Tribunals: Amicus Curiae), and opening of panel proceedings to the public at the request of all parties to the dispute—that were considered necessary for the proper administration of justice on the basis of the incomplete DSU rules.

16 The legal consistency of the more than 250 RTAs with WTO law, such as Arts XXIV GATT and V GATS, often remains contested and has been challenged in only a few WTO dispute settlement proceedings. The worldwide WTO rules and regional → free trade areas, → customs unions, common markets, or non-preferential trade agreements are supplemented by thousands of bilateral trade agreements, such as on regulatory co-operation, land, air, and maritime transports, and other functionally limited trade agreements, such as on the stabilisation of commodity prices. The multilevel regulation of world trade remains a ‘layered’, highly complex legal system. Its coherent legal interpretation and consistent functioning depend on legal and judicial protection of ‘the basic principles and → objectives underlying this multilateral trading system’ (preamble Marrakech Agreement), including judicial protection of the rule of law. For example, as an international movement of goods depends on international payments and related services, numerous provisions in the GATT, GATS, and TRIPS Agreement refer to multilateral agreements concluded outside the WTO, like the Articles of Agreement of the International Monetary Fund (signed and entered into force 27 December 1945) 2 UNTS 287; see Arts XII, XV GATT), the Constitution and Convention of the International Telecommunication Union (concluded 22 December 1992, entered into force 1 July 1994) 1825 UNTS 143; see GATS Annex on Telecommunications) and agreements concluded in the World Intellectual Property Organization (see Arts 2–5 TRIPS). Some of these WTO rules provide for additional legal safeguards, such as safeguards of intellectual property rights protected in the TRIPS Agreement, or limit the applicability of the WTO legal and dispute settlement system, such as in Art. 9 TRIPS excluding authors’ rights conferred under Art. 6 bis Convention for the Protection of Literary and Artistic Works (concluded 9 September 1886) 1161 UNTS 3 (Berne Convention). Other WTO provisions—such as the requirement of Art. XV GATT that “[c]ontracting parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund” (para. 4)—require legal interpretations reconciling the objectives and principles of successive agreements. Such mutual legal coherence may depend not only on formal legal principles codified in the VCLT (eg in Art. 30 concerning the application of successive treaties relating to the same subject matter) but also on respect for the underlying economic objectives of the GATT, the → International Monetary Fund (IMF) and other rules concerned. Some WTO provisions have lost legal relevance due to legal changes outside the WTO, such as Art. XXVIII GATT on observance ‘to the fullest extent of their executive authority’ [of the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter’ (→ Havana Charter [1948]).

17 The dynamic evolution and conclusion of new trade agreements inside and outside the WTO, like the thousands of dispute settlement decisions rendered every year by regional and national trade courts, often without regard to WTO law, enhance the importance of principle-oriented, judicial clarifications of the legal coherence of the world trading system. For example, the successive WTO agreements on liberalization of financial services and telecommunications services have supplemented the general GATS provisions by successive market access commitments, national treatment commitments, and additional commitments, such as prohibiting anti-competitive practices restricting trade in telecommunications services. WTO dispute settlement practice has interpreted trade rules regulated by the GATS in conformity with principles that had been previously developed for the interpretation of GATT rules for trade in goods, such as in WTO United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Report of the Appellate Body (7 April 2005) WT/DS285/AB/R), regarding the balancing of market access rights of exporting countries with the rights of importing countries invoking GATT’s ‘general exceptions’. Similar to references by GATT dispute settlement panels to economic principles—like the → Organization for Economic Co-operation and Development (OECD) principles for avoidance of → double taxation and the → polluter pays principle—WTO dispute settlement bodies have likewise referred to economic principles—like UN and OECD guidelines on prohibitions of price-fixing cartels—as relevant context for mutually coherent interpretations of successive WTO commitments for the liberalization and regulation of services trade (see WTO Mexico—Measures Affecting Telecommunication Services—Report of the Panel [2 April 2004] WT/DS240/R), regarding the potential legal relevance of broader ‘principles of justice’ as illustrated by the Appellate Body Report on WTO EC—Conditions for the Granting of Tariff Preferences to Developing Countries (7 April 2004) WT/DS246/AB/R), which reversed the panel’s formalistic interpretation of the non-discrimination requirement, in the sense of strict identical treatment, requiring identical tariff preferences for all less-developed countries, by allowing differential treatment (asum cuique), provided the differentiated tariff preferences had been made available on the basis of objective standards to all developing countries sharing the specific ‘development, financial or trade need’. The WTO Ministerial Conference Declaration on the TRIPS Agreement and Public Health [14 November 2001] WT/MIN(01)/DEC2) emphasized that—in order to ensure that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health—WTO Members have ‘the right to use, to any extent, any provision of the TRIPS Agreement which provide flexibility for this purpose’, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles; hence, ‘each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency’.

18 The WTO Appellate Body has also confirmed that WTO dispute settlement panels and the Appellate Body have inherent powers necessary for carrying out their tasks under the DSU, eg to review their respective jurisdiction and respond to procedural requests for preliminary rulings so as to ensure proper administration of justice. WTO law fails to specifically regulate many procedural issues and implied powers necessary for settling disputes on the basis of law and for administering justice in dispute settlement procedures, eg by allowing representation by private lawyers, allocating burden of proof, drawing adverse inferences, or providing adversarial representation. The Appellate Body, however, has reviewed the rules and duties of the parties that require judges to resolve conflicts by doing justice in the determination of the relevant facts, applicable rules, legal reasoning, and judicial justification of the decision and prevailing rights, with due regard to principles of formal justice (eg treating like cases alike), procedural justice (eg independent and impartial judicial administration of justice, audi alteram partem), and substantive justice (eg treating different cases differently, considering claims to distributive and corrective justice). The progressive legal and judicial interpretation and centralization of general principles, which are often older and more developed for the peaceful settlement of legal
disputes over commercial and international trade rules compared with other areas of international law, are of ever more importance for ‘multilevel judicial governance’ of trade by the ever larger number of national, regional, and worldwide courts and jurisdictions and their increasing dialogues about the appropriate ‘balancing’ and ‘concretization’ of principles and judicial co-operation (→ Comity) among courts.

G. Principles of Global Administrative Law

19 WTO law and RTAs aim not only at mutually beneficial liberalization of market access restrictions and distortions, such as subsidies, but also at → unification and harmonization of laws and intergovernmental, administrative, and judicial supervision of domestic regulation of trade in goods, services, and trade-related intellectual property rights. Compared with GATT 1947, the legislative, administrative, and judicial governance structures of the WTO and of many RTAs are increasingly based on global administrative law (GAL) principles of transparency, legality, participation, reason-giving, and → accountability, which penetrate ever more domestic administrative laws and practices. The worldwide and regional regulatory systems—such as for the elaboration and administration of technical regulations, sanitary, and environmental standards, and intellectual property rights—interact ever more closely, as reflected in the numerous co-operation agreements of the WTO with other international organizations like the IMF, the World Bank (→ World Bank Group), the → International Labour Organization (ILO), the → World Intellectual Property Organization (WIPO), and the → World Health Organization (WHO). They often aim at regulating the conduct not only of States and national administrations, but also of private actors like companies and other non-governmental organizations, such as for the elaboration of technical standards. Such intergovernmental decision-making in international trade bureaucracies, committees, expert groups, and other networks of domestic officials and private experts—inside and among international organizations and domestic administrations—may be distinguished as ‘administration’ different from international treaty-making and international adjudication. However, the emerging GAL principles of trade regulation—like national administrative law principles inside constitutional democracies—remain closely based on constitutional law principles like fundamental rights (as the constitutional basis for requirements of ‘necessity’ and ‘proportionality’ of government restrictions), democratic delegation of powers, rule of law and access to justice (as constitutional foundations of administrative law remedies and judicial review). In view of the ‘democratic deficits’ of intergovernmental organizations compared with constitutional democracies, transplanting principles of national administrative law, such as judicial deference in the review of delegated administrative powers that remain subject to effective parliamentary scrutiny to intergovernmental organizations, may aggravate constitutional problems of trade regulation and of inadequate judicial protection of constitutional rights.

H. Principles, Rules, and Multilevel Constitutional Order

20 The founding father of economics Adam Smith, like the founding father of multilevel constitutionalism Immanuel Kant, emphasized already in the 18th century that economic and legal orders cannot remain stable over time unless they are built on principles of justice. Just as the failures of re-establishing the pre-war liberal trading system and the rise of dictatorships in Europe following World War I were explained by the ‘social dis-embedding’ (K Polanyi) of citizens resulting from the economic, political, and social transformations in Europe, so does the modern recognition of → human rights obligations by all UN Member States reflect worldwide agreement that a liberal (ie liberty-based) → new international economic order (NEO) must be ‘embedded’ into laws and institutions protecting democratic self-governance, rule of law, and social justice. The more the survival of all people depends on production, exchange, and consumption of scarce goods and services, the more important becomes a liberal trading system for human freedom, consumer welfare, and citizen-driven self-governance, like in consumer-driven markets.

21 International trade law continues to progressively limit market failures as well as government failures in trade regulation, for example by limiting welfare-reducing border discrimination and nationalist exclusion of ‘the others’. There is worldwide consensus among economists today that further liberalization of international movements of goods, services, and persons, and non-discriminatory regulation of market failures—like cartelization—and ‘public goods’—like international energy security—would benefit all trading countries in terms of consumer welfare and productivity gains. The dramatic trade liberalization, foreign exchange earnings, and poverty reduction in China and India since the 1990s also illustrate that empowerment of citizens to engage in mutually beneficial trade is also of crucial importance for reducing unnecessary poverty. Yet, the reality of widespread trade protectionism and restrictive business practices, such as cartel agreements, illustrates that national, regional, and worldwide trade law does not effectively constrain protectionist governance failures; nor does it effectively protect the collective supply of international public goods, like an open trading system protecting mutually beneficial co-operation among free citizens across frontiers and non-discriminatory, democratic regulation based on respect for human and social rights, whose legal protection may legitimately differ according to the democratic preferences and resources of national communities. Hence, the legal institutional democracy, and social market economies. The increasing citizen demand for legal protection of international public goods requires transnational constitutional guarantees of the ‘constitutive principles’ (such as human rights, economic freedoms, property rights), ‘regulative principles’ (such as competition rules limiting abuses of market power, social rights helping the ‘losers’ in competition to adjust to change), and institutions necessary for protecting multilevel governance for the collective supply of a rules-based, efficient world trading system and other international public goods. The agreements constituting international organizations for the collective supply of functionality limited, international public goods (see also → Economic Organizations and Groups, International) are sometimes explicitly called ‘constitutions’ (eg establishing the ILO, WHO, → Food and Agriculture Organization of the United Nations [FAO], → United Nations

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a) constitute a new legal order with legal primacy over national laws in the Member States;

b) create new legal subjects and hierarchically structured institutions with limited governance powers;

c) provide for institutional checks and balances, eg among rule-making, administrative and dispute settlement bodies in the WTO;

d) legally limit the rights of Member States, eg regarding withdrawal, amendment procedures, dispute settlement procedures;

e) provide for the collective supply of ‘public goods’ that—as in the case of the treaty constitutions of the ILO, WHO, FAO, UNESCO—are partly defined in terms of human rights, such as core labour rights, human rights to health, food, and education; and often

f) operate as ‘living constitutions’ whose functions—albeit limited in scope and membership—increasingly evolve in response to changing needs for international co-operation.

23 Similar to the diverse constitutional cultures inside nation States, the functionally limited ‘internationalization of constitutional law’, eg as a result of the universal recognition of human rights and of some kind of national constitutionalism, and the constitutional transformations of certain fields of international economic law (→ Economic Law, International) reveal enormous differences. For example, intergovernmental institutions like the WTO differ from tri-partite institutions like the ILO, and the legal structures of the bottom-up constitutionalism of multilevel human rights law—with often more comprehensive legal and judicial guarantees at national levels—differ from the top-down constitutionalism of the comparatively more comprehensive, legal and judicial WTO disciplines on national trade policy powers. Functionally limited, international treaty constitutions complement the comprehensive, national constitutions for the collective supply of specific international public goods that can be secured neither unilaterally nor through intergovernmental power politics. From the perspective of citizens interested in maximizing general consumer welfare and transnational rule of law, international organizations are becoming no less necessary for the collective supply of public goods—like protection of human rights, legal security, sustainable development—than national constitutions. Human rights and their moral value premises (normative individualism) require designs of national and international governance as integrated, multilevel constitutional frameworks for protecting citizen rights, democratic self-government, and co-operation among free citizens across frontiers. As explained first by Immanuel Kant in his Zum ewigen Frieden (Perpetual Peace) of 1795, international constitutionalism is a functionally limited, but necessary complement to national constitutionalism. Human rights and democratic self-governance can be protected more effectively across frontiers—in the global economy no less than in the polity—only in multilevel constitutional frameworks protecting human rights and rule of law at local, national, regional, and international levels of citizen-driven government. Yet, multilevel constitutionalism, GAL, and multilevel judicial governance remain inevitably imperfect constraints of the antagonistic, human interactions at national, transnational, and international levels. Hence, their empowering functions, limiting functions, legitimizing functions, and structural interrelationships need to be constantly reviewed in order to protect universal and particular procedural, as well as substantive, principles of justice more effectively for the benefit of citizens, their constitutional rights, and their reasonable attempts at reconciling their conflicting desires, rational egoism, and limited reasonableness through moral, constitutional, and other legal restraints, mutually beneficial trade and other co-operation.

**Select Bibliography**


Select Documents

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