

The World Trade Organization

Why and How It Matters for Palestinian Businesses

Hadil Hijazi and Hannes Schloemann



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LIST OF ABBREVIATIONS

CET	Common External Tariff
CTD	Committee on Trade and Development
CVA	Customs Valuation Agreement
DDA	(Doha Development Agenda (Negotiations
DSB	Dispute Settlement Body
EFTA	European Free Trade Area
EU	European Union
FTA	Free Trade Agreement
GAFTA	Greater Arab Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariff and Trade
IAA	EU-PLO) Interim Association Agreement)
IMF	International Monetary Fund
LDC	Least Developed Country
MFN	Most Favoured Nation
MFTR	Memorandum on the Foreign Trade Regime
MTS	Multilateral Trading System
NTB	Non-Tariff Barrier
NTF	National Task Force
PLO	Palestine Liberation Organization
PNA	Palestinian National Authority
RTA	Regional Trade Agreement
SCM	Agreement on Subsidies and Countervailing Measures
SDT	Special and Differential Treatment
SPS	Agreement on Sanitary and Phytosanitary Measures
SSM	Special Safeguard Mechanism
TAT	Technical Advisory Team
TBT	Agreement on Technical Barriers to Trade
TPR	Trade Policy Review
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Intellectual Property Rights
VAT	Value Added Tax
WTO	World Trade Organization

INTRODUCTION

Palestine is a trading nation, and Palestinian businesses are the main stakeholders in Palestinian trade policy. Palestine is a party to several trade agreements, and it is aiming to obtain observership, and possibly later membership, in the World Trade Organization (“WTO”). And yet, most Palestinian businesses know very little about trade policy, trade agreements and the WTO.

This booklet provides Palestinian businesses with basic information and orientation on issues relating to the World Trade Organization, on other trade agreements and on trade policy more broadly. It aims to be practical, business-oriented and user-friendly. It explains the issues in plain language; it locates Palestinian business interests in the maze of WTO rules; and it corrects misunderstandings. It wants to stimulate the interest of Palestinian businesses in understanding the rules and processes of the WTO System, also known as the multilateral trading system (“MTS”). It aims to help elevate the national debate on Palestine and the WTO, to better enable Palestinian stakeholders to identify and support what is good for them and the country, and to identify and oppose what is not. And it wants to encourage Palestinian businesses to get engaged: To participate in trade policy making, to shape future trade relations by supporting trade negotiations, and to enforce their rights under WTO and other trade agreements.

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1. WHY THE WTO MATTERS FOR PALESTINIAN BUSINESS

1.1 Why the WTO matters: a few cases to consider

All businesses have experienced transactions where they face unexpected, unfair or discriminatory treatment in other countries. Consider, for example, cases like the following (fictional) stories:

- Palestinian exports of olives to China are taxed higher than olives from Lebanon
- Palestinian lamb meat exports to the United States face expensive extra inspections because, as the US authorities explain, there have been cases of severe disease in lambs “in the Middle East” (the cases were in Bahrain)
- Palestinian high-quality stone tiles face unfair competition on the European Union (“EU”) market from subsidized tiles from Italy and Indonesia
- A Palestinian lawyer wants to advise clients in Iraq on WTO law, but finds out that the law there requires that one needs to have an Iraqi law degree and an office in Iraq to “practice law” there
- A Palestinian pharmaceutical company has patented a new pneumonia drug. This drug, however, is copied in Zimbabwe under a “compulsory license” granted by the Zimbabwean government to a local company with no royalties paid to the Palestinian company

What can the affected businesses do? They can, of course, try to talk to the local authorities in the relevant countries and convince them to change their measures. They can also try to use local courts. And they can try to get the Palestinian government to make their case for them. But if the local law and the local authorities are not on their side, probably little will happen, and that will be the end of the story – the Palestinian businesses will have to live with the exaggerated, discriminatory or unfair measures because there is no higher law that protects them.

The situation is very different, however, if and when Palestinian businesses have (indirect) **rights** under WTO law or other trade agreements.¹ This is what the WTO and trade agreements are there for. Take the above stories, for example:

- If China taxes Palestinian olives are higher than olives from Lebanon, this is a discrimination which violates the WTO’s Most-Favoured Nation (“MFN”)

¹ Because WTO and other trade agreements are government-to-government treaties only governments have direct rights and obligations under them, so usually business cannot use them directly. In particular, businesses cannot engage foreign governments in WTO dispute settlement – their governments have to do that for them. But of course these rights are meant to benefit businesses and their transactions, and businesses can use them indirectly in various ways, with or without the help of their government (how this is done is explained in Section 1.2 below).



principle, which obliges China as a WTO Member to treat all foreign goods the same. If Palestine were a Member of the WTO, or had similar rights under a bilateral trade agreement with China, it would thus have the right to demand from the Chinese authorities to stop its discriminatory tax treatment of Palestinian olives.

- If the United States' authorities demand that Palestinian lamb meat exports to the United States undergo expensive extra inspections just because there have been cases of lamb disease "in the Middle East" (in Bahrain), this would likely violate the WTO's Agreement on Sanitary and Phytosanitary Measures ("SPS") Agreement which requires WTO Members to apply scientific principles, conduct a proper risk assessment and recognize pest-free areas – so the fact that there were cases of disease in Bahrain, which is far away from Palestine, would not be sufficient to justify their measures. If Palestine were a Member of the WTO, or had similar rights under a bilateral trade agreement with the United States, it could demand from the United States to stop requiring the costly extra inspections.
- If Palestinian high-quality stone tiles face unfair competition on the EU market from subsidized tiles from Italy and Indonesia, the subsidies granted by the Italian and the Indonesian government may violate the WTO's Agreement on Subsidies and Countervailing Measures ("SCM") Agreement because they cause significant damage ("adverse effects") to Palestinian exports. As a WTO Member, or as a party to similar trade agreements, Palestine could request the subsidies to be removed.
- If a Palestinian lawyer wants to advise clients in Iraq on WTO law, but cannot do so because the law there requires that she needs to have an Iraqi law degree and an office in Iraq to "practice law" there, this may be in violation of the WTO's General Agreement on Trade in Services ("GATS") – depending on what specific commitments Iraq makes when it accedes to the WTO (Iraq is not yet a Member, but is currently negotiating its accession). Again, if Palestine can rely on WTO law or similar provisions in other trade agreements which cover trade in services the Iraqi authorities will have to remove the requirements and allow the lawyer to advise its Iraqi clients – thus export her legal services to Iraq.
- If Zimbabwe allowed the patented Palestinian pneumonia drug to be copied under a "compulsory license" without paying the Palestinian pharmaceutical company a fair royalty, this may violate the WTO's Agreement on Trade-Related Intellectual Property Rights ("TRIPS") Agreement, which guarantees the protection of patents in WTO Member countries. Of course Palestine can only rely on this protection if it is a Member of the WTO or has similar treaty arrangements with Zimbabwe.



1.2 it's all about rights

As the cases illustrate, the WTO and other trade agreements confer rights which matter greatly for Palestinian producers and exporters of goods and services, and for owners of intellectual property rights.

Being able to rely on these rights fundamentally changes the rules of the game – and hence business reality. In most cases there is no need to even go very high. Foreign authorities usually recognize it when they are made aware that their measures violate WTO law or other trade agreements, and they will change them accordingly when faced with complains from businesses. But even if they resist, local courts may help as they apply local law in accordance with WTO and other agreements, thus granting businesses the rights their government has negotiated for them. And of course the Palestinian government would be in a much stronger position to demand from the foreign government to change its behavior – if need be by going through the powerful WTO Dispute Settlement System, or a similar arbitration under a regional or bilateral trade agreement.

Rights under the WTO or other trade agreements, in other words, makes business cheaper and – most importantly – more predictable, and hence provide significant value to businesses.

1.3 Businesses Need to Know

Businesses need to know as much as possible about these rights to assess their value for them and to use them when faced with obstacles like those in the examples above. The following chapters contain many more examples which will help Palestinian businesses understand “what’s in it for them.”

Only knowing these rights will allow businesses to be ready for change and take action where their interests are at stake.

1.4 What about Obligations?

The WTO and other trade agreements, of course, are not one-way streets. Being a Member of the WTO or a party to another trade agreement means that Palestine will have to grant similar rights to foreign producers and exporters of goods and services when these export to Palestine. The same applies to foreign holders of intellectual property rights such as patents, copyrights or trademarks. In principle all trade agreements rely on the principle of reciprocity – your rights are my obligations, my rights are your obligations.

What exactly Palestine would have to do, however, is partly a matter of negotiation. This is very important to understand, because it means that Palestinian



businesses have to be fully engaged to let their government know their interests.

If, for example, a promising Palestinian industry needs the protection of tariffs (customs duties collected at the border) to be viable and able to compete with imported products, it is important to make sure that Palestinian negotiators do not agree on an elimination or reduction of the relevant tariffs, or at least (if the other party has a strong interest in exporting the competing products to Palestine and strongly demands a tariff reduction) keep a reasonable tariff in place which provides reasonable protection. This can be negotiated.

The same applies in the area of trade in services. While many Palestinian service providers are very competitive and export their services, and are thus interested in securing the rights available under the WTO and other trade agreements, some providers may require protection against foreign competition to remain viable in Palestine. Palestinian negotiators would thus have to make sure not to make commitments in that services sector, or to ensure that the commitments are so limited that they do not affect the viability of the local services industry.

While important market access details (such as tariffs on goods, and market access commitments for services) are negotiated, many WTO disciplines, however, are non-negotiable. The basic rules in the GATT, the GATS, the TRIPS Agreement, the SPS Agreement, the Agreement on Technical Barriers to Trade (“TBT”) Agreement and other agreements must be accepted by all WTO Members (this is often called the “Single Undertaking”).

This is a bit different when regional or bilateral agreements are negotiated. There, the parties are free to negotiate everything, but often the flexibility is limited as most parties agree that many “best practice” rules which often reflect modern “good governance” principles (see, for example, the example of Palestinian lamb meat above where the SPS obligations on the US government are really just common sense).

1.5 Many WTO Obligations already Apply to Palestine – but not the Rights

Looking at the WTO obligations, some Palestinian businesses and other stakeholders may wonder whether it may not be better to stay away from the WTO. They may be overlooking an important fact: Many of the most important WTO obligations already apply to Palestine today. This is because the bilateral and regional trade agreements which Palestine is a party to often already today include key WTO obligations.

Of course, Palestine formally only has to apply these in trade with those countries with which it has concluded these agreements, such as the EU, Turkey, the



Mercosur countries or its GAFTA partners. However, when it comes to many regulatory matters such as TBT, SPS, customs valuation, as well as general transparency disciplines and the like, it is often simply not practical to apply different rules and practices to trade with other countries. This means: Palestine already “pays the price,” but does not yet enjoy the benefits (the rights) when trading with countries such as China, India, South Africa, Pakistan or others.

1.6 Palestinian Businesses Need to Ensure their Interests are Taken Care of

Palestinian businesses thus not only need to know what the WTO and other trade agreements contain and how they work. This is crucial, but not enough.

They also need to get engaged from the beginning until the end – from the identification of Palestine’s interests through the formulation of (trade) policy and the negotiation of trade agreements (including WTO observership and later membership) to the actual implementation of obligations and the use of Palestine’s rights. In fact, they should have gotten engaged a long time ago, as bilateral trade agreements have already been negotiated. Of course, in order to get engaged they need to understand the mechanics and the rules of the game first.

Palestinian businesses should thus

- Identify their offensive interests in foreign markets. This means to clarify which tariffs, quotas, services licenses, discriminatory measures or other obstacles in foreign markets should be addressed;
- Identify their defensive interests at home. This means to clarify which products and services need protection from too much foreign competition;
- Identify import interests. This means to clarify which goods and services Palestinian businesses need or want to import, in particular where they need them as inputs for their own production of goods or services. In these cases Palestinian businesses would suffer if importation were unnecessarily burdensome or costly;
- Identify their interests in the implementation of WTO and other trade rules in Palestine. In addition to “pure” offensive, defensive and import interests, Palestinian businesses must understand and identify their interests with regard to the implementation of disciplines under the WTO and other trade agreement Palestine is a party to. This means assessing what rules currently apply, what would change if and when Palestine joins the WTO and becomes party to other agreements, and how this would impact their businesses – positively or negatively;



- Articulate and communicate these interests to the government. The government can only represent, advance and protect interests it knows of, and needs businesses to articulate these very clearly;
- Participate in the preparation and conduct of negotiations. For the same reason Palestinian businesses must support and back up their government in its preparations for, and its conduct of, negotiations, whether in GAFTA, the Palestinian-EU negotiations, the Palestinian-Israeli negotiations on economics or the WTO accession/observership context;
- Contribute to the design and implementation of trade agreements in Palestine. International agreements need to be implemented locally. Often there are design choices to be made (e.g. how to recognize foreign professionals' qualifications; how to design food inspection mechanisms; etc.), which needs inputs from the affected businesses. Again, knowing and understanding the WTO and other international trade rules is, of course, crucial for businesses to fully articulate what they need and how it can be properly designed and implemented under the international trade rules; and
- Enforce Palestine's WTO/trade agreements rights. Finally, businesses need to be alert and engaged in order to effectively enforce their (Palestine's) rights under the WTO and other trade agreements. Rights will often be violated, in most cases inadvertently. This is true in all legal systems, and the WTO and other trade agreements are no exception. Businesses who understand their rights and articulate and defend them (if need be by enlisting their government's help) will enjoy the benefits.



2. THE WTO: A SYSTEM OF RULES, INSTITUTIONS AND PROCESSES

2.1 What is the WTO? What are Trade Agreements?

There are many ways to describe trade agreements in general and the WTO System, also called the Multilateral Trading System ("MTS"), in particular.

The essence can perhaps be put in one sentence:

The WTO and other trade agreements are systems of rules, processes and institutions through which governments mutually discipline their use of trade-distorting policy measures in order to create predictability and reliability in international trade.

What does this mean? Let's take a brief look at the elements, starting from the back:

- **Predictability and Reliability:** Every businessperson knows: The worst thing in business is an unpredictable situation. Lack of predictability means that businesses cannot calculate properly, and hence must calculate significant safety margins or pay significant insurance fees, or both – the "risk premium." As a result, many transactions become more expensive than necessary, or do not happen at all. Opportunities are missed, growth is reduced, development is stifled and businesses suffer.
- **Trade-Distorting Policy Measures:** In order to create better predictability and reliability the WTO and other trade agreements focus on controlling measures that distort trade. Trade, in principle, means division of labour. Trade helps allocating resources and efforts in an optimized way, ensuring that businesses and countries get the chance to use their comparative advantages. Manipulating or distorting that mechanism can thus create unnecessary waste (direct costs through higher prices, lost opportunities, etc.). It may, however, sometimes still be the best available option to achieve a legitimate goal. But in many cases governments use trade-distorting measures (tariffs, quotas, bans, licensing procedures, etc.) for short-term gains at the expense of others, and at the expense of overall efficiency. Because other governments do the same, often the overall result is that there is a net loss for their countries (while some special interests, for example individual businesses, may still gain from advantages they manage to secure).
- **Discipline:** Trade agreements aim to impose disciplines on the use of such measures. These disciplines often do not ban the use of trade policy tools altogether, but create a reliable framework of boundaries which allows



businesses to predict what will happen, and rely on it in their calculations.

- **Governments:** The WTO and other trade agreements tackle governmental measures – laws, regulations, administrative practices, etc. They do not (directly) tackle other factors that influence business opportunities, for example the preferences of customers. So it is logical that it is governments who agree with each other on disciplines on their own use of such measures.
- **Mutuality/Reciprocity:** Governments do this on the basis of mutuality, or reciprocity. By promising not to use trade distorting measures against the trade of another country, we obtain the reciprocal promise that the other country's government will equally abstain from applying trade-distorting measures to our trade (e.g. exports of goods or services to that country). In other words: Trade agreements are a bit like disarmament treaties: Both parties reduce their stockpile of weapons, and thereby reduce the risk of serious damage. The result is more security – or predictability and reliability – for businesses.
- **Rules:** The core of the trade agreements' mechanism are (substantive) rules, or disciplines. These rules, for example the rule that foreign goods are to be treated equally, without discrimination, or the rule that tariffs are only to be raised up to the agreed maximum level (the "bound rates"), form the essence of the system. There are over 20 WTO agreements, each with a different substantive focus. All of these contain multiple rules.
- **Processes:** Both the application of rules and the generation of new or better rules requires solid processes – consultation processes, dispute settlement processes (courts), negotiation processes, monitoring processes, etc. This is true for any state and other legal system, and the WTO is no exception. So the WTO, for example, maintains a highly respected dispute settlement mechanism, perhaps the world's most effective international court system, which allows Members to solve their trade disputes in a civilized way strictly on the basis of the agreed rules, or disciplines. These processes, thus, ensure that the rules actually work and apply – again securing predictability and reliability for businesses.
- **Institutions:** Processes need institutions to function. The WTO therefore maintains a highly efficient and well-oiled machinery of councils and committees, meeting frequently and regularly in Geneva, to discuss general and specific issues. The standing "Appellate Body" functions as an appeals court which reviews reports (judgements) issued by the dispute settlement panels. The 629 WTO Secretariat officials assist Members in running these institutions.
- **System:** The WTO is a system. This means that the rules, institutions and



processes form a logical whole where each element – rule, process, institution – has a place from where it interacts with other elements. This systemic logic is important to consider when applying the disciplines, and when negotiating new ones.

2.2 the WTO as a system of rules

The WTO is a system of rules and agreements negotiated among Members of the WTO. These agreements include the so called trade-related WTO agreements covering trade in goods, services and intellectual property rights, an agreement to settle trade disputes and an agreement to regularly review Members' trade policy. In addition, the WTO system of rules contains Members' individual commitments for the liberalization of trade in goods and services prescribed in Members' schedules of commitments. The terms of the schedules of commitments for those Members that joined the Organization after the establishment of the WTO in 1995 were negotiated with existing WTO Members during their accession process.

WTO rules balance Members' obligations to lower customs tariff and non-tariff measures, to open their services markets and to regulate the trade in ideas (intellectual property rights) with their right to enjoy similar guarantees when they trade in goods, services and ideas with their WTO trading partners. In other words, Members' obligations under WTO rules are rights for their trading partners, and vice versa.

When discussing WTO obligations Palestinian businesses should not only focus on the possible loss of their share in the domestic market as result of Members' rights to export goods and services to Palestine but should also reflect on their future gain arising from their right to access and export to WTO Members' goods and services markets. Membership in the WTO contains a package of rights and obligations. The quality of this package for Palestinian businesses is not predetermined but highly depends on the results of Palestine's accession negotiations. Chapter 3 below provides a detailed account of WTO accession processes and how Palestine can optimize its accession process.

The WTO system of rules contains key principles including the binding of commitments and the further liberalization of these commitments, non-discrimination and transparency.

Chief among these principles is the binding and progressive liberalization of commitments. WTO Members are obliged to bind their tariffs, i.e. establish maximum levels, referred to as bound rates, and not to increase their tariffs



beyond these bound rates.² Members can always apply lower rates than the bound rates.

WTO rules do not prescribe certain levels for tariff bindings or levels of liberalization of services markets. Based on negotiations each Member prescribes its bound tariffs in its individual tariff schedule and its services commitments in its schedule of specific commitments. These schedules are part of the WTO system of rules. The same applies to commitments on the reduction of agricultural subsidies.

WTO Members have also agreed to progressively further reduce their tariff commitments and liberalize their services markets. Further liberalization of commitments is sometimes undertaken unilaterally by Members, but usually comes about as a result of multilateral negotiations among WTO Members such as the ongoing Doha Development Agenda (“DDA”) negotiations. In addition, Members often apply tariffs that are lower than their promised “bound rates” and grant better treatment to foreign services and service providers than they are obliged to grant under their GATS commitments.

The binding of commitments aims to ensure the stability and predictability of trading conditions for WTO Members, and hence the stability of the MTS overall. This predictability is further enhanced through a set of transparency obligations including the obligation to publish domestically trade-related rules and procedures and notify the WTO of any changes to these rules. The WTO Trade Policy Review Mechanism (“TPRM”) provides another layer of transparency by regularly reviewing Members’ administration of their trade policy regimes.

Another key principle of the WTO rules-based system is non-discrimination. WTO agreements oblige WTO Members (1) to treat imported goods from WTO Members the same as they treat their domestic goods – after imposing the relevant border measures including tariffs on these imported goods. This non-discrimination principle is referred to as the national treatment principle. The national treatment obligation is available, in variations, in all WTO agreements. WTO rules further oblige WTO Members (2) to treat WTO Members same and not accord any privilege to one or more WTO Members without extending such privilege immediately and unconditionally to all other WTO Members. This non-discrimination principle is referred to as the MFN (most-favoured nation) principle. This term may sound counter-intuitive in today’s almost universal MTS where 159 WTO Members are entitled to MFN treatment. Historically the MFN principle was developed at a time when the MTS (the GATT at

2 If Members want to increase their tariffs beyond their bound rates, they have to negotiate with interested parties (Members) and the results of the negotiations might involve compensation to these interested parties for trade losses as a result of increase in tariff.



the time) was a much smaller club of members and these members promised to grant each other treatment that was not granted to third parties outside the club. However, the term MFN still makes a lot of sense for those who are not WTO Members, such as Palestine, and who do not necessarily benefit from MFN tariff rates and MFN market access for their services – who are thus not among the “most-favoured nations.”

There are a few important exceptions to the MFN principle. WTO Members are allowed to conclude regional trade agreements (“RTA”) such as customs unions and free trade agreements (“FTAs”) under which they can exchange privileges such as duty free treatment of goods without multilateralizing these privileges. WTO Members are also allowed to unilaterally grant lower tariffs to goods from developing countries, provided they treat similar countries the same. Under these “Generalized System of Preference,” or GSP schemes some countries grant additional privileges to Least-Developed Countries (“LDCs”). For example, the European Union (“EU”) grants duty free and quota free treatment to imports from LDC under its “Everything but Arms” initiative. WTO Members are also allowed to grant services and service providers from LDCs special rights which they do not grant to other WTO Members.

The MFN principle will, therefore, not limit Palestine’s efforts to conclude closer economic and trade agreements in the form of customs unions or free trade agreements (“FTA”) with its regional partners including the EU, the US and Arab countries individually or as part of the Greater Arab Free Trade Area (“GAFTA”). These RTAs have to fulfil certain conditions under WTO rules including comprehensive coverage if concluded with developed country Members. WTO rules contain less stringent rules on RTAs concluded among developing country Members including the possibility to conclude sectoral agreements covering goods trade.

The following sections provide an overview of existing WTO agreements, future WTO rules with a special focus on the ongoing negotiations on trade facilitation and an overview of exceptions and flexibilities available for developing and least developed countries.

2.2.1 The Existing WTO Agreements

The following is a brief overview of existing WTO Agreements covering trade in goods, services and intellectual property rights. The overview focuses on the main trade concerns addressed in these Agreements, a brief explanation of the Agreements and illustrative examples of how the Agreements play out in real life.



Multilateral Agreements on Trade in Goods

The largest group of multilateral agreements are those that deal with trade in goods. This does not mean that goods are more important than services or intellectual property rights, but it reflects the fact that trade in goods was originally the main focus of trade policy makers, and has attracted most attention.

These agreements are contained in Annex 1A to the WTO Agreement. They can be grouped in loose categories, namely (1) the GATT – the “General Agreement on Tariffs and Trade,” as the main and umbrella agreement; (2) sectoral agreements dealing with certain sectors, (3) agreements on technical standards and regulation, (4) agreements affecting the importation process and (5) agreements dealing with trade remedies as follows:

Box 1: Multilateral Agreements on Trade in Goods
(1) General Agreement on Tariffs and Trade – the GATT
(2) Sectoral Agreements <ul style="list-style-type: none">• Agreement on Agriculture• Agreement on Textile and Clothing
(3) Agreements on Technical Standards and Regulation <ul style="list-style-type: none">• Agreement on the Application of Sanitary and Phytosanitary Measures• Agreement on Technical Barriers to Trade
(4) Agreements affecting the Importation Process <ul style="list-style-type: none">• Agreement on Implementation of Article VII of the GATT (Customs Valuation Agreement)• Agreement on Preshipment Inspection• Agreement on Rules of Origin• Agreement on Import Licensing Procedures
(5) Agreements dealing with Trade Remedies <ul style="list-style-type: none">• Agreement on Implementation of Article VI of the GATT (Antidumping Agreement)• Agreement on Subsidies and Countervailing Measures• Agreement on Safeguards



i. The GATT – the “Mother of All Trade Agreements:” Goods Facing Tariffs, Quotas and Discrimination

What are the Issues?

Imports of goods face many obstacles before they reach their customers: At the border there are customs duties (tariffs) to be paid, import quotas (or even import bans) to be respected, procedures to be undergone. Sometimes there is discrimination when goods from some countries are treated better, for example, attract lower duties than goods from other countries. But even behind the border foreign goods may face challenges, such as discriminatory taxes or regulations in the market which disadvantage them in their competition with local products.

What the GATT Says

General Agreement on Tariffs and Trade (“GATT”), which has been around since 1947, is the main and umbrella agreement for disciplines on trade in goods. It contains many fundamental and important rules which deal with the issues described above, and many more. These rules are still of fundamental importance and value for businesses. In a nutshell:

- **Customs Tariffs: Maximum “Bound Rates.”** The GATT, in its Article II, foresees that WTO Members make binding commitments on maximum tariffs they will apply to specific goods. These commitments are individual for each Member, they are individually negotiated (in “trade rounds” and/or in the process of WTO accession), and they vary from Member to Member. Once agreed Members are not allowed to raise tariffs above the maximum level they have promised to respect.
- **Discrimination between Foreign Goods of Different Origin: The MFN Principle.** This is arguably the mother of all trade principles: GATT Article I requires that Members do not treat goods from any other WTO Members worse than they treat goods from any other country. This is the Most-Favoured Nation or the MFN, principle. This is very important for export businesses. It means that they can expect to compete on an equal footing with all other foreign goods on that Member’s market, and can resist any discrimination. Except, of course, where exceptions are applied in conformity with the GATT. These are very limited. The most important exception is that Members can enter into Customs Unions or Free Trade Agreements and then grant preferential treatment, for example duty-free market access, to goods from their partner countries.
- **Discrimination between Foreign and Domestic Goods: The National Treatment Principle.** GATT Article III requires WTO Members to treat products from other WTO Members, once these have cleared the border, on an equal



footing with their domestic products. This applies to taxes, and it also applies to all other laws and regulations, for example rules on distribution, sales, or storage. In other words: Once they have reached the market foreign goods from WTO Members must be allowed to compete with local products without discrimination.

- Bans, Quotas and other Quantitative Restrictions. GATT Article XI prohibits the use of any bans, quotas or other quantitative restrictions on the importation of goods. Of course, where legitimate policy concerns require governments to restrict importation (for example: ban the importation of disease-infected meat), such measures are fully covered by exceptions or even special WTO agreements (for example the SPS Agreement, discussed below). But all quotas and bans which are only applied for protectionist reasons are prohibited. This is very important for businesses: They know that their exports to another WTO Member's market can only be restricted for non-trade policy reasons, and not because the importing government suddenly feels it wants to protect domestic competitors.
- Transit, Customs Fees and Formalities, and other Import Regulations. The GATT guarantees freedom of transit for goods from one WTO Member through the territory of another WTO Member. It also guarantees that no excessive customs formalities apply, that fees at customs are not higher than the costs of the services they cover, and that import rules and procedures are transparent and administered reasonably. While these disciplines are broad and need further refinement (negotiations are under way and will likely produce a new "Trade Facilitation Agreement," discussed below), they are already now of immense value for businesses who know that they cannot be subjected to unreasonable treatment and fees. For Palestinian businesses the transit guarantee is perhaps most interesting. Not only it guarantees free passage but also ensures that goods in transits are not subjected to unnecessary delays or restrictions or taxes in excess of the reasonable costs of transit.
- Anti-Dumping, Safeguards and other Trade Remedies. The GATT, drafted in 1947, already foresees that when Members apply exceptional measures against unfair trade practices (for example against imports that are unfairly cheap because of dumping or subsidies), or against massive, sudden and unforeseen import surges, they do so only under certain conditions. In the meantime these rules have evolved, and these cases are now dealt with under specialized WTO agreements discussed below.
- General Policy Exceptions: Health, Environment, Security etc. No system can operate without exceptions which accommodate reasonable concerns.



Governments, of course, have to protect their citizens' safety and security, have to secure law and order, and have to protect the environment, to name just a few. Article XX of the GATT, therefore, allows Members to take measures that violate the trade principles above if and when these measures are taken to safeguard legitimate non-trade policy concerns, such as health and safety of people, animals and plants; public morality; the environment; or the protection of national artistic treasures; etc. Importantly, however, the provision ensures that such measures are not protectionist in disguise and are not more trade restrictive than necessary to achieve the legitimate policy goal. This is important for businesses as the temptation for governments is great to abuse such exceptions to create unfair advantages for special business interests. GATT Article XXI allows for national security measures to trump trade rules – provided, however, these are not obviously abusive.

The GATT in Practice: Examples for Businesses

Businesses, of course, immediately understand the value these rules bring to them: they protect them against abuse, against discrimination and against trade obstacles that are higher than expected. Here are a few fictional examples which illustrate the case:

- Pakistan Suddenly Raises Customs Duties on Stone and Marble from 5 per cent to 50 per cent. As a result, Palestinian exports to Pakistan can no longer compete with local Pakistani stone and marble products, and lucrative contracts with Pakistani building contractors threaten to fall apart. The Palestinian businesses and their Pakistani customers can now check: If Pakistan under the GATT has bound its tariffs on stone and marble at a maximum of 20 per cent (the "bound rate"), they can demand from the Pakistani government that it reduces its tariff to that level, if necessary by engaging the Palestinian government. As a result, Palestinian stone products can now again compete in the Pakistani market.
- Egypt Requires Foreign Textiles and Leather Products to Be Sold in Special Stores. Egyptian customers of Palestinian leather products now no longer find these products in normal stores alongside Egyptian products, and as a result sales go down. This is a violation of the National Treatment principle in the GATT (and in GAFTA). Palestine and other countries exporting leather and textile products to Egypt can demand that this discrimination be stopped.
- The EU Imposes an Import Quota on Foreign Olive Oil to allow Spanish, Italian and Greek olive farmers and processors to sell their surplus on the EU market without too much foreign competition. This is a violation of GATT Article XI (and also of the corresponding provision in the EU-Palestine



Interim Association Agreement), which prohibits quantitative restrictions on imports from WTO Members (from Palestine). Palestinian olive oil exporters, alone or together with exporters from other countries, can demand that the quota is abolished and Palestinian olive oil can once again be imported without restriction into the EU. If need be, they can engage their government to make the case formally.

- Mexico Allows Duty Free Imports of Pharmaceuticals from Brazil and Argentina, but Keeps its Normal Tariff of 10 per cent in Place for Palestinian and other Products. This means that Mexico is discriminating among foreign “like products” from different countries. This is a violation of the MFN principle. Mexico can be asked to stop this discrimination and treat all foreign Pharmaceuticals from WTO Members equally. Of course, as long as Palestine is outside the WTO and does not have a trade agreement with Brazil, Brazil can continue to treat its products differently.
- Jordan Charges High “Transit Fees” for Palestinian Exports through Aqaba. This would be a violation of GATT Article V, unless the fees represent actual costs (for example for the processing of Palestinian goods in transit at the bridge and in Aqaba). If the fees are in fact a disguised tax, Palestine and its exporters can demand that they are removed or reduced to the actual level of costs.

Box 2: Classical Misunderstandings – “GATT Eliminates Tariffs”

“The WTO means free trade. Palestine will have to eliminate all customs duties. Businesses will lose all protection, and the country will lose all customs revenue.” This is wrong. WTO Membership means agreeing to maximum tariff levels for each product (“bound rates”), but it does not automatically mean eliminating customs duties. The level of “bound rates” is a matter of negotiation. Other WTO Members may request Palestine to reduce tariffs on this or that product, but in most if not all cases where Palestine has an actual interest in keeping tariffs in place this can and should be negotiated. This, of course, means that Palestinian businesses need to work with the government to ensure that such interests are properly protected.



ii. Sectoral Agreements

The Agreement on Agriculture

What Are the Issues?

Since 1947 the GATT applies to all products, whether agricultural or non-agricultural. However, many countries continued to treat agriculture as a special case. They applied quotas and kept granting massive subsidies, in many cases even outright export subsidies, often in violation of the GATT. This has distorted markets in agricultural products worldwide. The worst offenders were the big developed countries who could afford major subsidy programmes. The major losers were developing countries which could not play out their comparative advantage in agricultural production. Since 1995 the WTO's Agreement on Agriculture tackles this "wild" situation.

What WTO Law Says: The Agreement on Agriculture

The Agreement on Agriculture addresses in particular three issues:

- **Subsidies Bound and Scheduled for Reduction.** The Agreement requires all WTO Members to bind their export and domestic subsidies at agreed maximum levels and reduce them over time. There are, however, significant *de minimis* exceptions, which means that developing countries which do not have high subsidy levels anyway (because they cannot afford them) can continue to provide reasonable subsidies to farmers where this is useful. The same applies to subsidies granted as relief in case of natural disasters (for example flooding or major storms).
- **Tariffs instead of Quotas and other "Funny" Measures.** WTO Members had to transform all quotas and other quantitative and similar measures into tariffs (this process is called "tariffication"), agree to bind them ("bound rates," as for other goods) and reduce tariff levels over time down to a reasonable level.
- **Special Safeguards.** Because some countries feared that tariffication would inadvertently lead to unexpected increases in imports, threatening their farmers, WTO Members agreed that they could apply "special safeguards" in such exceptional situations. In the current Doha Round (or DDA) negotiations Members are discussing whether to create a new Special Safeguards Mechanism ("SSM") which would allow developing countries to apply an easy-to-use tool to raise tariffs on specific agricultural products when these come in at very low prices and/or in very high quantities and threaten local farmers.

Illustrative Examples

- Palestine has become a Member of the WTO. Indonesian exporters of palm



oil complain that Palestinian subsidies for new palm plantations in Jericho are illegal under WTO Law. As part of its negotiated accession package Palestine will have agreed to maximum subsidy levels in agriculture, so one would have to check whether subsidies, if any, exceed agreed levels. However, most likely Palestinian subsidies will fall under the de minimis exception anyway and be safe from challenge.

- Jordan imposes variable import duties on Palestinian oranges. Whenever their price goes down, import duties automatically go up. The duty is calculated ad hoc at the border. This is illegal under Article 4.2 of the Agreement on Agriculture. Variable import levies had to be converted into ordinary customs duties and are no longer permitted. Jordan has to remove the measure and apply normal customs duties, if at all these are allowed under GAFTA and the GATT.

Box 3: Classical Misunderstandings – “Agriculture is Different”

“The GATT only applies to industrial goods. Agriculture is special and only subject to the Agreement on Agriculture. WTO Members can apply quotas to agricultural goods.” This is wrong. Agricultural goods are subject to the GATT and other agreements, just as all other goods. The Agreement on Agriculture adds to these disciplines by imposing special scrutiny on agricultural subsidies. It has “tamed” a previously unruly application of trade rules in the area of agriculture. In practice still more needs to be achieved (there is still abuse), and “bound tariffs” in agriculture are still high for many Members. This is why members are negotiating significant reductions in agricultural tariffs in the current Doha Round of trade negotiations at the WTO.

iii. Agreements on Safety, Standards and Technical Regulations

Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”)

What Are the Issues?

Governments are obliged to ensure that their citizens consume safe food according to acceptable and safe standards, and to protect the health and life of their animals and plants. However, such policies might also be excessive or used by governments as a disguised restriction on trade to provide protection to domestic products.



What WTO Law Says: The SPS Agreement in a Nutshell

The SPS Agreement allows governments to undertake measures and implement regulations to protect their citizens from unsafe food and dangerous organisms and germs which may be contained in imported products. It also allows them to protect the health and life of their animals and plants which may be threatened by unsafe products which may carry diseases and pests.

These regulations, including food safety standards, however, (1) have to be based on scientific evidence, (2) must rely on proper risk assessments, (3) have to be applied only to the extent necessary to achieve the safety objectives and (4) must not discriminate between countries where the same conditions prevail.

WTO Members are encouraged to adopt international standards if they exist. International standards according to the SPS Agreement are only those developed by (a) Codex Alimentarius Commission for standards related to food safety, (b) the World Organization for Animal Health (OIE) for animal health standards and (c) the Secretariat of the International Plant Protection Convention (IPPC) for international standards related to plant health. When a government adopts international standards developed by these organizations it is presumed to act in compliance with the SPS Agreement.

If international standards are not available or if Members want to apply higher levels of sanitary and phytosanitary protection than those provided by existing international standards, they are allowed to do so provided that these measures are based on scientific evidence.

Importantly, in situations where a new threat arises (for example a new disease-causing organism emerges, or an unknown disease suddenly afflicts certain animals), WTO Members are allowed to take measures on a provisional, precautionary basis even where the science is not yet clear. Such measures, however, have to be reviewed regularly as better science becomes available.

The SPS in Practice: Illustrative Examples

- **Food & Mouth Disease.** When the foot and mouth disease affecting certain animals broke out, WTO Members were allowed under the SPS Agreement to impose bans on imports of livestock from regions where the disease was endemic. The import ban as a trade (SPS) measure was necessary to protect the safety of humans in imported countries. In such cases, however, countries have to be treated even-handedly if the conditions are similar. Because the outbreak happened in several countries including the UK and Egypt for example, countries that imposed import bans on UK livestock also had to ban the importation of livestock from Egypt.



- **Import Ban on Chinese Soft Drinks Containing Toxins.** Import bans are extreme trade measures. Depending on the severity of the safety concern, other measures that are necessary to ensure food safety but yet are less trade restrictive should be considered by Members. If, for example, a country finds toxic material in soft drinks produced by one Chinese producer but not in drinks from other Chinese producers, import bans on all Chinese soft drinks might not be necessary while measures such as additional testing procedures might be sufficient to ensure that imports of soft drinks from China are safe. In general, however, the SPS Agreement allows governments to err on the side of caution when it comes to food safety.

Box 4: Classical Misunderstandings – “WTO Membership Means that One Cannot Ban Unsafe Food Imports”

“The WTO demands free trade. This means that WTO Members have difficulties keeping low-quality food out of the market because they have to accept all imports from all WTO Members.” This is wrong. WTO Member governments can take any measure necessary to ensure that food is safe. The SPS Agreement only requires Members to base their measures on scientific evidence and on proper risk assessments. Where the evidence is still incomplete (for example because the disease comes from new bacteria which scientists are still examining), Members can still take provisional measures until the science is clear.

Agreement on Technical Barriers to Trade (“TBT Agreement”)

What Are the Issues?

Both voluntary standards and mandatory technical regulations³ are important to ensure safety, consumer protection, fair competition and environmental protection. Standards also often simply help the industry and consumers to avoid incompatibilities of products.

But technical regulations and standards can also be problematic for trade in at least two ways. First, high standards and tough technical regulations may be difficult to meet. This is unavoidable where they are necessary to protect legitimate interests such as safety, but unnecessary where a less strict measure would already achieve the aim.

3 The TBT Agreement defines “technical regulations” as mandatory and “standards” as voluntary. This terminology is not always used in the same way elsewhere. Often the word “standards” is used to imply also mandatory measures imposed by governments. In the WTO these would be called “technical regulations.”



Second, when standards and technical regulations vary from one country to another these differences alone make compliance for producers and exporters a doubly difficult and costly task. The result is that producers often comply with standards and technical regulations in some markets and not others, thereby missing out on some export markets and forgoing the benefits of economies of scale.

Businesses know both problems well. It is thus not surprising that TBT and SPS measures are the most frequently encountered non-tariff measures and are considered the most burdensome for exports according to the 2012 WTO World Trade Report.

What WTO Law Says: The TBT Agreement in a Nutshell

The TBT Agreement tries to balance the right and duty of governments to protect legitimate interests with their obligation to avoid unnecessary trade barriers. It supports their right to achieve legitimate regulatory objectives such as ensuring the quality of exports, safety, consumer protection, fair competition, environmental protection and the protection of national security through the application of technical regulations, standards and testing and certification procedures. But it also imposes an obligation on governments to avoid creating unnecessary barriers to trade, which includes the obligation to seek harmonization where possible.

In a nutshell, the TBT Agreement addresses the following:

- **Scope.** The TBT Agreement tries to discipline the preparation, adoption and application of standards, technical regulations and conformity assessment procedures. Standards and technical regulations include packaging, marketing and labelling requirements including product-related processes and production methods. Conformity Assessment Procedures are the procedures used for assessing conformity with the requirements of technical regulations or standards.
- **Non-discrimination.** WTO Members must not discriminate between imported and domestic products (national treatment) or among imported products from different countries (MFN) when applying technical regulations and standards. Similarly, conformity assessment procedures should not be prepared, adopted and applied in a manner than discriminates between foreign and domestic products or among foreign imported products.
- **Use of international standards.** The TBT Agreement encourages the use of international standards when available and relevant as a basis for technical regulations and conformity assessment procedures. The use of international standards reduces regulatory fragmentation and allows for harmonization of technical regulations which makes compliance with different regulatory



systems less of a challenge for producers and exporters. There is an additional benefit when it comes to WTO compliance: When governments adopt international standards as a basis for their technical regulations and conformity assessment procedures, they are presumed not to create unnecessary barriers to trade according to the TBT Agreement. Unlike the SPS Agreement, the TBT Agreement does not specify which international standardizing bodies provide international standards.

- Least trade restrictiveness. If international standards are not available or if governments want higher levels of protection than provided by international standards they are free to adopt technical regulations that fulfil their policy goals, provided that these technical regulations are not prepared, adopted or applied in a manner that is more trade restrictive than necessary to achieve their intended objective. When assessing the risks of non-compliance, governments are required to take into account available scientific and technical information and the end use of the product. In addition, the TBT Agreement mandates governments to review and amend their technical regulations if the reasons or risks which justified their measures no longer prevail.
- Mutual Recognition. The TBT Agreement encourages government to recognize each other's conformity assessment procedures to avoid subjecting products to multiple testing procedures.
- "Code of Good Practice" for Standardizing Bodies. More and more voluntary standards are applied in business practice, and even though they are not technically mandatory may be almost as burdensome for businesses as mandatory technical regulations would be. The TBT Agreement sets out a "Code of Good Practice" for government and industry standardizing bodies in regard to the preparation, adoption and application of voluntary standards. Where standards are developed by a standardizing agency run by the central government, the agency must subscribe to the "Code of Good Practice." For private and local government standardizing bodies there is only the obligation on the central government of the WTO Member to do its best to ensure their compliance with the Code.

TBT in Practice: Illustrative Examples

- US "Dolphin Safe" Label. In an effort to avoid accidental dolphin mortality in the process of tuna fishing, and because many US consumers were deeply concerned about the problem, the United States government established an exclusive "dolphin safe" label for the sale and import of canned tuna. For products to be allowed to carry such a label, the exporting country had to



abstain entirely from a certain fishing method. Other “dolphin safe” labels were not allowed even where it could be proven that dolphins were not hurt. As a result, Mexican tuna could not be labelled “dolphin safe” in the US market, and hence was difficult to sell as most wholesalers and retailers were not ready to stock any tuna without a “dolphin safe” label. Mexico challenged the US measure (which evolved over time) in three consecutive cases before the GATT and at the WTO. Mexico eventually won the latest case before the Appellate Body (in 2012) because the measure was found to be discriminatory, as tuna from other world regions was assessed differently from tuna from the Pacific. Interestingly, the measure was found to be a technical regulation rather than a standard because the United States made it impossible to use another label, even if truthful.

- South African labelling requirement for settlement products. Earlier this year, the government of South Africa started requiring importers of products originating in Israeli settlements in Palestine to label these products as settlement products and not as Israeli products for purposes of consumer protection - in order to allow consumers to know where these products originate from and make their choice on the basis of such knowledge. Israel claimed that such labelling requirement is discriminatory vis-à-vis Israeli (settlement) products and as such are contrary to South Africa’s obligations under the TBT Agreement. However, settlement products are not Israeli products according to international law (because the West Bank is not part of Israel) and as such not subject to the disciplines of the TBT Agreement in the first place since Palestine is not yet a member of the WTO. For that reason alone South Africa’s labelling requirements are not inconsistent with its WTO obligations.

Box 5: Classical Misunderstandings – “WTO Obliges Members to Apply International Standards Even where these Don’t Fit”

This is not correct. The TBT Agreement requires Members to base their technical regulations on international standards, but they may go beyond these (or remain below their level) if this is warranted. Also, where international standards do not fit the specific circumstances of a Member (for example its climate or environment), they do not have to be followed. For developing countries there is more flexibility – they can deviate from international standards for reasons of their developmental and financial needs.



iv. Agreements Affecting the Importation and Exportation Process

Agreement on Rules of Origin

What Are the Issues?

When states grant each other's goods special rights under the WTO Agreements or under other trade agreements (e.g. FTAs) – for example tariff bindings, National Treatment etc. – they aim to benefit goods which actually originate in their respective countries. Conversely they will want to retain the right to exclude from such rights those goods which do not originate in any of the Members/parties to the agreement – for example goods which have just been transshipped or repackaged, but which actually originate in third countries. It is therefore necessary to establish the origin of goods – in other words: their economic nationality. This is done by applying rules of origin.

The problem is: Countries so far design and apply their own national rules of origin to imported products. Free Trade Agreements often prescribe specific rules of origin (often on a product-by-product basis) which the parties will then apply vis-à-vis each other. The WTO, however, so far does not prescribe specific rules of origin. There is thus a risk that Members may exclude products from WTO-conform treatment (e.g. may charge higher tariffs than they agreed under the GATT) because these goods are not considered “products of other Members” under the national rules of origin. Other Members and their producers of those products may of course disagree with that classification and claim that their products should enjoy WTO rights.

What WTO Law Says: The Agreement on Rules of Origin

The Agreement on Rules of Origin does not actually contain specific rules of origin which Members are to apply to imports. The Agreement does, however, contain a set of principles which WTO Members are to apply when designing and applying their national rules of origin, such that rules of origin must be non-discriminatory, must be applied in consistent and reasonable manner, must be published, or must allow traders to obtain binding rulings on their goods' origin upon request (this is very important for traders, as it allows them to base their calculations on a firm ground).

In other words: The Agreement provides a framework of reasonableness, but no details yet. “Yet,” because under the Agreement WTO Members have embarked on a lengthy work programme to design and agree on a set of harmonized non-preferential rules of origin. This work has not yet been completed. Once the work is finalized, however, Members will have much more detailed prescriptions at hand, and rules of origin for trade conducted under WTO agreements will be largely harmonized in all WO Members.



The Agreement concerns primarily non-preferential rules of origin. These are the rules of origin which apply to trade which is not conducted under preferential agreements, such as FTAs (for example, GAFTA or the EU-PLO Interim Association Agreement). These FTAs contain their own rules of origin which determine which good will be considered “originating” for purposes of the application of the preferences granted by the respective FTA (e.g. duty free treatment for Palestinian products in the EU under the EU-PLO IAA).

The WTO Agreement on Rules of Origin thus concerns trade under multilateral (in particular WTO) disciplines; it does not concern preferential trade under FTAs (except for an annexed general “declaration” taking up some of the general principles).

The Agreement in Practice: Illustrative Examples

As indicated, the Agreement only provides for a framework of general principles. However, these are still relevant for traders and may provide them with valuable remedies against unreasonable and burdensome (application of) rules of origin. A (fictional) example:

- Kenya refuses to grant binding rulings on Palestinian origin for Hebron glass products. A Palestinian producer of artisanal hand-blown glass products who uses raw glass from Uzbekistan (not yet a WTO Member) applies to the Kenyan customs authorities for a binding ruling on whether the glasses will be treated as Palestinian (and hence enjoy WTO rights, assuming Palestine has become a Member). This is important as Kenya applies a 50 per cent tariff on glass products from non-WTO Members (such as Kazakhstan), while for WTO Members the tariff is “bound” (and applied) at a maximum of 10 per cent. If the 50 per cent tariff applies, the glasses from Hebron will be too expensive for the Kenyan customer. The Palestinian trader will thus benefit from the Agreement on Rules of Origin, which requires the Kenyan authorities to grant a binding ruling.



Box 6: Classical Misunderstandings – Marks of Origin v. Rules of Origin

Many products in many countries are labelled with an origin mark (e.g. “Made in Palestine”). Most countries regulate the use of such origin labels, especially for consumer goods, to ensure that consumers are not misled. Such “marks of origin,” however, have nothing (or very little) to do with rules of origin. Rules of origin determine the nationality of the product for purposes of customs (in particular: tariffs). Marks of origin serve to inform the consumer about where goods come from. While the underlying idea is the same (origin of the product), the purpose is different, and as a result the rules often differ. GATT Article IX contains general disciplines on the requirements of marks of origin.

Agreement on Import Licensing Procedures

What Are the Issues?

Like any procedure, procedures in the context of import licensing can in themselves operate as an obstacle to trade, for example when licenses are arbitrarily refused, or granted with significant delays, or when traders have to approach several different authorities for bits and pieces of the licensing process.

What WTO Law Says: The Import Licensing Agreement (AILP)

The Agreement on Import Licensing Procedures provides for a set of procedural rules and disciplines which aim to ensure that whenever WTO Members apply any licensing requirements to any imports, the procedure is conducted in a reasonable, impartial, speedy and reliable manner.

The AILP in Practice: Illustrative Example

The AILP thus helps traders to ensure that they are not subjected to unreasonable procedures when importing products. For example:

- **Importation of Narcotic Drugs.** The importation of narcotic drugs to Australia is subject to non-automatic import licensing procedures - meaning that the Office of Chemical Safety (licensing authority) in Australia has the discretion to decide on whether to grant the license or not in order to ensure that the imported quantities of narcotic drugs are in line with medical needs. The Office of Chemical Safety is required under the AILP to provide information about the licensing requirements and procedures, the licensing forms that importers need to fill and the time needed to process applications.



Box 7: Classical Misunderstandings – “We Have no Import Licensing”

Many people do not realize that the AILP principles apply to any license required for importation, whatever it is called – for example “permit,” “authorization,” “approval,” or the like. All such procedures are considered licensing procedures under the AILP if made conditional for importation and must, therefore, respect the disciplines of the AILP.

Agreement on the Implementation of Article VII of the General Agreement on Tariff and Trade – “Customs Valuation Agreement”

What Are the Issues?

Most import tariffs (duties) are calculated on the basis of the value of the imported product – for example: a 20 per cent tariff on shampoo means that a shipment of shampoo will attract a customs duty of 20 per cent of its value. But what is the value?

Two challenges arise: First, the importing country may be tempted to assume an arbitrarily high value, and thereby covertly raise its tariff, in reality, above the agreed “bound rate.” Second, importers and exporters may be tempted to “under-invoice” so as to suggest that the value of the goods is lower than it actually is, to save on the import duties. This may also happen without intent, for example where goods are shipped within a bigger company from a subsidiary in one country to another subsidiary in another country, applying internal “transfer prices” between the two subsidiaries.

What WTO Law Says: The Customs Valuation Agreement (CVA)

The Customs Valuation Agreement (CVA) establishes a clear system of rules for customs authorities when establishing the value of imported goods.

- **General Rule: Transaction Value.** As a general principle the value of the goods is the transaction value. That means, the price actually paid or payable – in other words: The price on the invoice. This means that customs authorities cannot apply a fictional price, for example based on a reference price list (in earlier times this was the practice in many countries).
- **When the Transaction Value is not Clear: Cascade of Alternative Proxy Methods.** However, what if there is no invoice (for example because the goods



are gifts or donations), or where the customs authority feels that the price on the invoice does not represent the actual value (for example because the seller and buyer are relatives or subsidiaries of the same company and the value seems too low/high)? In these cases the CVA requires that customs follows a strict cascade of alternatives, or proxy methods – only when the preferred alternative does not work can it use the next, and so on. These alternative methods try to make sure that the customs value is established as close as possible to the real value. The cascade looks as follows:

- Transaction Value of Identical Goods imported at around the same time, in similar quantities and at the same commercial level (e.g. wholesale). If this does not work:
- Transaction Value of Similar Goods imported at around the same time, in similar quantities and at the same commercial level. Here, under the second best alternative, the goods don't have to be identical in all respects (e.g. one could compare a Coca Cola with a Pepsi shipment). If this does not work the importer can choose which method comes next
- First Onward Sale in the Importing Country. This means looking at the price of the first "arms-length" sale (i.e., sale under normal commercial conditions) of the goods in the country of importation.
- Computed Value. The value can be calculated on the basis of production costs and assumed reasonable profits. This makes sense if the importer has those data (for example because this is a transaction between two subsidiaries) and is willing to share them with the customs authority.
- Fallback Method: "Reasonable Means." If all the above methods do not generate a reasonable result, customs may use all "reasonable means" consistent with the principles of the methods above to value the goods. This fallback method, however, does not mean that the authority can do what it wants. The valuation has to remain true to the principle: to get as close as possible to the real commercial value of the goods at the moment when they cross the border.

The CVA in Practice: Illustrative Examples

The aim of the CVA, again, is very simple: Get as close as possible to the real value. That's normally the price reflected on the invoice, but where that doesn't work, reasonable alternative methods have to be applied. A few (fictional) examples:

- Turkish Customs does not trust the invoice price of a shipment of Palestinian furniture and applies a "proxy method." It does so simply because the Palestinian producer/exporter and the Turkish importer belong to the same



Jordanian family holding, without further investigating the issue. However, the family holding is organized in a way that between the two companies prices are set on a normal, “arm’s length” commercial basis. Turkish authorities therefore have to accept the invoice price (the “transaction value”) as the customs value and cannot apply alternative methods.

- Sri Lanka authorities apply minimum reference value to Palestinian olive oil while the actual invoice price is lower. This is illegal under the CVA. The CVA prohibits the use of reference values. Sri Lanka Customs has to apply the transaction value, i.e. use the invoice price, or the alternative methods prescribed by the CVA, in sequential order.

Agreement on Preshipment Inspection

What Are the Issues?

Fewer and fewer countries require the pre-shipment inspection (PSI) of goods. This is usually delegated to inspection companies such as SGS. This process can not only be expensive for businesses. It can also put them in a position where they are facing private companies rather than customs officials that are less inclined to take recourse against problematic decisions. It may also require them to ship their goods through inconvenient routes so as to enable PSI companies to inspect them.

What WTO Law Says: The PSI

The Preshipment Inspection Agreement tries to strike a balance between the rights of WTO Members to require PSI, and the need for such requirements not to operate as excessive barriers to trade. It requires governments which use preshipment inspections to ensure non-discrimination, transparency, protection of confidential business information, avoidance of unnecessary delay, the use of specific guidelines for conducting price verification and avoiding conflicts of interest by the inspection agencies.

v. Agreements Dealing with Trade Remedies

Agreement on the Implementation of Article VI of the General Agreement on Tariff and Trade – “Anti-Dumping Agreement”

What Are the Issues?

Sometimes producers or traders decide to sell goods into foreign markets at prices that are lower than the prices they charge in their home market, and sometimes even below their own costs. This may be because they have over-capacity (e.g. a production plant for cars which is only running at half capacity), or because they plan to establish a higher market share before raising prices



again to higher levels after having damaged the competition (producers of local or other foreign “like products”).

Governments often want to protect their domestic industry against such unfair price competition from “dumped” foreign products, and hence take “anti-dumping” measures, usually in the form of additional duties (anti-dumping duties). However, governments and local industries may also be tempted to call for/apply such anti-dumping protection in an abusive way in cases where there is actually just fierce but fair competition, not unfair dumping.

What WTO Law Says: The Anti-Dumping Agreement in a Nutshell

The WTO’s Anti-Dumping Agreement (which builds on a basic clause in the GATT) allows Members to take anti-dumping measures in cases where there is actually dumping – i.e., where goods are sold into their market below their “normal value,” which is the price they fetch in their home market. (Dumping thus does not necessarily mean selling below cost – just below that “normal value,” or home market price.) In those cases WTO Members can apply anti-dumping duties on specific products from specific companies in specific countries, and these duties can be higher than the maximum “bound rates” for tariffs which must otherwise be respected.

However, because the risk that governments may abuse this right is great, the Anti-Dumping Agreement applies strict disciplines on anti-dumping investigations and on the application of anti-dumping measures. Governments who wish to apply anti-dumping measures must thus apply a number of procedural rules before they can do so. For example, they can normally only start such a procedure when there is sufficient support from the local industry (not just one or two disgruntled companies with good connections to the government); they must engage the foreign exporters in a fair procedure, through questionnaires and hearings, which allows them to explain how their (alleged dumping-) prices come about; they must respect timelines and transparency requirements; etc. They also have to establish that the dumping (if it occurs) is actually causing, or threatening to cause, economic “injury” to the local industry (not just inconvenient competition). And they can only apply anti-dumping duties to the extent necessary to solve the problem, namely to equalize the effects of dumping – not more.

In other words: The Agreement aims to ensure that governments only apply anti-dumping measures if and when it has been established through a fair and open procedure that dumping actually happens and that it causes or threatens to cause serious damage (“injury”).



The ADA in Practice: Illustrative Example

Because anti-dumping measures can be very severe for an affected company – in many cases it can effectively “kill” the market for them – the procedural rights are very important to ensure that they (and, if needed, their governments) can defend themselves against abuse by the importing country’s government, usually provoked by local industries with vested interests. For example:

- Palestinian shirts are suddenly hit with 50 per cent anti-dumping duties in Ghana, a market just recently entered by three Palestinian shirt producers. Based on a complaint by two local producers of similar shirts, who represent 3 per cent of the local market, the government of Ghana applies the duties after a brief summary procedure of two weeks. The Palestinian producers received questionnaires, which were sent to Palestine by normal mail, two days before the deadline of submission, and did not manage to reply. The calculation of the dumping margin (50 per cent) is based on unverified information supplied by the Ghanaian producers. If Palestine were a Member of the WTO, or had a trade agreement with Ghana which included similar disciplines, it could force Ghana to rescind the measure, for several reasons. The Anti-Dumping Agreement requires that foreign producers (here the Palestinian shirt producers) are given at least 30 days to reply to a questionnaire. It also requires that an application by the local industry for anti-dumping measures against foreign products must be supported by at least 50% of the local industry. Both rules (and probably others) were violated here.

Box 8: Classical Misunderstandings – “Dumping” of Low-Quality Products

“Dumping means that low-quality, sub-standard goods are sold at low prices, competing unfairly with local products.” Quality has nothing to do with anti-dumping. Anti-dumping aims to tackle cases where products (of any quality) are imported at prices that are lower than the “normal value,” that is, the price at which they are sold in their home market. If imported product are of a sub-standard quality this is a matter which must be tackled by applying technical regulations to imports, and thus prohibit the importation of products which do not meet these technical regulations. (This would be assessed under the TBT Agreement, see above.)



Agreement on Subsidies and Countervailing Measures (SCM Agreement)

What Are the Issues?

When a company receives a subsidy, it becomes more competitive in the market. It can produce more goods with the same amount of own investment capital, and/or sell the goods it produces cheaper than before. What is good news for one company can be bad news for its competitors who need to finance their operations from their own efforts, and hence compete with the subsidized company without themselves having the same support of the state.

This can be problematic even within one and the same economy, but there usually subsidies are granted to all similar companies within an industry under fair and non-discriminatory rules. When it comes to international trade, however, subsidies are usually not the same on both sides of the border. This is where it becomes problematic.

For example, Palestinian producers of olive oil, who receive no or few subsidies from the Palestinian government, may find that Palestinian supermarkets sell olive oil from subsidized producers in countries such as Italy, Greece or Spain, at low prices which are only possible because these producers receive significant subsidies. Or, as explored in the first chapter, Palestinian palm oil producers from Jericho may find themselves in competition with subsidized Indonesian palm oil when exporting to third country markets.

In fact, subsidies may have the same effect as dumping: In the case of dumping, it is the company itself which finances its very low “dumping prices.” In the case of subsidies, it is the state which finances the low prices. For competitors affected by such unfair competition both may feel the same.

Subsidies come in different forms, and with different conditions attached to them. Some are more problematic than others from a trade perspective. These are, first, export subsidies (because they specifically make exports cheaper, and hence directly “target” other countries’ markets). Second, subsidies which are conditioned on the use of domestic goods (“local content subsidies”) in the production of other goods or services have the effect that the domestic goods become more attractive (because the producers have to buy them in order to get the subsidy). This means that there is less demand for foreign imported goods of the same kind, which puts them at a disadvantage. But even other, domestic subsidies which are not so conditioned may still have a significant trade effect when the producers of these are able to sell their goods much cheaper on their home market or on foreign markets, affecting their competitors’ ability to compete with them.



However, in practice many subsidies are not problematic at all, at least from the perspective of international trade, because they are too small to distort the markets in a significant way. This applies in particular to the often very small subsidies granted by developing countries.

What WTO Law Says: The SCM Agreement in a Nutshell

The Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”) responds to the issues described, in two ways. First, it allows other WTO Members to ask the Member who grants subsidies to stop these subsidies if they are trade-distorting. In other words: It can attack the subsidies themselves. Second, very similar to the Anti-Dumping Agreement, it allows WTO Members to take countervailing measures against subsidized imports which cause, or threaten to cause, injury to their domestic industry.

Subsidies which can be directly attacked are the following:

- Export subsidies and local content subsidies. These are entirely prohibited under WTO law (except for very poor countries which are allowed to use export subsidies).
- Other subsidies can be attacked (and must be stopped) if and when they cause significant “adverse effects” on a market – this could be the home market of the subsidizing country, the home market of the competing companies (if the subsidized goods are exported to that market), or a third country market where both compete. As indicated, however, most subsidies, especially in developing countries, are not significant enough to cause such “adverse effects” on the market, and are therefore entirely legal under WTO law. Very low level subsidies are automatically excluded from disciplines (“de minimis”), with higher thresholds for developing countries.

All subsidized imports (whether benefiting from direct export subsidies or other subsidies) can be tackled through countervailing duties if they cause, or threaten to cause, injury to the domestic industry of the importing country. These countervailing duties can then be higher than the “bound rates” which otherwise limit the level of tariffs.

Here the problems are the same as under the Anti-Dumping Agreement, because this tool can, of course, be easily abused to provide unfair protection to the local industry. That’s why, like the Anti-Dumping Agreement, the SCM Agreement allows countervailing measures (i.e., countervailing duties which equalize the effect of the subsidies) only after strict conditions are met, such as a thorough and fair investigation. The disciplines here are very similar to those under the Anti-Dumping Agreement (see above).



The SCM Agreement in Practice: Illustrative Examples

Businesses which have faced subsidized competitors can easily imagine examples where the SCM Agreement – or similar disciplines in other trade agreements – can help them. Consider the examples mentioned above:

- Palestinian olive oil faces competition from subsidized olive oil from the EU. Here, the SCM Agreement would allow the Palestinian government to impose countervailing duties on olive oil from the EU if it can be established that the subsidies cause injury to Palestinian olive oil industry.
- Palestinian palm oil faces subsidized competition from Indonesian palm oil in a third country market. Here, Palestine can ask Indonesia to stop the relevant subsidies if it can be established that these cause significant “adverse effects.”

Could the SCM Agreement, conversely, be problematic for Palestine and Palestinian producers? This is not very likely, as the Palestinian government will usually not be able (nor willing) to provide subsidies that are big enough to cause significant “adverse effects.” Most subsidies the government may want to grant will be entirely legal and unproblematic under the SCM Agreement.

However, like the Anti-Dumping Agreement the SCM Agreement could help Palestinian producers to fend off attempts by other countries’ governments to impose unjustified countervailing measures on them. For example:

Palestinian stone & marbles products face countervailing measures in Egypt. Let’s assume the Palestinian government grants a development subsidy to a new Palestinian quarry, which starts exporting its stone and marble products to Egypt. The Egyptian government reacts quickly and imposes countervailing duties on the Palestinian products, although the effects on the Egyptian market are minimal. Here, under the SCM Agreement (once Palestine is a WTO Member), Palestine would be able to request from the Egyptian government to withdraw the additional duties if the effect of the subsidy is not big enough to count as “adverse effects” under the SCM Agreement.

Agreement on Safeguards (and other Provisions on safeguards in WTO Law)

What Are the Issues?

Sometimes imports may suddenly increase dramatically, for reasons that have nothing to do with unfair trade practices such as dumping or subsidization. In other words: The trade is entirely fair. However, dramatically increased imports, even if not unfair, can still cause dramatic negative effects on the domestic industry, sometimes so severe that they threaten to destroy an entire industry.



In these cases the importing country's government has a legitimate interest in putting a temporary brake on the problematic imports. This, however, must be the exception – after all the exporters have done nothing wrong.

What WTO Law Says: The Safeguards Agreement (and other Provisions on Safeguards) in a Nutshell

The WTO Agreement on Safeguards (and the GATT Article it is based on) provides that in cases where, as a result of “unforeseen circumstances,” certain goods are imported in such increased quantities that they cause, or threaten to cause, serious injury to the competing domestic industry, the importing country can impose safeguard measures, usually additional tariffs. This is similar to anti-dumping duties or countervailing measures.

Again, however, this tool can of course be easily abused to provide unfair protection to domestic industries. This is why the Safeguards Agreement, like the Anti-Dumping Agreement and the SCM Agreement, imposes strict substantive and procedural disciplines to ensure that safeguards are only applied in exceptional cases.

Also, because the imports are actually not unfair to start with, the Safeguards Agreement demands that the country which applies safeguards provides compensation to the exporting countries affected. This compensation, however, is not in the form of payments but in the form of equivalent trade concessions in other areas – so it does not benefit the affected exporters, but only their country as a whole.

As discussed above, the Agreement on Agriculture allows for easier procedures – the so-called Special Safeguards – in certain cases in the area of agriculture. Similarly, WTO Members are negotiating a facilitated general Special Safeguards Mechanism which would allow developing countries to apply safeguards more easily on all agricultural goods.

The SGA in Practice: Illustrative Example

Safeguards are very rare, but they do happen. A real-life example shows that WTO disciplines can work:

- US safeguards on steel products. A few years ago the US government imposed safeguards (additional tariffs) on steel imports from around the world. Many countries affected, from the EU to China, took immediate action in the WTO, claiming that the conditions for safeguard action were not met and that the United States was thus acting in violation of the SCM Agreement. Under this pressure the US government decided to withdraw the measure and abolish the safeguard duties.



The General Agreement on Trade in Services (GATS)

What Are Services?

Banking, telecommunications, hairdressing, cleaning, repairing, software support, accounting – these and many more services are part of everyday private and business life, and they play a big role in today's economy. Most people know what services are, but describing services in the abstract is difficult. They are often described as "intangible" and "invisible" but then a massage or a medical surgery are very physical, tangible exercises, and an advertising campaign is often very visible indeed.

Perhaps the best way of thinking about services is that they are valuable "things" we often pay for, but which are not goods. The old rule of thumb says: "If you can drop it on your foot, it's a good." But then again, certain gases will go up, not down, when released – and yet they are clearly goods.

Perhaps most instructive is to look at a list of services, and trust that we know what a service is when we see one. The WTO has once created a list of service sectors which includes over 150 sub-sectors. They are grouped into 12 sectors – these are

1. Business services, a large category including professional services from legal services to accounting, and many others, from advertising to event-organization
2. Communication services, including postal/courier services, telecommunications and audio-visual services, for example video or sound recording
3. Construction services, from the construction of houses and kiosks to the construction of bridges and towers
4. Distribution services, including wholesale, retail and franchising
5. Educational services, from primary and secondary schools to universities and professional training institutes
6. Environmental services, from sewage treatment to street cleaning
7. Financial services, from insurance and banking to stock brokerage and asset management
8. Health and social services, such as hospital and pension home services
9. Tourism services, such as hotels and restaurants
10. Recreational Services, such as entertainment and cultural services
11. Transportation services, including by road, rail, air, water and pipeline
12. Other services (this can be anything)



All of these services can be provided within one economy, but can also be traded across borders.

What Is International Trade in Services? How Are Services Traded Between Countries?

Like goods, services can cross borders. The provider of a service can be based in one country, and the consumer in another – that is trade.

There are four ways in which this can happen.

- **Mode 1: Cross-Border Supply – Service Travels.** First, the service provider (for example a lawyer) can send his service (for example a legal memorandum) across the border to a client in another country (for example by email or letter). This is like trade in goods – the seller/provider stays in his country, the buyer/client in hers, and only the service crosses the border. Many Palestinian professionals such as consultants, advertising agencies and others export services in this way.
- **Mode 2: Consumption Abroad – Consumer Travels.** Second, the client may travel to the service provider to consume the service before she returns to her country. This is the case, for example, when a patient travels to a doctor in another country for treatment, and the returns home. For Palestine, of course, the most important export in this mode is tourism services – millions of foreigners yearly come to Palestine to consume various services.
- **Mode 3: Commercial Presence – Supplier Sets up Shop Abroad.** Third, the service provider may establish a branch or subsidiary in another country to service customers there. For example, banks, telecoms companies, hotel chains or international accountancy firms often open branches or subsidiaries in other countries – Palestine imports many services in this mode. Palestine, however, also exports services in mode 3, too – from small specialized training institutes, for example the “Career Management Institute for Training and Consultancy” from Gaza, which has established branches/outlets in Jordan and the UAE, to PalTel, which holds shares in several foreign telecoms companies.
- **Mode 4: Presence of Natural Persons – Service Supplier Travels.** Fourth, and perhaps most obviously, the service supplier may travel to the client, deliver his service, and return home. For example, a consultant or a plumber may travel abroad to provide their services in another country, and then return home.



Box 9: International Trade in Services – Four Modes of Supply	
<p>Mode 1: Cross border supply: Services are exchanged without a physical or legal person crossing borders. The service is provided through telephone, fax, e-mail or similar means. The provider remains in her country, the client in his; only the service travels.</p>	<p>Mode 2: Consumption abroad: Services are provided to a visiting foreign person who later leaves the country; the service provider remains in his home country, where the service is supplied.</p>
<p>Mode 3: Commercial presence: Service providers establish foreign affiliates (subsidiaries, branches, representative offices etc.) in third countries which then provide their services through their presence in the domestic market of those countries.</p>	<p>Mode 4: Temporary presence of natural persons: Services are provided through natural persons travelling to the target country and performing their services there before returning home.</p>

What Are the Problems?

Once international trade in services is understood, the problems and challenges become obvious – they are mostly the same as in trade in goods, with some specialties. Exported services, or service exporters, may face discrimination in foreign markets – for example, Palestinian advertising agencies who have been contracted to run advertising campaigns in Jordan may pay higher taxes or face more difficult administrative procedures than their Jordanian competitors. Or they may not get market access in the first place – for example, Egypt may only allow Egyptian (and Egyptian-trained) lawyers to service clients in Egypt, excluding Palestinian and other foreign lawyers. In many cases the difficulties will be in the details of domestic regulations – for example, it may be difficult or costly to obtain a certificate of recognition for a Palestinian doctor who wants to provide specialized medical advice in Turkey.

While trade in services is thus (often strongly) affected by regulation, certain challenges known in trade in goods do not apply to trade in services – there are usually no tariffs, no customs valuation, and no customs or other border procedures, etc. This makes exporting and importing services, especially in “Mode 1” and “Mode 2” often easier than exporting or importing goods, especially in places such as Palestine where borders are a major practical challenge.



What WTO Law Says: The GATS in a Nutshell

The General Agreement on Trade in Services – or GATS, for short – is one of the three fundamental pillars of the WTO, alongside the GATT and the TRIPS Agreement. Like the GATT for goods it aims to cover the fundamental issues for services. For service providers it is worth taking a good detailed look at the GATS and other agreements on trade in services, as they address many important challenges which business may face when they export their services or when they import services from abroad. In a nutshell:

- **Most-Favoured Nation (MFN) Treatment.** The GATS requires WTO Members to treat services and service providers from other WTO Members at least as well as they treat services and providers from any other country.
- **Market Access Commitments – Negotiated, Sector by Sector.** Under the GATS, WTO Members make specific commitments to grant access to their markets for foreign services and service providers. These commitments, however, are individually negotiated when a country joins the WTO – so there is no automatic market opening, although other Members will have many demands on Palestine when it accedes to the WTO. Palestinian service providers and policy makers thus need to be ready to negotiate, i.e. know which sectors they are ready to open and which not, and where the “red lines” are. They also need to know which services they may positively want to import more, which can be facilitated by making binding commitments which provide more comfort to attractive foreign service providers.
- **National Treatment – Negotiated, Sector by Sector.** In stark contrast to the GATT, the GATS does not foresee automatic national treatment (equal treatment between foreign and domestic services or suppliers). Foreign services and providers only enjoy this form of non-discrimination guarantee if and when this has been specifically included in the specific commitments of the importing country. This means that preferences for local service providers, for example local doctors, lawyers or stock brokers, can be preserved in WTO accession negotiations. Again, Palestinian stakeholders need to be ready and know their interests well to be able to ensure this.
- **Domestic Regulation (for Example: Licensing, Recognition).** The GATS is a young agreement, and the disciplines on domestic regulation are not yet very strong (new disciplines are currently being negotiated in the WTO). However, the GATS does require, for example, that WTO Members must provide reasonable procedures for the recognition of qualifications of foreign professional service providers, for example lawyers, doctors, accountants or



engineers, if they have made market access commitments in these services sectors. They also have to make sure that there are reasonable licensing procedures, and that there are possibilities to appeal licensing decisions.

- General Exceptions and Security Exceptions. Like the GATT, the GATS allows governments to pursue legitimate non-trade policies (e.g. environment, safety, public morals, security) and “violate” their GATS obligations if this is necessary, provided these exceptions are not abused.

The GATS does **not yet** contain any disciplines on **subsidies**. At this point WTO Members can therefore freely subsidize their service providers. The GATS also does not foresee the possibility of safeguards yet. (Negotiations on both are under way in the WTO, but don’t look as if they will produce new disciplines any time soon.)

The GATS in Practice: Illustrative Examples

Services, when exported or imported, encounter numerous obstacles. Every service provider knows: It is often not easy to enter foreign services markets. Some obstacles they face are of a business nature, for example more experience or better equipment of competitors, or “natural” advantages for local providers because they speak the language and know the market. These obstacles usually cannot be tackled through the GATS or other trade agreements. They reflect the nature of the game – competition.

Other obstacles are imposed by laws, regulations or administrative decisions by government authorities. These may fall under the GATS or other services agreements (for example the future agreements on services in the EuroMed context and in GAFTA). Consider for instance the following (fictional) examples:

- Palestinian Insurance Wants to Set up a Branch in Ireland. A Palestinian insurance company would like to set up a branch in Ireland, not least to provide travel insurance to Catholic “Holy Land” pilgrims. It will need a specific insurance license from the Irish insurance authority. Under the GATS (provided Palestine is a WTO Member), or under the future EuroMed services agreement between the EU and Palestine, the company will have certain rights, including the right to be treated at least as well as any other foreign insurance company in Ireland, and the right to be treated the same as Irish insurance companies (the EU has made full national Treatment commitments for Ireland in the WTO).
- Palestinian Law Firm Wants to Advise German Clients on International Law. A Palestinian law firm that advises clients on international law wants to provide



these services to clients in Germany through email, fax and telephone. This consulting firm will be subject to the German Law on Legal Advice, which imposes certain qualification requirements on persons providing legal services into Germany. But since Germany has committed itself under the GATS to allow qualified lawyers from WTO Members to provide advice on international law, the Palestinian firm would have the legal right to do so (once Palestine is a WTO Member).

- Palestinian Tour Guide in Morocco. A Palestinian tour director who would like to accompany a Palestinian tour group on their tour through Morocco may face rather strict Moroccan regulations on tourist guides. She may not be allowed to guide at all, or may have to apply for a license there, which may be subject to strict qualification requirements, and perhaps face a quota (maximum number of licenses for foreigners). Morocco, however, has made a commitment under the GATS to allow foreign tour groups to be accompanied by "tour leaders." Once Palestine is a Member of the WTO, the tour director would thus be guaranteed to be allowed to accompany her Palestinian groups in Morocco.
- A Palestinian Bank Setting up Branches in other Arab Countries may encounter requirements on minimum capital, the maximum percentage of foreign ownership or the maximum number of bank branches in cities of a certain size. Whether these requirements are legal under WTO law depends on the specific commitments of those Arab countries under the GATS.
- Foreigners – Including Palestinians – Are not Allowed to Own Land in Sweden. This means that a Palestinian Hotel company, even if it is allowed to operate a hotel in Sweden, is still at a disadvantage vis-à-vis its local competitors because it has a less secure hold on its infrastructure (the hotel), so for example cannot get a mortgage to finance furniture.

Regulations of the kind described operate as obstacles to foreign services and service providers that are imposed by the state, the local government. It is this kind of obstacles that can be addressed – and possibly removed – through international agreements, such as the GATS or the upcoming EuroMed agreement on services and establishment.



The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Why Intellectual Property?

Businesses rely on ideas, inventions, sounds, images or names to build their products, to market their services, or to establish and maintain their reputation. They – and the people who generate these ideas, inventions, images etc. – have obviously a great interest in the protection of such “intellectual property.” Without such protection, especially without exclusivity and control over such intellectual property, it would often be impossible to extract their value. For example, without patent protection (i.e., the right to exploit their newly developed medicines exclusively for a certain number of years) pharmaceutical companies often could not afford the investment in research and development which are needed to develop new medicines. And without the protection of their trademarks companies like Coca Cola, Taybeh or Mövenpick would be defenceless against other companies using their trademarks to sell their own products or services. This would not only mean that the investment made into building a strong brand is lost, but also that a reputation built can be easily destroyed by unauthorized use of the brand by low-quality competitors. And without protection of their copyrights movie makers and studios could often not generate the capital to actually produce movies in the first place, because they would be unable to recover their costs as everyone just copies their movies for free.

The Interests of Society & the Need for Balancing

At the same time, society often has an interest in securing access to some of these items, including in particular useful inventions or work or works of art. For example, a useful new medicine should not remain under the exclusive control of its inventor forever (who will somewhat understandably charge higher monopoly prices as long as the patent is in force), but should eventually become free so that competing companies can produce and sell it at competitive prices for the benefit of patients who need it. There should thus be a time limit to patents. In some cases, where the patent holder is unable or unwilling to produce or sell the products in a certain market, or to sell them at acceptable prices, there may be an overriding interest to allow another company to produce the needed medicines.

Similarly, works of art should at some point, at least some time after the death of the writer/artist/musician, become freely available. And some texts, sounds, or images should be freely available immediately because the general interest is more important than the author’s rights – for example political speeches, public texts, etc. And some free use of copyrighted published materials should



probably be allowed for other reasons such as education, for example the copying of a text from a book for a school lesson.

A counter-example is trademarks. There is usually no need for society or anyone else to gain access to trademarks, so these can and should remain the exclusive property of those businesses who have invested time and money in building them up.

In other words: Intellectual property protection is thus important, but its design and implementation often requires careful balancing with other interests.

Trade-Related IP Issues (Or: Why a TRIPS Agreement?)

Intellectual Property (IP) can affect international trade in several ways. No or too little IP protection in an export market makes it harder for businesses who rely on patents, trademarks, copyright or other forms of IP in their business model (for example pharmaceutical companies, music performers, branded restaurant chains, software designers) to trade with that market because they cannot protect their products effectively there. Conversely, imports of desired goods and services may be hampered by the lack of IP protection. For example, foreign music performers have been reluctant to perform in Palestine due to lax copyright protection (many still come for solidarity, but not as a sound and sustainable business activity) – this means: Trade in services is affected. European companies producing high-tech environmental equipment have reportedly been hesitant to sell and install it in China because they fear that their products will be pirated (copied without permission and payment). This affects both trade (importation of desired goods) and the environment in China (the benefits of the equipment cannot be used).

On the other hand, IP protection means giving monopoly rights to patent owners, copyright owners, etc. That means they can stop the production, sale, and also importation of copies of their products – i.e., hinder trade in such copies. Again, there is obviously the same need to establish a balance.

Third, differences in IP protection in several markets can make exports and imports more difficult to manage (just as differing product standards and other differences in regulation do).

What WTO Law Says: The TRIPS Agreement in a Nutshell

The Agreement on Trade-Related Intellectual Property Rights (TRIPS) establishes minimum standards for IP protection. These define the intellectual property rights (IPRs) which WTO Members are committed to protect, their scope and reach, as well as procedures relating to their granting and enforcement which Members have to respect under their national laws. It also foresees minimum remedies and penalties.



The TRIPS Agreement's standards are, in fact, relatively high, and the prescriptions often very detailed. They are "minimum" standards only in the sense that WTO Members are allowed to provide more IP protection than the Agreement demands, but not less.

The TRIPS Agreement builds on other IP-conventions which existed before. Many of their provisions are directly incorporated into the TRIPS Agreement. This has made international IP protection significantly stronger because now key IP standards are backed up by the threat of enforcement through WTO dispute settlement.

The TRIPS Agreement thus requires WTO Members to grant and defend the following IPRs:

- Patents (protection of inventions – for example: a patent for a newly invented cancer medicine)
- Copyright and related rights (protection of expressions such as texts, music, pictures, films, performances – for example: protection of the books of Mahmoud Darwish)
- Trademarks (protection of key names, symbols etc. which distinguish a business, its goods or its services – for example: the name "Coca Cola")
- Industrial designs (protection of designs of products – for example: the chassis of a Porsche car)
- Layout designs of integrated circuits (designs of computer chips – for example: Intel's i7 processors)
- Undisclosed information (business secrets which the owner makes efforts to keep secret – for example: the Coca Cola formula)
- Geographical indications (indications of geographical origin of goods or services which consumers associate with specific qualities – for example: sparkling wine from "Champagne," a region in France).

Some of these rights must be granted for certain minimum periods, but may then lapse (e.g. patents for 20 years, copyrights for 50 years after the death of the author). Others, like trademarks, should be renewable indefinitely. (As discussed above, this is because for these IPRs there is no legitimate interest of others to use the protected right.)

The TRIPS Agreement foresees a number of important exceptions, such as the right of WTO Members to grant compulsory licenses on patented inventions under certain circumstances (e.g. a national emergency such as an epidemic), or the right of small-scale private, non-commercial reproduction ("fair use") of copyrighted materials (e.g. allowing a legitimately bought music CD to be copied for a family member).



The TRIPS Agreement further prescribes in some detail what IPR enforcement mechanisms Members have to provide for in their national laws. In other words: Tools for right holders (both nationals and foreigners) to enforce their rights through domestic administrative and judicial means. (They also prescribe rights for alleged “violators” of IPRs in such proceedings, so that they can defend themselves against unjustified attacks from the alleged right holders.)

These enforcement tools include:

- Civil judicial procedures, i.e. the possibility for IPR holders, for example patent owners or authors, to sue others who violate their rights. These procedures must be fair and equitable.
- Rules on evidence which regulate what information the claimant (the aggrieved right holder) must bring, and which can be demanded from the alleged violator.
- Rules on damages which provide that there must be adequate damages available once a violation of an IPR has been found.
- Effective deterrents must be available, such as the destruction of copyright infringing goods.
- Provisional measures must be available. That means injured right holders must be given immediate access to court injunctions to stop violations that are occurring, or are about to occur. This is an important tool because often time is of the essence – once “fake” goods are in the market, the damage is done.
- Border measures must be available, i.e. right holders who learn that “fake” goods or patent violating products are about to be imported must be able to ask the customs authorities to stop them from entering the market.

TRIPS in Practice: Illustrative Examples

The TRIPS Agreement offers powerful protection for businesses – patent owners, copyright holders, trademark owners and others. Some (fictional) examples:

- Fake “Taybeh” Beer in Jordan. Taybeh, the Palestinian brewery, has built up a small but lucrative market among Jordanian beer drinkers. It has registered its trademark “Taybeh” in Jordan. A Jordanian brewery now introduces a new beer which it calls “Tayba” in English (Latin) letters. The name in Arabic letters is the same as the Palestinian brand. The Palestinian brewery can ask Jordanian courts to prohibit the use of the name for the Jordanian beer and to seize products which have already been labelled – provided Jordanian law ensures effective tools. If these tools do not provide the minimum standard



mandated by the TRIPS Agreement, and if Palestine is a Member of the WTO (or has secured similar IP standards under another trade agreement), the Palestinian government can ask the Jordanian government to make sure “Taybeh”’s rights are respected in Jordan. If necessary this could be done through the WTO Dispute Settlement Mechanism.

- Unlicensed copying of Palestinian specialized software in Saudi Arabia. A software company in Gaza designs specialized “point of sales” software for Saudi clients. A Saudi company copies this software and sells it to other clients. Under the TRIPS Agreement Palestine (if a WTO Member) can demand from Saudi Arabia to ensure that the Gaza company can effectively prohibit these copyright infringements.
- Palestinian licensee of trademarked pharmaceuticals faces unlicensed “parallel imports” from India. A Palestinian pharmaceuticals company produces and markets the famous German medicine “Gladiol” in Palestine. It holds a license to do so from the German trademark owner, to whom it pays a yearly licensing fee. An Indian pharmaceuticals company now wants to sell medicine with the same name in Palestine. The Palestinian licensee can ask Palestinian customs authorities to seize these goods at the border. If need be it would be backed up by the German trademark owner and possibly the German government (or the European Commission). This would probably already work under the EU-PLO Interim Association Agreement, which requires the parties to ensure IP protection “in accordance with the highest international standards.” These claims would be more precise and stronger under the detailed provisions of the TRIPS Agreement – once Palestine is a Member of the WTO.

2.2.2 Future Trade-Related WTO Rules: The Upcoming Agreement on Trade Facilitation (for Example)

WTO law is not set in stone. In fact, there are many areas where new or more detailed disciplines are needed, or will be needed in the future. One prominent example is **Trade Facilitation** – broadly speaking: the need to discipline, control and streamline the design and implementation of import and export-related procedures and mechanisms, from customs formalities to transit routes.

Negotiations on improved and upgraded Trade Facilitation disciplines are part of the WTO’s “Doha Development Agenda” (DDA) negotiations. Unlike most of the other areas, however, the Trade Facilitation negotiations have progressed steadily and are nearing completion. While many details are yet not decided, it is fair to expect that WTO Members may soon agree on a new WTO Trade Facilitation Agreement.



What Are the Issues?

Traders in many countries face a multitude of measures including institutional and regulatory obstacles, customs and port inefficiencies, complex and lengthy trade-related border procedures, unnecessary documentary requirements and multiple fees and charges for no apparent reason. All that leads to additional transaction cost.

Trade facilitation is about reducing transaction costs through eliminating, simplifying and ideally harmonising complex procedures and processes related to trade. In essence, trade facilitation is about avoiding unnecessary waste in time and resources which creates losses to producers, traders and consumers.

Therefore, Members agreed in Doha to launch negotiations aimed at clarifying and improving GATT Article V (Freedom of Transit), Article VIII (Fees and Formalities connected with Importation and Exportation), and Article X (Publication and Administration of Trade Regulations). The negotiations also aim to enhance technical assistance and capacity building in the area of trade facilitation and to improve effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues

What WTO Negotiating Text Says

The negotiations on Trade facilitation are taking place on the basis the Draft Consolidated Negotiating Text (“Negotiating Text”), the latest version of which (TN/TF/W/165/Rev.13) was issued on 17 October 2012. The Negotiating Text provides the blue print for a WTO agreement on trade facilitation.

The Negotiating Text is composed of two sections. Section I contains the actual trade facilitation disciplines or the trade facilitation rules. Section II contains the flexibilities for developing and least developed countries.

The main technical issues under negotiations under Section I are as follows:

- Transparency provisions including Article 1 (publication and availability of information), Article 2 (prior publication and consultation), Article 5 (Other measures to enhance impartiality, non-discrimination and transparency) and Article 6 (Disciplines on fees and charges imposed on or in connection with importation and exportation);
- Provisions that aim to facilitate customs processing including (Article 3: advance ruling), Article 7 (release and clearance of goods) and Article 9 (customs cooperation);
- Transit provisions: Article 11 (freedom of transit) and Article 9Bis ([Declaration of transhipped or in transit goods][Domestic transit];



- Provisions on harmonising streamlining formalities connected with trade including Article 10 (formalities connected with importation and exportation and transit) and Article 6 (Disciplines on fees and charges imposed on or in connection with importation and exportation);
- Provisions on administration of trade regulation: Article 4 (appeal procedures); and
- Provisions on customs cooperation: Article 9 (border agency cooperation).

Section II of the Negotiating Text titled “special and differential treatment provisions for developing country Members and least developed country Members” contains exceptions and flexibilities for developing countries and LDCs. These flexibilities are beyond the classical special and differential treatment provisions in existing WTO agreements discussed under section 2.1.3 below. They contain novel flexibilities including the flexibility for developing and least developed countries to self-categorise trade facilitation disciplines in three different categories according to their interests, reform needs and priorities and readiness to implement such disciplines; categories (a) for example is the category of trade facilitation disciplines that implies immediate implementation, category (b) requires deferred implementation (transition period of time) and category (c) requires deferred implementation and aid conditionality meaning that the developing or least developed country needs time and aid to implement trade facilitation disciplines under category (c) commitments. Other flexibilities include the flexibility to reschedule commitments (shift between categories), seek an extension of transition period (early warning mechanism) and a grace period for the application dispute settlement rules.

Another set of rules under Section II relates to the provision of capacity building and assistance from donors.

The Future of Trade Facilitation

Whether the current ongoing negotiations on trade facilitation will lead into a new agreement on trade facilitation and thus new disciplines on trade facilitation or nor remains unclear. There is currently a push in Geneva by many Members to conclude an early harvest in trade facilitation at the upcoming Ministerial Conference in Bali in 2013. However, several elements of the Negotiating Text on Trade facilitation remain bracketed and require additional attention to come into an agreement on.

In principle, most countries agree that trade facilitation is desirable as it facilitates trade and improves trade-related governance. Some argue, however that the trade facilitation disciplines under negotiations facilitate more



imports than exports and, therefore, might not fully represent the interests of developing countries and LDCs. Others argue that the implementation of certain trade facilitation disciplines requires heavy investments in infrastructure which might not necessarily represent the reform priorities of developing countries and LDCs.

While these and other arguments should be seriously considered, the overall assessment of whether an agreement on trade facilitation will soon be concluded highly depends on the other elements of the early harvest package.

2.2.3 “Special & Differential Treatment:” Exceptions and Flexibilities for Developing and Least Developed Countries

Existing WTO agreements contain the following types of special and differential treatment (SDT) provisions or flexibilities for developing countries and LDCs that aim to support them overcome supply side constraints and help them comply with their WTO obligations.

- Exemptions from obligations: This category relates to WTO provisions that (fully or partially) exempt developing countries or LDCs from obligations that would otherwise apply to these countries. For example, Article 27 of the SCM Agreement fully exempts certain sub-group of developing countries and all LDCs from the prohibition of export subsidies.
- Transition Periods: Some WTO agreements set out transition periods for developing countries and LDCs with respect to the implementation of certain obligations under these agreements. The SPS Agreement, for example, contains provisions that grant LDCs a transition period of five years and other developing countries two years for the application of their SPS measures affecting imported products due to the lack of technical expertise, technical infrastructure or resources.
- Positive Special and Differential Treatment Measures: some WTO agreements contain provisions that require WTO Members to take account of the special problems and needs of developing countries and LDCs, in particular their special development, financial and trade needs, in the preparation and application of measures covered under these agreements. The TBT agreement, for example, requires WTO Members to ensure that their technical regulations and standards do not create unnecessary obstacles to exports from developing countries and LDCs.
- Technical Assistance: several WTO Agreements contain provisions requiring WTO Members to offer technical assistance and capacity building for developing countries and LDCs primarily in order to comply with their WTO



obligations and to upgrade their supply side capacity. The TRIPS Agreement, for example, requires developed countries to provide incentives enterprises and institutions within their territories to promote the transfer of technology to developing countries and LDCs in order to enhance their technological base.

- (Special) Transparency Requirements: Existing WTO Agreements including the SPS Agreement and TBT Agreement, contain provisions which require the WTO Secretariat to draw the attention of developing countries and LDCs to notifications made by other WTO Members regarding proposed measures if these measures concern products of export interest for developing countries and LDCs.
- Participation of developing countries and LDCs in relevant International Organizations: some WTO Agreements, including the TBT Agreement and the SPS Agreement, contain provisions that seek to foster the active participation of developing countries and LDCs in international standard setting organizations.

Most flexibilities relating to technical assistance including the assistance to support developing countries to participate in international organisation are, however, drafted in a language that is not legally binding, therefore, establishing only soft obligations on Members to provide such assistance.

Many Members argue that these flexibilities lack teeth and need to become operationalization, improvement and clarification in order for developing countries and LDCs to benefit from them. The Doha (negotiations) mandates Members to review these SDT provisions with the view to improve them and make them more effective and operational. Several proposals were contemplated on how to achieve this but the overall stalemate in the Doha negotiations did not lead to a meaningful progress in the negotiations on SDT.

2.3 The WTO as a System of Institutions

2.3.1 The WTO as a Member-Driven Organization

A key characteristic of the WTO, in some contrast to many other international bodies such as the World Bank or the International Monetary Fund (“IMF”), is that is essentially “Member-driven.” This means that “the WTO” usually acts upon the initiative of its 159 Members, and through the bodies directly controlled by the Members.

The WTO Secretariat is really just that – a secretariat. The Director-General of the WTO, who heads the Secretariat, has only very few formal powers (for ex-



ample the power to select dispute settlement panelists only in cases where the litigating Members cannot agree on a group of panelists). In essence, he/she and the WTO Secretariat assist the Members and the Members' WTO bodies, from the Ministerial Conference to the committees and working parties, in their work.

2.3.2 The Members' Bodies

The WTO's work thus happens primarily in or through the bodies composed of Member representatives. In a nutshell these are the following:

- Ministerial Conference – Every Two Years. The Ministerial Conference is the central organ of the WTO. In it the WTO Members meet at least every two years on the ministerial level to take important decisions, such as on granting waivers, providing negotiating mandates, and other matters.
- General Council – Every Month. The rest of the time, the functions of the Ministerial Conference are performed by the General Council where Members meet every month in Geneva on the level of ambassadors. The General Council is thus a very active and powerful body, reflecting the WTO's nature as a technical "can do" organization, in contrast to many other international organizations which operate on a much less frequent and intensive schedule (and with less effective power).
- Councils for Trade in Goods, Trade in Services and TRIPS. Immediately under the General Council the Members operate three main Councils responsible for the work on the three main pillars of the WTO – goods, services and intellectual property rights. These councils meet usually at least four times a year.
- Committees. The WTO Agreements establish a number of committees to conduct detailed work on specific matters. These include a Committee on Trade and Development (CTD) which oversees development-related aspects of the operation of the WTO – an important forum for the specific concerns of developing country Members. They also include the TBT Committee and the SPS Committee. These are very important for businesses, because it is here where WTO Members confront each other with "specific trade concerns" they may experience in the area of food safety, product standards, technical regulations etc. The TBT and SPS Committee act as fora for the discussion (and confrontation) of Members before they go to formal dispute settlement (see below). Over the past years many cases where Members apparently did not respect SPS or TBT disciplines have been resolved here, in the committees. For businesses which experience problems this facility is very important, as it is faster and often less disruptive than formal dispute settlement.



- Working Parties and other Subsidiary Bodies. The Councils often establish “Working Parties” and other subsidiary bodies to deal with specific non-permanent issues. The most famous cases are Accession Working Parties where interested WTO Members discuss matters relating to the accession of a new Member. Each acceding country has its own Working Party.
- Dispute Settlement Body (DSB). The DSB is the General Council “with a different hat on.” It meets usually every month, and more often if need be. The DSB manages, or rather: supervises, the dispute settlement processes. It establishes panels and adopts their reports – as such or as modified by the Appellate Body, in the case of appeals.
- Panels are established ad hoc for each formal dispute. They act as the courts of first instance.
- The Appellate Body is a standing body with permanent members. It acts as an appeals court and reviews Panel reports for errors of law, if and when a party appeals.
- Trade Policy Review Body (TPRB). The TPRB, like the DSB, is the General Council acting in another form. The TPRB periodically reviews the trade policies of every Member – an important peer-review body where each Member must face the other Members and be ready to explain its trade policies.

2.3.3 The WTO Secretariat

As indicated, the 700+ staff of the WTO Secretariat, usually highly qualified professionals, are there to service the Members and their bodies. They wield very little formal power, but of course due to their permanent involvement play an important role in the functioning of the system.

The Secretariat is headed by the Director General, assisted by four Deputy Directors-General. Under them there are number of “Divisions” where the technical work happens. One of these is the Accessions Division, which helps in managing the accession process and is an important discussion partner for acceding countries, often providing indispensable technical help. Another important part of the Secretariat is the Institute on Training and Technical Cooperation (“ITTC”)⁴ which administers the WTO’s significant technical assistance activities (especially) for developing country Members and Observers.

4 Not to be confused with the ITC, the International Trade Center, a separate international organization based in Geneva.



2.4 The WTO as a System of Processes

2.4.1 Forum for the Discussion of Trade Issues and the Settlement of Disputes

The WTO's bodies serve, first of all, one key purpose: they are the places where Members discuss and solve trade issues, applying and administering the various WTO agreements discussed above. They thus apply processes without which the actual problems would likely remain unresolved. In particular:

- “Specific Trade Concerns.” In several committees, in particular in the TBT and SPS Committees Members bring forward problems their businesses face in or with other Members. Through these processes violations of the SPS and TBT disciplines are often remedied, so that formal dispute settlement (see below) is avoided, and businesses are given their rights under the respective agreements.
- Formal Dispute Settlement (Panels, Appellate Body). Members have the right to enforce their WTO rights through a formal, powerful dispute settlement process. If preliminary consultations are unsuccessful in resolving an issue, the aggrieved Member can request the establishment of a panel, which then reviews the measures of another Member which allegedly violate WTO agreements. This is a fully-fledged judicial procedure, even though the verdicts are still called “reports,” for reasons of tradition. If one or both parties to a dispute do not agree with a panel’s findings, they can advance to the Appellate Body. This appeal, again, is a judicial procedure very similar to an appeal under domestic law. A small difference: The reports of the panels and the Appellate Body must be “adopted” by the Members through the Dispute Settlement Body. However, a report is automatically adopted unless all Members agree to reject it – this “negative consensus” has never happened so far, and will likely never happen. In other words: The decisions of the Appellate Body are final.

But what about compliance – do losing Members actually implement the decisions? The answer is yes – virtually all panel/Appellate Body reports are implemented. This is not so much because of the formal enforcement procedures, through which compliance can be reviewed and winning Members can be authorized to apply retaliatory measures in case of non-compliance. More importantly, WTO Members have shown to have such a vital interest in the functioning of the WTO system that even the strongest Members usually comply with the rulings against them. After all, they want other Members to comply when they next win in another dispute. There are very, very few cases in which Members have chosen not to comply and instead accept to “pay” by suffering counter-measures, such as additional tariffs imposed by the winning Member.



2.4.2 Forum for Monitoring and Review

The WTO provides for a number of regular, automatic review processes which serve to monitor and supervise what is happening, without the need for an aggrieved Member to take the initiative and complain.

Trade Policy Review Mechanism (“TPRM”)

The most prominent regular review process is the Trade Policy Review Mechanism. Each Member’s trade policies are reviewed in the Trade Policy Review Body (see above) in regular intervals, from as often as every two years for the big developed countries to every six (or more) years for LDCs.

The reviews include a report from the respective government and a separate, independent report prepared by the WTO Secretariat. These are then discussed by the Members in the TPRB. The minutes of these meetings are public.

While the process is diplomatic and somewhat “friendly” in nature, it operates as a powerful transparency mechanism which puts Members who do not comply with their WTO obligations “on the spot.” Often the coming of a Trade Policy Review causes Member governments to review their own performance, and many have rectified their policies before or after a TPR process.

Other Transparency Processes: Reporting and Notifications

In addition to the TPRM several WTO Agreements foresee that Members must report regularly on certain matters, for example on their use of general subsidies (SCM Agreement) and their practice of granting agricultural subsidies, as compared to their commitments (Agreement on Agriculture).

Developed country Members also have to report regularly on how they are implementing their obligation to facilitate technology transfer to developing countries (Article 66.2 of the TRIPS Agreement) – another important “naming & shaming” exercise which puts at least some (many would say: still too little) pressure on developed Members to work towards technology transfer, an important tool for development.

Many agreements further foresee that Members have to submit notifications to the WTO (i.e., to the other Members) when they take certain measures. For example, Members have to notify SPS and TBT measures which do not correspond to international standards already in their draft stage. These notifications are public and can be monitored on the WTO website, and hence provide an important advance warning of upcoming measures which may otherwise surprise other Members’ businesses.



Specifically: Review of Regional Trade Agreements (FTAs, Customs Unions, etc.)

Through Free Trade Agreements (FTAs) or Customs Unions countries grant each other trade preferences. This means that other WTO Members' rights to be granted Most-Favoured Nation treatment are violated. WTO law accepts this under certain conditions, namely when the agreement establishes a very close connection between the parties and thus creates more trade than it distorts.

Such RTAs, however, must be notified to the WTO where they undergo a review by other Members. This creates transparency and supervision, and thereby puts pressure on the parties to such RTAs to make sure that their agreement actually satisfies these conditions.

A similar review mechanism has been established for unilateral preferences granted under other exceptions.

Ad-Hoc Monitoring of Emerging Issues

WTO occasionally set up additional monitoring mechanisms to keep track of emerging issues and ad hoc developments. For example, they have mandated the Director-General to report regularly on any new trade obstacles which Members may impose in the context of the recent financial crisis.

2.4.3 Forum for Negotiations

As much as the WTO is already a system of far-reaching rights and commitments, there is a need for progressive development on several fronts. The WTO, importantly, thus acts as a forum for negotiations.

Further Liberalization: The “Doha Development Agenda” and other “Trade Rounds”

The specific market access commitments made by WTO Members in goods and services often leave room for further liberalization. Similarly, the commitments undertaken to reduce agricultural subsidies leave massive amounts of subsidies especially in developed country Members such as the EU, the United States, Japan and Switzerland in place – heavily affecting business opportunities not least for farmers and other agro-businesses in developing countries as well as developed countries.

Further, there are many issues where the WTO system is so far arguably too weak and where there is a need for new or better disciplines. One such area is trade facilitation, as discussed above.

Because of these and other issues the WTO remains a forum for further negotiations. These have traditionally been conducted in grand “Trade Rounds.” At



the Ministerial Conference's 2001 session in Doha, Qatar WTO Members agreed to start such a new round of negotiations, the so-called "Doha Development Agenda" (DDA). While the DDA negotiations have encountered many obstacles, they are still alive and may yet yield at least some new disciplines, for example and Agreement on Trade Facilitation.

Of course, nothing obliges Members to conduct negotiations only in the form of such comprehensive trade rounds. They remain free to agree in other formats, and may do so more in the future as it has become more and more difficult to bring many matters into one process. This may become even more pressing as so-called "new issues", such as "Trade and Climate Change," demand solutions from the WTO system.

Accession Negotiations

When a new Member joins the WTO there is, of course, the need to negotiate the terms of such an accession. This includes negotiations on tariffs (the "bound rates" which the new Member will have to respect) and market access for services (the new Member's "specific commitments" under the GATS), as well as on a number of other issues.

The accession process is a complex technical challenge, discussed in more detail in the next section.



3. ACCESSION TO THE WTO

WTO Accession – Why not just sign on the dotted line?

There are in particular three main reasons why accession to the WTO is more complicated than joining other international agreements or organisations. First, WTO law is only partly a fixed treaty text that can be signed and adhered to. In addition to the main body of law – the agreements – each acceding Member needs to agree with all other Members on its individual specific commitments, in particular its tariff commitments for goods, its schedule of specific market access, national treatment and other commitments for services, and its subsidy reduction commitments relating to agriculture. These commitments require careful design work and detailed negotiations.

Second, acceding countries are expected to comply with existing WTO agreements making up the body of mandatory WTO law at the time when they join the system. WTO agreements are voluminous and contain many, often very prescriptive provisions. Compliance often requires a great number of changes in domestic legislation, the establishment or upgrade of institutions, new processes and administrative/regulatory capacity. These reform processes are time- and resource-consuming and at times controversial within the acceding country. Where the acceding country faces transitional difficulties, WTO Members may be willing to agree to phase-ins. This, in turn, again requires negotiations. Members require comprehensive information on the acceding country's current laws, policies and practices. This exchange of information and discussion requires significant time and effort.

Third, WTO membership is often seen as membership in a club and a privilege that is to be earned and can be denied by those inside, for both WTO- and non-WTO-related reasons. Often therefore some Members, which hold the key to the door, use the opportunity of an accession application to address bilateral trade as well as non-trade concerns. This may lead to additional demands that go beyond what is strictly prescribed by WTO law (“WTO Plus”). It may also lead to political linkages between WTO accession and other, sometimes geopolitical processes and concerns, which in some cases complicates, delays or even temporarily halts WTO accession processes.

WTO Law of Accession: Little Guidance

WTO law proper contains virtually no guidance on the process of accession. Article XII of the Marrakesh Agreement simply provides in relevant part that “[A]ny State or separate customs territory... may accede to this Agreement, on terms to be agreed between it and the WTO.” Some elements of the accession process, which have evolved over time, have however been fixated in various guidance documents and checklists – often referred to as the “ACCs.”



Importantly, except for accessions of LDCs, WTO law does not provide any rules for the conduct, nor benchmarks for the outcomes, of the negotiations between WTO Members and the acceding country on specific commitments beyond the basic body of WTO rules. In 2002 the WTO General Council adopted a set of Guidelines for the Accession of Least-Developed Countries,⁵ which it complemented in July 2012 by setting up more stringent rules for LDC accessions, including benchmarks for commitments on goods and services.⁶

However, for all other acceding countries (and to some extent still for LDCs) the accession process remains in essence a process where existing Members act as gatekeepers who are more or less free to decide what to demand and where to stop, a power only lightly controlled by tradition and general political mechanisms.

For Palestine, looking ahead, an important question would thus be whether it will be treated as an LDC. This is not clear because it is not listed as an LDC on the relevant UNCTAD list of LDCs, but there is a 1988 UN decision to treat Palestine as if it were an LDC for the time being.

3.1 The Accession Process from the Perspective of the WTO

One – classical – way of looking at the accession process is to consider the steps and stages which make up the chronology of formal, “visible” interaction between the acceding country, on the one side, and the WTO and its Members, on the other side.

The first stage of initial formal steps includes the formal request for membership, the establishment of the WTO Accession Working Party and the grant of observership status to the acceding government, and the appointment of a chair of the Working Party.

The second stage, the working party process, begins in earnest with the submission of the acceding country’s comprehensive Memorandum on the Foreign Trade Regime (“MFTR”), arguably the single most challenging step in the accession process – often a source of delay as governments struggle to compose their MFTR. What follows, and continues throughout the accession process, is a “Questions and Replies” process where Members ask and the candidate country answers. The candidate government will further be requested to submit voluminous additional documentation, including in the form of the “ACC” checklists. Working Party meetings are normally held at suitable junc-

5 Decision of 10 December 2002, WTO document WT/L/508 of 20 January 2003.

6 Decision of 25 July 2012, WTO document WT/L/508/Add.1 of 30 July 2012.



tures of the process. Exchanges are often substantial and substantive, and the ability of the acceding government to respond to questions “then and there” can be a significant factor for its success.

Somewhat outside the spotlight of the Working Party process, but still as part of the same, acceding governments and Members conduct bilateral negotiations on goods and services, as well as plurilateral negotiations on agricultural support measures, leading up to the new Members’ schedules of specific market access and subsidy commitments. These negotiations can be many, difficult and time-consuming, depending on Members’ demands and the acceding government’s readiness and ability to negotiate actual concessions.

In addition to bilateral and plurilateral negotiations acceding countries and Members, in this case on a multilateral basis within the Working Party, engage in negotiations on flexibilities to be granted to the acceding country with regard to general WTO obligations, on the one side, and additional “WTO Plus” obligations which Members may request the applicant to assume.

The final stage leading to the actual accession comprises the finalization of the Working Party Report with its annexes, i.e. the complete package of commitments undertaken by, and flexibilities granted to, the new Member; the adoption of the Protocol of Accession by the WTO Ministerial Conference or the General Council and the formal acceptance of the package by the acceding country.

3.2 The Accession Process from the Perspective of the Acceding Government

While the above description of the accession process somewhat accurately reflects the perspective of the WTO and its Members, it is rather insufficient to capture the multitude of processes, issues and correlations that make up the accession process and determine its progress from the perspective of the acceding government. An alternative conceptual framework⁷ therefore looks at the accession process as comprising six overlapping and interlinked “tracks,” as briefly discussed below.

⁷ This six track framework was developed by the authors, Hadil Hijazi and Hannes Schloemann, in the context of a study for the Commonwealth Secretariat.



3.2.1 Track 1: Identifying and Formulating the Country's Interests

A precondition for any successful negotiation is the thorough identification and formulation of a party's interests with respect to what is, or can be, on the table. For WTO accession negotiations this means that an acceding government is called upon to gain a broad, deep and comprehensive understanding of what the country's offensive, defensive and possibly systemic interests⁸ in WTO membership are, including any economic, social and political as well as legislative, regulatory and administrative implications, positive and negative. The identification and formulation of interests is not only highly dependent on the human and financial capacity of the acceding government and the effectiveness of its structures but it is also connected to a government's ability to harness support, critique and information from stakeholders.

3.2.2 Track 2: Internal Processes, Organization, Ownership, Cooperation and Communication

A key component of any accession process is the operation of a multitude of internal factors within the acceding country. These include the designation and mandate of the coordinating agency, the choice and empowerment of key personnel including the chief negotiator, the establishment of intra-government (intra-ministerial and –agency) communication and cooperation mechanisms, including between negotiators and capital-based officials, and comprehensive and reliable communication and cooperation mechanisms between the government and non-state stakeholders (private sector, civil society), ensuring reliable and lasting political ownership of the accession process at home. An important organizational factor is the presence, or absence, of a permanent representation of the acceding country at the WTO.

3.2.3 Track 3: Information Gathering and Information Management

Following the mere procedural step of application, the accession process begins in earnest with the submission of the MFTR followed by the submission of replies to questions raised by Members and the various standard information forms. This information flow requires significant information gathering and information management by the acceding government in cooperation with its stakeholders.

8 Offensive interests could include access to the markets of WTO Members, substantive and procedural rights under various WTO agreements, the desire/need to lock in domestic reform and the participation in the further development of WTO disciplines. Defensive interests could include market access for goods and services originating in WTO Members' markets, cost of reform and impact of WTO commitments on national policies. Systemic interests may include a country's general interest in the functioning of the multilateral trading system WTO system and its participation in, and future shaping of, that system.



The quality and timing of the resulting submissions to the Working Party is not only a function of the technical capacity of the accession team to provide and manage information and respond to questions but is also a function of the quality and thoroughness of the identification and formulation of interests (Track 1) and the internal organization of the acceding government (Track 2).

3.2.4 Track 4: Legislative, Administrative and Institutional Reform

Reflecting the wide reach of WTO disciplines, and sometimes the even further reach of some Members' demands ("WTO plus"), accession requires a significant amount of legislative, administrative and institutional reforms. Carrying out these reforms requires a multitude of resources, a significant degree of coordination and management, time and often political action and compromise.

3.2.5 Track 5: Bilateral, Multilateral and Plurilateral Negotiations with WTO Members

The accession process involves bilateral, multilateral and plurilateral negotiations with Members. A key feature of both the multilateral negotiations on general obligations and the bilateral negotiations on market access commitments is their asymmetry: While the "offer" from WTO Members is largely fixed in the form of their existing schedules and general obligations, the acceding country's offer is subject to discussion and negotiation.

For the acceding government this situation requires careful preparation and management despite multiple intervening difficulties. The keys to successful market access negotiations lie in thorough work on interests (Track 1) and well-oiled communication and coordination within the government and with stakeholders (Tracks 2 and 3). Success further requires good management of the negotiations themselves as well as a good level of understanding of WTO law, on the one side, and the relevant international and regional contexts, on the other side.

3.2.6 Track 6: International and Regional Contexts

WTO accession processes obviously do not happen in clinical isolation from other international processes. Both trade-related and other factors may play important roles.

Existing and envisaged regional trade agreements ("RTAs") and related negotiations provide important context, and may influence the negotiations directly. For example, a regionally agreed common external tariff ("CET") provides an obvious bottom line for an acceding country in its goods negotiations. Regional harmonization, therefore, provides a powerful "objective" argument for the acceding country against further concessions.

WTO accessions will further be influenced by entirely external factors, including geopolitical aspects. Because Members can effectively obstruct formal steps in the accession process, considerations unrelated to trade can enter the process. Conversely, the acced-



ing Member may be able to “buy” tempered market access demands in WTO accession negotiations and hence achieve the conclusion of crucial bilaterals by conceding political capital in other fora.⁹

4. PALESTINE AND THE WTO

4.1 Palestine in the broader Economic Context

4.1.1 Palestine as a Trading Nation

Palestine has been at the crossroads of international trade for thousands of years. One of the “Spice Routes” famously ended in Gaza, and the “Silk Road” made several immediate neighbours of Palestine rich and benefited and involved Palestine as well.

Today Palestine relies heavily on imports of goods and services, and in turn heavily exports goods and services (leaving, however, a significant trade deficit). Trade is the lifeblood of the Palestinian economy. As such, Palestine is already, and cannot be anything other than, embedded in world trade. Virtually all its trading partners are Members of the WTO – or, in other words: the World Trading System.

Given the above, some may say that the right question is not “Why should Palestine become a Member of the WTO?”, but rather: “Can Palestine afford remaining outside of the World Trading System?”

4.1.2 Palestine’s Trade Agreements: Why we have them, and what they achieve

Palestine is currently not a Member of the WTO. Unlike businesses in most other countries Palestinian businesses thus do not yet enjoy the bundle of WTO rights described above. This puts them at a disadvantage – discrimination against Palestinian goods and services in foreign markets is still very easy, and market access rights such as maximum tariffs (“bound rates”) are not guaranteed. (Conversely Palestine also does not yet carry WTO obligations, of course.)

When the Peace Process began, the Palestinian authorities - the Palestine Liberation Organization (“PLO”) and the Palestinian National Authority (“PNA”) - sought to secure at least some trade rights with some of the most impor-

⁹ The EU-Russia bilaterals, for instance, were significantly advanced in 2004 in the context of Russia’s agreement to ratify the Kyoto Protocol, and vice versa.



tant trading partners. This was done through a number of trade agreements, starting with arguably the most important one, the “Paris Protocol” with Israel, which forms part of the Interim Agreement between the parties.

These agreements, or arrangements, usually provide duty free or reduced duty treatment to Palestinian goods. Several of them also address some non-tariff barriers and other trade-related issues. Some, as discussed above, incorporate important parts of WTO law, for example TBT and/or SPS disciplines. None does as yet cover services,¹⁰ but negotiations are under way, or are being (re-) initiated, with Arab countries and the European Union.

Palestine’s Trade Agreements: A Very Brief Overview

Palestine is a party to several bilateral and regional trade agreements (Free Trade Agreements and a Customs Union) or similar arrangements with its trading partners, namely the Arab countries under GAFTA, the EU, the United States, Canada, Israel, European Free Trade Area (“EFTA”), Turkey and most recently MERCOSUR. A brief description of the scope and content of these agreements is available, for example, on the website of the Palestinian Trade Facilitation Portal at (<http://ptfp.ps/etemplate.php?id=92>). In a nutshell:

- Palestine-Israel: The Paris Protocol. As part of the Interim Agreement the “Paris Protocol” since 1995 (1994) links Israel and Palestine in the form of a slightly atypical Customs Union. On trade in goods Palestine and Israel aligned their external tariffs as follows: On most goods Palestine agreed not to lower its tariffs below Israeli tariffs. Palestine may, however, charge higher duties than Israel on these goods. On a select group of goods (listed in Annexes A1, A2 and B to the Paris Protocol) the parties agreed that Palestine may charge lower tariffs than Israel. The Paris Protocol also contains rules on some services sectors, as well as on a number of other matters, including cooperation in customs and tax administration. (It is the basis for the current Value Added Tax (“VAT”) system and the collection of Palestinian duties and VAT on imported goods from third countries.)
- Palestine-EU: The EU-PLO Interim Association Agreement. The agreement, dating from 1997, grants duty free access for Palestinian non-agricultural goods to the EU market, and a phase-out of customs duties on agricultural goods. EU goods enjoy preferential market access in Palestine, with Palestinian commitments aligned to those Israel made under the Israel-EU agreement. A main challenge for Palestinian businesses in using the agreement is the need to fulfil the applicable rules of origin. The Agreement

10 With arguably a few isolated exceptions in the Paris Protocol, which addresses, for example, car insurance coverage.



contains general references to other areas of trade regulation, but no specific disciplines on trade in services.

- Palestine-EFTA Agreement (Iceland, Liechtenstein, Norway, Switzerland). The Agreement foresees duty free treatment for most Palestinian and EFTA industrial products. Agricultural goods are dealt with under separate agreements with the EFTA States. They provide for duty free treatment for some Palestinian and EFTA processed agricultural products, and a reduced tariff for others. Palestinian fish and other marine products are granted duty free access to EFTA states. Again, Palestinian commitments to EFTA are aligned to those Israel made under the parallel Israel-EFTA agreements. The Agreement also includes provisions relating to other trade-related disciplines, but no disciplines on trade in services.
- Palestine-Turkey: Turkey-PLO Interim Free Trade Agreement. The agreement foresees duty free treatment for non-agricultural goods, and partial liberalization for agricultural goods. It also includes general provisions on trade-related disciplines, but none on trade in services.
- Palestine-United States: Preferences Unilaterally Extended. The United States grants Palestinian goods the same preferences as it grants Israeli goods, i.e. largely duty free treatment. Technically this was done through a presidential declaration extending key benefits of the US-Israel agreement to products produced in the West Bank, Gaza and qualifying industrial zones, e.g. in Jordan. The preferences are thus based on a unilateral decision of the US government, not on an international agreement.
- Palestine-Canada: Preferences Extended. Similarly to the United States, Canada extended preferences granted to Israel also to Palestine. This, however, was done on the basis of a bilateral agreement.
- Palestine-Arab States: Greater Arab Free Trade Area (GAFTA).¹¹ Under GAFTA Palestinian goods in principle enjoy duty free access to Arab countries' markets. Other trade barriers for goods are also addressed. Importantly, negotiations within GAFTA are under way to liberalize trade in services as well.
- Palestine-Jordan and Palestine-Egypt Economic Agreements. In addition to GAFTA some of Palestine's goods enjoy preferential access to Jordan and Egypt under the bilateral agreements with these countries concluded after the Paris Protocol for the first time opened the Palestinian market for some Arab goods.

11 Members of GAFTA are Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen in addition to Palestine.



- Palestine-MERCOSUR Agreement. In late 2011 Palestine concluded an FTA with the four MERCOSUR Member States.¹² The agreement provides for the elimination of tariffs on a broad range of goods. It also contains a number of disciplines on many other matters, from safeguards to SPS.

Market Access and Reciprocity: Correcting Asymmetries for Palestine

The RTA with Israel (Paris Protocol), as indicated, is a quasi-Customs Union, meaning that Palestine and Israel have by and large a common, rather: parallel external tariff vis-à-vis the rest of the world. Because the Paris Protocol arrangements mean that goods which enter Israel will usually de facto not be re-checked when they enter the West Bank or Gaza, goods which enter Israel under Israeli RTAs with third countries may end up in the West Bank without paying Palestinian duties (even though legally they would be subject to Palestinian tariffs). This was the initial situation after the Oslo Process started. This meant that Palestine was de facto subject to the obligations of Israel's RTAs – allowing market access opportunities to imports from the markets of these RTAs – while Palestinian exports did not have rights – market access opportunities – in these markets, as they were not Israeli products and hence could not claim tariff preferences and other privileges under these agreements.

This asymmetric situation of having (de facto) obligations without rights led the Palestinian government to conclude RTAs with many of Israel's trading partners in order to provide predictable market access opportunities for Palestinian products in these markets and transform the asymmetric situation created by the customs union with Israel in relation to trade with third parties into a more symmetric situation of reciprocity of rights and obligations between trading partners.

Importantly, the same asymmetry currently applies to trade between Palestine and WTO Members. Imports from WTO Members de facto enjoy MFN treatment in the Palestinian market while Palestinian products do not necessarily enjoy the same rights in these markets. This underscores the fundamental rationale for the Palestinian efforts to approach the WTO is to ensure rights for Palestinian exports in WTO Members' markets.

Regional Trade Agreements and WTO Commitments: Why Palestine Is in Fact Already Bound by Large Parts of WTO Law

It is important to note that the function of RTAs is not only to eliminate customs duties between the parties to the RTA but also to regulate non-tariff barrier ("NTBs) and other regulations of commerce such as import licensing, SPS and TBT measures, rules of origin, customs valuation, trade remedies, etc. The provisions on these NTBs in most RTAs, including those that Palestine is a party to, often make reference to relevant WTO provisions (e.g. GATT, SPS Agreement, TBT Agreement, Agreement on Agriculture, etc.) thereby incorpo-

¹² MERCOSUR is an economic and political agreement among Argentina, Brazil, Paraguay and Uruguay.



rating these WTO obligations into the RTAs. In other words, Palestine is already bound to treat imports from some of its RTA markets according to WTO rules without being a member of the WTO.¹³

Services Trade

With the exception of the Paris Protocol,¹⁴ all of Palestine's current RTAs are "goods only" RTAs creating predictable market access opportunities for Palestinian exports of goods but not for services.

Foreign services, however, often do enjoy de facto market access to the Palestinian market, also as a result of the close economic relations with Israel and the fact that physical access to Palestinian territory is largely unchecked by the Palestinian government. Palestinian law is also relatively open to foreign services and service providers.

Palestinian service providers, however, often do not enjoy the same market access to foreign markets. As a result, Palestine has embarked, or is planning to embark, on negotiations for the liberalization of services trade with some of its trading partners including the EU and GAFTA, but these negotiations are still in very early stages. Efforts to enhance the Palestinian negotiating capacity of services agreements and achieve more clarity as to Palestinian offensive and defensive interests in international trade in services are underway.¹⁵

4.2 Palestine and the WTO: Background & State of Play

4.2.1 WTO Membership, WTO Observership and WTO Accession: Understanding what is what

At the present time Palestine is seeking observership in the WTO, not yet membership, i.e. accession to the WTO. It is useful to understand the differences:

- WTO Membership means to be fully bound by all obligations, and to acquire all rights, under the WTO agreements discussed above.
- WTO Observership means to not (yet) be bound by any obligations, and not (yet) to acquire any substantive rights. It does, however, mean to acquire

13 A recent paper by Luis Abugattas titled "Palestinian Free Trade Agreements and WTO Obligations: Adoption by Incorporation and Commitment without Membership" prepared for MoNE's WTO Unit examines Palestine's WTO obligations including on agriculture, SPS, TBT, quantitative restrictions, customs valuation, trade remedies and IPR that are incorporated in its RTAs with the EU, EFTA, Turkey and MERCOSUR.

14 Paris Protocol addresses aspects of services trade between the Palestinian and Israeli markets including tourism and financial services.

15 The Ministry of National Economy and PalTrade are heavily engaged in an effort to enhance the Palestinian negotiating capacity of services agreements, to conduct a regulatory audit of services regulations and assess the strengths and weaknesses of four services sectors. This effort is supported by a project funded by the EU and managed by MoNE and PalTrade.



some important procedural and institutional rights, namely:

- to attend the sessions of the WTO bodies, from the General Council to the Committees (with the exception of the Budget & Finance Committee);
- to speak at those sessions (Observers may be invited to speak after the Members have spoken)
- to receive most WTO documents
- to receive technical assistance from the WTO's "Institute of Training & Technical Cooperation".
- WTO Accession is the process of becoming a Member of the WTO, described above. (The sometimes encountered phrase "accession as an observer" is thus misleading.) Importantly, when a country applies for Membership the WTO's General Council usually not only establishes the Working Party for that accession, but also usually grants the status observership for the duration of the accession process so that the candidate can acquaint itself better with the organization.

Observership is thus often simply a part, or by-product, of the accession process. But importantly it can also be obtained without (yet) starting the accession process. This is what Palestine is aiming to do, for the time being.

Equally importantly, the accession process consists in fact to a very large extent of internal preparations and reforms. This means that most work is actually homework. It therefore matters less when the process formally starts, and more when the homework is done. If Palestine chooses to obtain first observership and later seek accession, this does not have to impact on the timing of membership at all – it could simply mean to do the preparations before the formal process starts, instead of after submitting an application. The formal accession process can then be much shorter.

Conversely, starting the accession process by submitting an application for Membership in itself does not in itself accelerate Membership. The homework will still be the same.

In other words: If the candidate country – Palestine – manages its side of the process properly, there is very little actual difference between seeking just observership or seeking membership now. In both cases Palestine would become an observer and remain in that state until the accession process is completed. In both cases it would depend almost entirely on Palestine if and when it does its homework, and hence if and when it actually becomes a Member of the WTO. And in both cases the actual decision whether Palestine will be admitted remains subject to the Members' consent.



4.2.2 Approaching the WTO: The External Process

Palestine has been contemplating the possibility of integrating itself into the multilateral trading system for a long while. Early preparatory efforts and discussions with partners date back well over ten years. The Palestinian government has made various documentary submissions to the WTO.

- Observership in the Ministerial Conference Sessions 2005, 2009 and 2011. Palestine successfully applied for observership in the past three sessions of the Ministerial Conference. This, however, gave it only access to these sessions. The status was granted ad hoc and must not be confused with full WTO Observership, which Palestine has not yet achieved (formally called: observership in the General Council).
- Application for Observership in the General Council (Full Observership). Palestine submitted a formal application for full WTO observership in the autumn of 2009. This application has since been renewed, but remains pending. So far the WTO General Council has not yet put the issue on its agenda, so the WTO Membership has not yet had the chance to formally debate and decide on the matter. The reason for this delay is that while many Members have voiced support for the application, some so far maintain their reservations. As the WTO usually works on the basis of consensus, this has so far left the situation undecided. Meanwhile a renewed application with updated information has been developed under the auspices of the National Task Force on WTO (see below).

4.2.3 Approaching the WTO: The Internal Process

Meanwhile, however, many steps have been taken internally to advance the issue.

- Decision to Seek WTO Observership. In 2009 the Palestinian government decided to seek WTO Observership as a first step towards eventual WTO Membership. The ultimate goal of WTO Membership is expressly mentioned in the August 2009 government programme “Ending the Occupation, Establishing the State.”
- National Task Force on WTO (NTF). In the wake of that decision the NTF was established in January 2010. It includes senior public and private sector representatives and is now meeting every two months under the chairmanship of the Minister of National Economy.
- Technical Advisory Team (TAT). The NTF is assisted by the TAT, a body composed of senior technical officials/staff, again from both public and private sector stakeholders. The TAT usually meets every month. The two bodies differ in their mandates. While the NTF provides overall guidance



and policy direction on WTO preparations, the TAT is responsible for the technical aspects of these preparations.

- Transparency Committee. The committee, established by the NTF and composed of members of the NTF and the TAT, is tasked with reviewing transparency rules in Palestine with a view to achieving compliance with WTO transparency requirements.
- WTO Unit at the Ministry of National Economy. The Ministry of National Economy has established a WTO Unit staffed with expert professionals. The WTO Unit provides technical support to the work of the TAT and the NTF and advises the Minister of National Economy on all matters relating to the WTO, WTO law and related processes. The WTO Unit, in that sense, acts as Palestine's central "secretariat" on WTO matters.

A legislative and institutional reform process is under way. It includes steps such as a review of the telecommunications regulatory framework for WTO compliance and the drafting of new existing intellectual property laws. Other measures taken include the development of a WTO road map.

There are, thus, serious internal efforts under way in Palestine, and more is envisaged – but even more needs to be done, both on the public and on the private sector front, to prepare Palestine for its proper integration into the world economy generally and the multilateral trading system in particular.

These efforts enjoy the support of donor-funded projects, including in particular the USAID-funded Investment Climate Initiative ICI Project, which has provided significant input and expertise to the work of the TAT and the NTF. An EU-funded project further supporting the Ministry in trade policy formulation and the preparation of WTO accession is expected to start work in the course of 2013. Many other projects contribute directly or indirectly to the effort, such as in particular the EU-funded Trade in Services project spearheaded by Pal-Trade and the Ministry of National Economy.



5. HOW BUSINESSES CAN/SHOULD GET ENGAGED

All the above shows that Palestinian businesses have a great interest in making sure that Palestine gets it right. Palestine should integrate into the multilateral trading system, but it needs to do it right – obtaining important market access, securing non-discrimination, ensuring substantive and procedural rights, but also safeguarding key defensive interests where appropriate, for example where producers of goods or suppliers of services need and should get protection to operate. This applies in particular where such producers or service providers have a good long-term perspective and/or are important to provide employment.

A first-to-do list for businesses was provided in Section 1.6 above. The following elaborates on these points with a broader view on trade policy.

What should Palestinian Businesses do?

- **Get Educated.** This booklet is just the beginning. Palestinian businessmen and –women need to get on top of their case when it comes to trade policy, both in goods and services, and regarding intellectual property rights. Without this knowledge they will be like balls in the game of international economic relations, rather than the players they should be.
- **Get Organized.** Palestinian businesses need to get organized to analyse, formulate and represent their interests. Trade policy making, including the negotiation of trade agreements (such as WTO accession) requires smart inputs from the business side. It also requires that properly organized private sector organizations act as a driving force behind, and discussion partner to, the government which is defending the national interests.
- **Analyse and Formulate Interests.** Palestinian businesses in all sectors – from stone and marble to banking, from agriculture to advertising, and from textiles to IT consulting – need to identify and formulate their trade interests. This means: their offensive interests in tackling export markets; their defensive interests in defending their positions in the Palestinian home market; and their positive import interests, i.e. their interest in importing input goods or services for their businesses. (See above Section 1.6 for a more detailed account of these different types of interests.)
- **Participate Actively in the National Debate.** Palestinian businesses need to get pro-actively engaged in the national debate around trade policy on goods and services, on WTO observership and accession, and on trade agreements with partners such as the EU, Turkey and the Arab states (under GAFTA). Businesses should not leave the debate to officials, consultants,



representatives of international organizations, activists and journalists. Trade and the WTO are about economic and business interests, which translate into national interests – businesses need to be at the forefront of this debate, not at the receiving end.

- Engage Formally through the NTF and TAT. Palestinian businesses need to get fully engaged through the National Task Force and the Technical Advisory Team – either individually or through their respective organizations.
- Participate in the Preparation and Conduct of Negotiations (WTO & other). Palestinian businesses must support and back up their government in its preparations for, and its conduct of, negotiations, whether in GAFTA, the Palestinian-EU negotiations, the Palestinian-Israeli negotiations on economics or the WTO accession / observership context.
- Contribute to the Design and Implementation of Trade Agreements in Palestine. International agreements need to be implemented locally. Often there are design choices to be made (e.g. how to recognize foreign professionals' qualifications; how to design food inspection mechanisms; etc.), which needs inputs from the affected businesses. Again, knowing and understanding the WTO and other international trade rules is, of course, crucial for businesses to fully articulate what they need and how it can be properly designed and implemented under the international trade rules; and
- Engage and Support the Government in Pursuing Trade Rights. Palestinian businesses need to not only know their rights under trade agreements, but then also engage their government in pursuing those rights with foreign governments. The Palestinian government, however, also needs the full support of businesses when pursuing trade interests, such as the enforcement of rights under trade agreements.
- Ensure Public-Private Information Flow. Palestinian businesses need to ensure that the government has all the information it needs to build and update Palestinian trade policy on goods, services and intellectual property rights. Without such information the government will be weak in defending Palestinian interests, with it will be strong. The same goes the other way 'round: the government needs to talk to businesses and inform them of rights and opportunities. But the business side also needs to be ready to receive, absorb and use the information.
- Develop Visions for the Future. Palestinian businesses, individually and collectively, need to look into the future: Where will the Palestinian economy be in 5, 10, 15 years? What will the trade interests be? How will, how should



Palestine be integrated into the world economy? What services and goods will we, should we trade? Which countries will be our trading partners? It is these visions which they will have to bring to the government.

- Talk to Foreign Partners. Palestinian businesses need to talk about trade with their foreign partners – suppliers, customers, clients, joint-venture partners. These discussions will help identify where things should be going. Trade agreements are often the result of business-to-business relations, with businesses from both sides pushing for facilitated trade.





