The Development of the Regulation of International Trade: The Past and the Future

Abstract

International trade regulation based on agreement and the MFN principle has developed from bilateral FCN agreements to a multilateral arrangement under the GATT with diverse ancillary decisions, understandings, and agreements, to its modern form of comprehensive multilateral agreement under the WTO. A critical part of trade regulation has been the role of dispute settlement where under the WTO the Appellate Body became the authoritative decision-maker on the scope or ambit of the obligations under the WTO agreements. However, since the WTO, preferential trade agreements have proliferated at the bilateral, regional, and plurilateral levels, often deepening the areas of obligation from those under the WTO or expanding to new areas not covered by the WTO agreements. Most recently, this has taken the form of a mega-regional arrangement, the TPP, transformed into the CPTPP, characterized by the number of parties and the size of markets and coverage of areas not found in the WTO or other trade agreements, and without a constitutional role being granted to dispute settlement. The future of international trade regulation, given the present economic and political conditions, is uncertain. The comprehensiveness of mega-regulation is a model, but a reinvigoration of the WTO is unlikely. Retrenchment to traditional bilateral or small-scale regional forms of regulation of much narrower scope cannot be ruled out.

I. Introduction

IN the first edition of this handbook, the international trading system's evolution was dealt with by Gil Winham, who provided the economic and political context, and John Jackson, who provided the legal and institutional context. Professor Winham traced the development of international trade law from the early economic analyses of Adam Smith and David Ricardo to, bilateral treaties of the nineteenth century, the negotiation of GATT 1947 and then the Uruguay Round and the WTO. Professor Jackson focused more specifically on the Uruguay Round and the institutional and legal innovations that emerged with the WTO.
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The present chapter will not go over the ground covered in the two earlier contributions of the first edition, although it will come back to some of the essential material and issues dealt with by Winham and Jackson. Instead, it will focus less on the institutional development of an international trading regime and more on the phenomenon of regulation in international trade. In doing so, it will go beyond the WTO and look at the way the regulation of trade has developed since the advent of the WTO. If the period before the GATT 1947 and the WTO can be seen as a period of bilateralism and the GATT 1947, and the WTO, as the apogee of multilateralism, the period since the WTO has been characterized by a return to bilateralism but at the same time a new form of plurilateralism, sometimes described as 'mega-regionalism'.
C2.P2
A description of the history of international trade regulation cannot focus solely on the form in which trade regulation is embodied. The full picture is much more complex. There are other questions about trade regulation that have to be canvassed in order to gain a proper understanding of the development of international trade regulation. This includes looking at how regulation is put in place, what is being regulated, and the reasons for regulation. All of these matters together enable a full appreciation of the history of the regulation of international trade and where the regulation of international trade stands today.
C2.P3
The Cambridge English Dictionary defines regulation as the 'act of controlling something'. While the idea of control reflects one aspect of the legal regulation of international trade, there is much more in trade regulation than control. The regulation of international trade encompasses a myriad of mechanisms and institutions designed to facilitate trade, to enhance opportunities for exchange, to resolve disputes that arise between States or claims against States, and to protect the interests of participants in the activity of exchange—all under the rubric of the regulation of international trade. In short, to understand how the regulation of international trade began and has continued and to consider prospects for the future, these many aspects of trade regulation have to be considered.
3 C2.P4
The history of international trade regulation is a history of managing the cross-border movement of goods and products—things that a person in one State seeks to sell in another State—even if trade has expanded into manifestations that go well beyond the movement of goods. Cross-border movements, however, are the essence of international trade. In the absence of any arrangement to the contrary, the goods that are moved across borders would be governed completely by separate legal regimes. This includes the laws of the place of origin and the laws of the place of destination and, if they transit a third State, the laws of that State as well.

II. The origins and content of international trade regulation C2.S2

Before the development of the modern State, trade was regulated by empires: ancient Persia, and China. The historian Peter Frankopan provides a picture of trade within the Persian empire and the trade between China and Persia. There were revenue implications—trade was important for ancient Persia to finance military expeditions. And there were regulatory implications—China had a strict regime for controlling foreign merchants and their goods. However, this meant that foreigners trading in China were at the whim of China. But national control in this way was not attractive to States that wished to protect the interests of their trading nationals. This led to a move beyond national regulation to the international regulation of trade.
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The fundamental mechanism for trade regulation was agreement. By the seventeenth century, States were seeking commitments from other States regarding the treatment of their nationals engaged in commerce. The

1654 Treaty of Peace and Commerce between Great Britain and Sweden provided:
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The people, subjects, and inhabitants of both confederates shall have, and enjoy in each other's kingdoms, countries, lands, and dominions, as large and ample privileges, relations, liberties and immunities, as any other foreigner at present doth and hereafter shall enjoy.
C2.P8
This was essentially a guarantee of non-discrimination, which became known as the MFN clause, and was a staple of treaties of friendship, commerce and navigation (FCN) throughout the eighteenth and nineteenth centuries.
C2.P9
While the basic instrument of trade regulation was agreement, non-discrimination was the core principle of regulation. Under the MFN principle, States agreed to grant to the nationals of their trading partner treatment as favourable as that granted to the nationals of other States. In part, non-discrimination was an effort by States to ensure a level playing □eld for their nationals engaged in trade, but it also served an economic function. Non-discrimination was the vehicle for giving effect to the comparative advantage principle according to which countries would bene□t if they exported their least cost products (those in which they had a comparative advantage) and imported their higher cost products (those in which they had no comparative advantage). Non-discrimination through the MFN principle served such a goal, and thus its inclusion in FCN agreements had an economic objective as well.
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The move from conditional MFN—MFN treatment granted in exchange for some other concession—to unconditional MFN—where MFN was granted without restriction—laid the basis for a common acceptance of MFN in international trade relations and opened the way for MFN to be the organizing principle for a multilateral system regulating international trade. Non-discriminatory trade liberalization was the common goal of the United States and the United Kingdom in discussions both during and after the War. Those two States played the principal role in the negotiation of the GATT 1947.
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III. The contribution of the GATT 1947 C2.S3

The GATT 1947, which was drafted as the □rst portion of the planned International Trade Organization (ITO), was primarily concerned with trade in goods and included provisions, often hortatory, on subsidies, antidumping and countervailing duties, quotas, and balance of payments. But perhaps the greatest achievement of the GATT 1947 was the reduction of tariffs and the commitment to continue with tariff reduction over time. The key to this agreement was concessions made by the United Kingdom regarding imperial preferences and concessions made by the United States regarding their high tariffs and the 'grandfathering' of inconsistent domestic legislation. But this was to be just the beginning. The imperial preferences and the high US tariffs were to be further negotiated down over time through successive negotiating rounds. In the negotiating rounds, tariffs that were to be applied on an MFN basis were granted in exchange for reductions of tariffs on other products. MFN treatment was not unconditional like under many FCN agreements but granted in return for 'payment' obtained through tariff negotiations. In a sense, conditional MFN had gone, but conditionality was extracted by negotiating tariff reductions. Reciprocity still existed, just in another form.
C2.P12
Moreover, the GATT 1947 went explicitly much further than earlier trade treaties. It articulated the terms of a national treatment obligation and provided for general exceptions, permitting Contracting Parties to deviate from their obligations when justi□ed by such matters as public morals, the protection of human or animal plant life or health, the conservation of exhaustible natural resources, or national security. All of these were to resonate when trade regulation became more encompassing, and trade disputes abounded.
C2.P13
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Agreement continued to be the basic instrument for the regulation of international trade, but in the form of a multilateral agreement, not just through bilateral treaties. The ambition had been much greater than what had emerged with the GATT 1947. The GATT 1947 was only part of what should have been a fully-.edged international organization, the ITO, to regulate trade going well beyond trade in goods. However, the ITO never came into existence, so the GATT 1947 remained a provisional agreement and not an organization. It was not seen as a formal treaty; it was an agreement operating under a Protocol of Provisional Application. In common parlance, the GATT 1947 was viewed as a 'contract'. Nonetheless, the GATT 1947 included speci□c obligations on its contracting parties, including obligations of a general character. The GATT 1947 was a treaty, although perhaps unusual in its origins and in the method by which it came into effect.
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The GATT 1947 suffered, as a regulatory instrument, from the lack of organs or any real institutional element that would exercise a monitoring function in respect of the implementation of the agreement. In accordance with Article XXV of the GATT 1947, 'joint action' of the Contracting Parties was the mechanism for 'facilitating the operation of and furthering the objectives' of the agreement. The GATT 1947 was never intended to be an international organization in its own right, and no provision had been made for a secretariat. This defect was overcome pragmatically. The Interim Committee for the International Trade Organization (ICITO) became de

facto the secretariat for the GATT 1947, and the Contracting Parties informally established a Council that became the permanent body to direct the GATT 1947.
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However, the GATT 1947 did provide for a rudimentary form of oversight of the obligations under that agreement, and in particular for the preservation of tariff concessions. Apart from a fairly routine obligation of the contracting parties to consult on any matter regarding the agreement's operation, there was also a potential formal dispute settlement process with an enforcement mechanism. Article XXIII, entitled 'Nulli□cation or Impairment', provided that matters which could not be resolved by the parties could be referred to the contracting parties. The Contracting Parties were then to investigate the matter and make recommendations to the parties or make a ruling. They could authorize the suspension of concessions against a Contracting Party if it were appropriate to do so. A Contracting Party against which the suspension of concessions had been ordered could, if it wished, give notice of withdrawal from the agreement.

The GATT 1947 had thus moved beyond the traditional model of international trade regulation in signi□cant ways. Although the mechanism for trade regulation was still an agreement, in the case of the GATT 1947, it was a multilateral agreement under which obligations and bene□ts were provided for across the board based on the non-discrimination principle, MFN. Moreover, the GATT 1947 was the framework for further negotiating rounds in which tariff reduction could be continued. The GATT 1947 also provided for oversight of the performance by parties of their obligations under the agreement, which became the basis for a future, sophisticated third-party dispute settlement system. Trade regulation under the GATT 1947 was moving toward a system with obligations that were seen to be binding and not just political obligations. The process for the resolution of disputes was more than traditional diplomatic representation. The Contracting Parties' involvement in dispute settlement, including the power to make rulings and order the suspension of concessions in respect of a Contracting Party, was a move toward independent third-party adjudication.
C2.P17
With hindsight, it can be seen that international trade regulation was on a trajectory of formalizing, creating more stringent obligations with much stronger methods of adjudication and enforcement. But it was not necessarily seen that way at the time. In many respects, the GATT 1947 was a temporary measure that secured tariff concessions but, in large part, would be subsumed within the ITO. Reciprocity governed tariff concessions, although more of the larger economies were primarily responsible for negotiating tariff concessions. MFN allowed the smaller economies to free ride on those bene□ts. Moreover, although the economic bene□ts of liberalization and MFN were an underlying factor that led to the GATT 1947, the agreement was negotiated in the post-War context of building institutions to promote peace. A multilateral trade agreement was seen as a major contributor to world peace.
C2.P18
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The tariff negotiating rounds were an important achievement of the GATT process. Originally seen as the mechanism for achieving trade liberalization through tariff reductions, by the end of the Kennedy Round, which lasted through 1963–1967, tariffs had been reduced by 35 per cent on top of the lesser reductions of the earlier negotiating rounds. However, tariff reduction was only part of what occurred in the negotiating rounds. The Tokyo Round, in the following decade, turned attention to non-tariff barriers and resulted in the extension of GATT disciplines into areas not previously seen as subject to international trade regulation or had been dealt with in only a rudimentary way. Six 'codes' emerged from the Tokyo Round dealing with antidumping measures, government procurement, technical barriers to trade, customs valuation, import licensing, and subsidies. These codes were agreements in their own right, either elaborating on provisions of the GATT 1947 or developing disciplines for matters not yet regulated by the GATT 1947.
C2.P19
p. 13
While tariff reductions resulting from each negotiating round were simply incorporated into the schedules of the GATT 1947, and the Contracting Parties were committed to them under Article II, the 'codes' were not part of the GATT 1947. They were separate agreements to which GATT Contracting Parties could become a party. Thus, not all of the codes were accepted by all of the GATT Contracting Parties. This was later to create problems interpreting provisions of the GATT 1947 where a code relevant to the interpretation of that provision was in force for one GATT Contracting Party but not for another.
C2.P20
The agreement that constituted the GATT 1947 was unusual in that, in addition to the substantive provisions, it included an Annex of Notes and Supplementary Provisions, which included interpretative notes for each provision and understandings of the parties at the time of the negotiation of GATT. These provisions were said to be an 'integral part' of the GATT 1947. The Codes, however, were separately negotiated and agreed upon instruments and were not part of the GATT 1947, even though they were deposited with the GATT Director-General and 'serviced by the GATT secretariat'. In addition to the Codes, the Tokyo Round also resulted in several Declarations, Decisions, and Understandings. The Declaration on Trade Measures taken for Balance-of-Payments Purposes uses the language that the Contracting Parties 'agree as follows'. The Decision on Safeguard Action for Development Purposes does not use the language of 'agree', but states that the parties 'recognize'. However, the Understanding regarding Noti□cation, Consultation, Dispute Settlement, and Surveillance, while using the language of 'understanding', also reverts to the language that the Contracting Parties 'agree'.
The precise legal status of these instruments was unclear. Article XXV of the GATT 1947 provides for joint action by the Contracting Parties. Still, such action contemplates the existence of 'exceptional circumstances', which does not appear to be the basis on which the Tokyo Round instruments were prepared. However, regardless of strict legal status, these instruments represented how the GATT Contracting Parties wanted to conduct their relationship under the GATT 1947. Some were carried out as if they involved legal commitments.

Thus, the understanding on dispute settlement guided the way the panel dispute settlement process developed under the GATT 1947. Moreover, notwithstanding the uncertainty of the legal status of some of the Tokyo Round instruments, they were to have an important in.uence on the development of the regime that emerged from the Uruguay Round.

C2.P22

The practice under the GATT 1947, in particular through the tariff negotiating rounds, was an important step forward in international trade regulation. Not only did it clarify and extend the scope of GATT disciplines, but it also caused the mechanism for trade regulation to evolve. Agreement was still the basic instrument for embodying the substance of trade regulation, but the GATT 1947 agreement was both less and more than what a treaty normally comprised. It was less because it was seen as a contract that was provisionally applied. It was more in that it had its own provisions incorporated in the agreement to guide in the interpretation and application of the treaty's substantive obligations. Moreover, the Tokyo Round complicated this further with its conclusion of separate agreements, declarations, decisions, and understandings. The regulation of international trade had become a complex of legal commitments and related clari□cations of those commitments and expressions of willingness to move ahead in common without the overall cover of a legally binding agreement. It was a practical, albeit piecemeal, approach.

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IV. The advent of the World Trade Organization C2.S4

The Uruguay Round of Multilateral Trade Negotiations brought into being the WTO and, in many respects, a new international order for international trade regulation. It was fundamentally based on the GATT 1947, which was incorporated and brought into the new WTO. But it was a more comprehensive regime expanding the regulation of trade in goods to regulate trade in services and trade-related aspects of intellectual property. In addition to broader coverage in the WTO, the regime for trade in goods, the staple of the GATT 1947, was enhanced with obligations being speci□ed and what may have been implicit or hortatory under the GATT regime was made subject to more precise obligations. Also, a highly sophisticated dispute settlement system was elaborated.

C2.P24

The mechanism for international trade regulation under the WTO was once again an agreement, but it was agreement in a much more comprehensive way. The Tokyo Round approach of concluding additional agreements (codes), declarations, decisions, and understandings was continued. Still, the result was wrapped together in a comprehensive package under which all was binding as if it were a single instrument. The GATT approach of separate codes, or declarations or understandings whose legal status was obscure, was abandoned in favour of a 'single undertaking' under which everything was binding regardless of whether it was called an agreement, a declaration, a decision, or an understanding.

C2.P25

The mechanism to implement the WTO obligations was the WTO Agreement to which was annexed all of the other agreements entered into as a result of the Uruguay Round (covered agreements). Thus, the WTO Agreement was a framework agreement, and three of the annexes were, as in the GATT 1947, designated as 'integral parts' of the WTO Agreement. The fourth annex consisted of 'plurilateral' agreements that applied only to the WTO Members that had become a party to them. The model of the Tokyo Round codes was thus continued for these agreements. In addition, during the Uruguay Round, in December 1993 and April 1994, States adopted, within the framework of the Trade Negotiations Committee, a number of decisions and declarations regarding the operation of the WTO and the covered agreements. Those decisions are listed by the WTO with the legal texts and, if not formally binding, operate in the same way as the Tokyo Round decisions and declarations.

The regulation of international trade under the WTO is based on a complex constitutional system founded on the WTO Agreement, which incorporates the substantive covered agreements and includes as Annex 2 the Dispute Settlement Understanding. Notwithstanding the use of the term 'Understanding', the DSU is simply another agreement that is an integral part of the WTO constitutional system. And that system includes the ministerial decisions and declarations adopted during the Uruguay Round. Moreover, Article XVI of the WTO Agreement provides that 'the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947'.

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Thus, the WTO brought together under a single treaty regime the disparate parts of the GATT 1947 that had previously enjoyed a degree of independence. That independence was no longer possible under the WTO regime. However, despite its characterization as a single undertaking, the WTO is not a single unitary arrangement. The plurilateral agreements are not part of the single undertaking. The potential variation in the normativity of the various ministerial decisions and declarations adopted separately from the WTO agreement itself indicates a more complicated regulatory system than the notion of a single undertaking might imply. This highlights the importance of the new WTO dispute settlement system in interpreting the WTO agreements and the related undertakings.

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V. The role of dispute settlement in the new regulatory regime C2.S5

Under the GATT 1947, dispute settlement had an important focus, encouraging the disputing parties to resolve their dispute through an amicable resolution if possible. The original purpose of a panel having two meetings with the parties was that one meeting would be devoted to ascertaining the facts and alleged violation and the other to seeking a resolution of the dispute. Indeed, violation of the GATT 1947 was only one basis for bringing a matter to the Contracting Parties. Complaints could also be brought where a Contracting Party could show that the bene□ts it expected to get under the Agreement had been nulli□ed or impaired by the actions of another Contracting Party even though those actions did not constitute a violation of the GATT 1947.

C2.P29
WTO dispute settlement maintained the form of GATT dispute settlement, including two panel hearings with the parties and the possibility of a non-violation complaint. But the fundamental orientation of dispute settlement changed. The panel process's objective was less to encourage the parties to nd a solution to their differences but more to resolve disputes that were fundamentally about the interpretation and application of the WTO agreements. Provisions for consultation remained as well as encouragement to parties to resolve their disputes through mutual agreement. A 'mutually agreed' solution is still preferred.
p. 16 C2.P30
More importantly, the DSU characterizes the dispute settlement system as 'a central element in providing security and predictability to the multilateral trading system' and provides that its functions include, 'to clarify the existing provisions of those (covered) agreements in accordance with customary rules of interpretation of public international law'. In other words, the WTO negotiators saw the dispute settlement system in terms of resolving disputes between WTO Members and as being the guardian of the interpretation of the WTO agreements and thereby maintaining security and predictability in the multilateral trading system. The WTO was clearly now a system based on rules with a mechanism for interpreting those rules and ensuring they would be applied to ensure that the rules of the international trade regime were stable and predictable.

The effect of these provisions was to create the potential for dispute settlement to have a key role in the constitutional system of the WTO. The Members negotiated the text of the WTO agreements. After that, the scope and ambit of international trade regulation, through the power of interpretation, was assigned to the dispute settlement process.
C2.P32
Two other elements of the Uruguay Round regime served to bolster the centrality of the dispute settlement process.
C2.P33
First, the reverse consensus procedure took away from States the power to block both the bringing of disputes and the implementation of decisions of the dispute settlement organs. Article 6.1 of the DSU provides for the establishment of panels unless there is a consensus in the DSB not to do so. Article 16.4 of the DSU states that panel reports placed before the DSB are to be adopted unless there is a consensus not to adopt them. Under Article 17.14 of the DSU, the same result is achieved for reports of the Appellate Body. These provisions essentially made WTO dispute settlement compulsory and the decisions of WTO dispute settlement organs binding.
C2.P34
Second, the WTO covered agreements also created an Appellate Body, an organ whose function was to consider appeals from panel reports on 'issues of law covered in the panel report and legal interpretations developed by the panel'. Since the dispute settlement process' function was 'to clarify the existing provisions of those [covered] agreements', that role inevitably would fall to the Appellate Body. This is because the Appellate Body had the power to review interpretations of law formulated by panels. The ultimate arbiter on the interpretation of the WTO agreements' provisions was to be the Appellate Body.
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The rst members of the Appellate Body clearly saw their role in constitutional terms. They set about establishing a framework for interpretation. Since a treaty established the WTO, the interpretation of the WTO agreements was to be in accordance with the principles of interpretation of public international law. Indeed, that was required by Article 3.2 of the DSU: 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. Thus, Articles 31 and 32 of the VCLT became boilerplate for the interpretation of the WTO agreements. The Appellate Body had established the WTO rmly in the mainstream of public international law: 'the General Agreement is not to be read in clinical isolation from public international law'.
p. 17 C2.P36
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The Appellate Body then went about lling in gaps that had become apparent because there was no provision made in the WTO agreements. In large respect, these were procedural or administrative. WTO dispute settlement had no rules on the burden of proof. The Appellate Body, aligning itself with other international courts and tribunals, adopted the rule that a party that asserts must prove. But the Appellate Body went further and made substantive additions. The DSU makes no provisions for amicus briefs. However, relying on a panel's power to seek information (Article 13 of the DSU), the Appellate Body concluded that a panel could consider information provided to it by a third party (an amicus) that had been submitted voluntarily and not sought by the panel. It then went further and concluded that the Appellate Body itself had the power to consider amicus briefs, notwithstanding that there is no equivalent to Article 13 of the DSU relating to the Appellate Body.
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Moreover, the Appellate Body asserted its primacy in interpretation. When panels have failed to follow a decision of the Appellate Body's decision in an earlier case, the Appellate Body has simply reversed them. Since, in practice, the Appellate Body's decision could not be overturned by the DSB, the Appellate Body stands alone as the authentic interpreter of the WTO agreements. In principle, the WTO Members can amend the relevant agreement to overturn an interpretation of it by the Appellate Body. But amendment is complicated and politically unlikely, so the decisions of the Appellate Body remain.
C2.P38
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The WTO regime changed the nature of international trade regulation in two critical ways. It put trade

regulation into a comprehensive treaty framework, which moved beyond the uncertainty of the GATT era. It created a dispute settlement process that granted the dispute settlement organs a major role in determining the scope and extent of international trade regulation.
p. 18
The full potential for this role of dispute settlement was perhaps not appreciated at the time of the Uruguay Round negotiations. And there were several safeguards in the WTO agreements that could have suggested the opposite result. Article 3.2 of the DSU provides that dispute settlement is meant to 'preserve the rights and obligations of Members' and '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'. The Members have the power to amend the agreements. There were still to be negotiating rounds (Ministerial Conferences) where the consequences of dispute settlement interpretations of the covered agreements could be negotiated away. But the reality is different from the text. Ministerial Conferences, by and large, have not resulted in signi□cant amendments to the WTO covered agreements. Although some major new agreements have been concluded under the auspices of the WTO, membership oversight and control of the function of interpretation and thus the application of WTO agreements have not materialized. The consequences of this, culminating in the lack of a functioning Appellate Body today, are dealt with elsewhere in this book.
C2.P40
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VI. The return to bilateral international trade regulation C2.S6
Multilateral trade regulation under the GATT 1947 did not replace bilateral trade agreements. It was recognized in the GATT 1947 itself that bilateral trade agreements existed, and it provided a mechanism in Article XXIV for reconciling such bilateral agreements with the multilateral regime. The fundamental problem was that a bilateral agreement provided preference to the Contracting Parties to that agreement that was not being provided to other GATT Contracting Parties and thus was contrary to the general requirement for MFN in Article I of the GATT 1947. The objective of Article XXIV was to permit the continuance of customs unions and free trade areas outside the GATT framework, provided they were structured and operated in a way that minimized trade diversion. This resulted in a diminution of the basic principle of non-discrimination, but it also recognized a reality that States had entered into customs unions and free trade agreements notwithstanding their commitment to the GATT 1947 and were likely to continue to do so.
C2.P41
The WTO, through incorporating the GATT 1947, accepted Article XXIV and its framework for accepting customs unions and free trade areas, notwithstanding their incompatibility with the non-discrimination principle. It also included a similar provision in respect of services—Article V of the GATS. The Uruguay Round agreements also included an Understanding on the Interpretation of Article XXIV of GATT 1994, setting out clari□cations and factors to be taken into account in Article XXIV's interpretation. In February 1996, the General Council set up a Committee on RTAs to examine noti□cations by WTO Members of their creation or intent to create a customs union or free trade area and consider its compatibility with the provisions of Article XXIV and make recommendations to the General Council.
C2.P42
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However, the formulae in Article XXIV for the creation of WTO-compatible customs unions or free trade areas are not models of clarity or easy to apply in a straightforward manner. While over 500 noti□cations have been made to the WTO, few have been endorsed as compatible with Article XXIV of the GATT 1994. But, the Committee has also been reluctant to conclude that customs unions or free trade areas are not compatible with Article XXIV of the GATT 1994. Thus, although there are procedural hurdles under the WTO to the conclusion of preferential trade agreements, there is no effective regulation by the WTO over the creation of such agreements.
C2.P43
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Preferential or free trade agreements (PTAs or FTAs) existed during the era of the GATT 1947. A major development in this regard was the European Economic Community (EEC) in 1958 and the subsequent enlargements of the Community. There was the European Free Trade Association (EFTA) in 1960 of countries that were not part of the EEC. Both the EEC and EFTA also entered into bilateral agreements with neighbouring states. The Central American Common Market (CACM) was established in 1960, and some 13 years later, the Caribbean Community and Common Market (CARICOM) came into existence. Bilateral free trade agreements (FTAs) were entered into among countries of Eastern Europe which were not part of the GATT 1947. And there were isolated bilateral FTAs elsewhere in the world. The United States had not in the early GATT days entered into bilateral free trade agreements, but in 1985 it entered into a free trade agreement with Israel and three years later into an agreement with Canada.
In the years immediately prior to the Uruguay Round, changes in the landscape of PTAs began to occur. Argentina, Brazil, Paraguay, and Uruguay negotiated their own customs union (MERCOSUR, 1991). The United States began to negotiate a much deeper and more comprehensive free trade agreement that would be an enlargement of the Canada-US Free Trade Agreement and would include Mexico (NAFTA, 1994).
C2.P45
NAFTA, which came into force prior to the WTO, was in many respects a precursor of the type of trade agreement negotiated in the Uruguay Round and a model for later, broader FTAs. NAFTA covered services as well as goods and included provisions relating to intellectual property and an investment regime. It contained a comprehensive dispute settlement system for State-to-State disputes, which built on and went beyond GATT dispute settlement. It also included a novel dispute settlement process of bilateral review of domestic decisions on antidumping and countervailing duty matters. Moreover, it included side agreements relating to the environment and labour standards. Thus, even by the time that the WTO came into existence, a competing model of trade regulation had emerged. And in addressing investment within the context of a trade agreement

and including institutions that would focus on the environmental and labour standards, NAFTA went beyond anything included in the WTO agreements.
C2.P46
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However, in practice, there was little challenge to the trade regulation model developed in the WTO. The mechanism for dispute settlement adopted in the WTO went beyond what had been provided for in NAFTA, and the combination of the institutional support for dispute settlement that the WTO provided, the compulsory and binding nature of WTO dispute settlement, and the presence of an appellate jurisdiction all made WTO dispute settlement a much more viable and attractive option for the parties. As a result, apart from matters that involved the interpretation of NAFTA regarding provisions for which there is no counterpart in the WTO, NAFTA dispute settlement gained no real traction. Even in respect of matters for which there were no parallel WTO obligations, the parties were to □nd that the process was de□cient, and a NAFTA party was able to block dispute settlement by refusing to agree to the appointment of a panel member necessary for the dispute to proceed.
C2.P47
In two respects, NAFTA dispute settlement functioned well. Dispute settlement regarding antidumping and countervailing duties operated without problems, and Investor-State dispute settlement was active and effective. However, as between Canada and the United States, following a three-year legacy period, Investor-State dispute settlement terminated on 1 July 2020, the date on which NAFTA's successor came into force.
C2.P48
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MERCOSUR also has its own provisions for dispute settlement, with a panel process similar to the GATT and NAFTA but, as with NAFTA, there is no indication that dispute settlement under that agreement has challenged or supplanted WTO dispute settlement. However, the con.ict between WTO decisions and MERCOSUR dispute settlement has arisen and is discussed elsewhere in this volume.
C2.P49
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In its early years, then, WTO dispute settlement occupied the □eld and dispute settlement through the interpretation and application of trade agreements as a form of trade regulation was essentially a WTOphenomenon. Therefore, it might have been assumed that the comprehensive scope of the WTO agreements, with a sophisticated dispute settlement process, together with a process for amendment of the WTO agreements and the negotiation of new agreements, would have meant that the negotiation of FTAs outside of the WTO would, at least in respect of WTO members, have been unnecessary.

A few FTAs entered into force in the years immediately following the WTO's establishment, but in the 2000's the number increased dramatically. In 1990 there were 70 FTAs in the world. By 2020, 303 were in force. While many of these FTAs were bilateral, there was an increasing tendency to conclude agreements with more than two parties. While these multi-party agreements were designated as 'regional' there has been an increasing tendency to conclude trade agreements that are plurilateral but not based on a speci□c region. Trade regulation, therefore, was functioning at multilateral, bilateral, regional, and other plurilateral levels.
C2.P51
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p. 21
The nature of FTAs could be measured not only in terms of who was subject to them (bilateral, regional, plurilateral) but also in terms of the subject-matter or scope of regulation. Early FTAs were concerned largely with tariff reduction, but with the substantial gains made in tariff reduction under the GATT, the scope for tariff reduction lessened. FTAs started to be characterized in terms of the depth of regulation that they encompassed. This has led to the scholarship on FTAs being categorized into 'WTO plus' agreements, that is to say, agreements that include obligations that exist under the WTO but take them further, and 'WTO extra' agreements, that is to say, agreements that include obligations not found in the WTO. WTO plus agreements might relate to tariffs and particular provisions on safeguards; WTO extra agreements might cover investment, a matter not dealt with under the WTO.
C2.P52
The rationale for the conclusion of FTAs outside the WTO framework is debated, with a division between those who see FTAs as trade-distorting and those who see them as potentially trade enhancing. FTAs are seen as a means of negotiating on issues on which no movement can be seen in the WTO since the organization has been unable to advance a negotiating agenda after the failure of the Doha Round. This is coupled with paralysis over the Appellate Body. FTAs are also seen as a way of providing better market access into larger economies.
C2.P53
A WTO study identi□es market access and investment as the primary factors put forward by States in government reports for entering into FTAs, encompassing both of the above rationales. FTAs can be mechanisms whereby trade regulation is deepened and covering matters not included in the WTO. This can be illustrated by FTAs that cover matters like investment, labour rights, environment, digital commerce, and corporate social responsibility. However, depth regarding coverage does not always mean depth in terms of the stringency of obligations. A study comparing FTAs entered into by the European Union with FTAs entered into by the United States concluded that while the EU FTAs were broader in coverage of new areas, US FTAs included more obligatory language in the areas covered.
C2.P54
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As has always been the case with trade agreements, there is also a political element. FTAs are entered into with States to further political objectives, either because of who they include or who they do not include. This is a phenomenon that has increasing salience in recent years, as will be mentioned later.

C2.P55
p. 22
There is, however, a further emerging economic reason for such FTAs. Changes in manufacturing have changed how trade occurs and hence how trade has to be regulated. The simple model, which underlay the GATT 1947 and to some extent the WTO, was that of a good produced or manufactured in State A that was shipped to State B for sale. But trade patterns are more complex than that. Production may be completed in one country, but it can result from the production of components and assembly in other countries. There is in effect a chain throughout the production process culminating in the sale of the product to a consumer in a □nal country. In this broader perspective, trade is concerned not just with the crossing of a □nal product across a border but with the whole 'global value chain' that integrates what has been traditionally understood as trade with investment and services. A focus on global value chains provides an incentive for FTAs between countries that are part of such a chain and seek to provide a comprehensive and more integrated approach to trade. As will be mentioned later, this factor has had more in.uence in developing large FTAs rather than bilateral agreements, resulting in mega-regionals and mega-regulation.
C2.P56
What, then, are the trade regulation implications of FTAs? The 2004 Sutherland Report stated, 'what has been termed the "spaghetti bowl" of customs unions, common markets, regional and bilateral free trade areas, preferences and a miscellaneous assortment of free trade deals has almost reached the point where MFN treatment is exceptional treatment'. The Sutherland Report perceived the erosion of MFN to be a fundamental failing diminishing the authority of the WTO, undermining the economic rationale on which the MFN principle is based, and resulting in incoherence in international trade regulation. The hope expressed in the Sutherland Report was that States would think again before entering into FTAs. That hope, however, did nothing to stop the continued conclusion of FTAs.
Nor can the claim of incoherence be seriously substantiated. It is true that States entering into FTAs will be regulated by the terms of both the WTO and their FTAs but con.icts between the multilateral regime and bilateral or regional agreements have arisen infrequently. In part, this is because the parties have been able to manage those con.icts and in part because FTAs generally do not have active and effective dispute settlement regimes that can adjudicate authoritatively on con.icts between a FTA and another international trade agreement. By contrast, the WTO dispute settlement regime is authoritative and widely used. On each occasion when the issue of priority between the WTO agreements and a FTA has arisen, the Appellate Body has ruled conclusively in favour of the priority of the WTO. Thus, while in, principle, there could be incoherence in international trade regulation through the proliferation of FTAs, in practice, the few issues that have arisen have been managed within the WTO framework.
C2.P58
p. 23 36
Yet, the situation is not entirely satisfactory. In a global economic order with an active resort to creating FTAs, does it make sense that the WTO regime always has priority? The reality of FTAs was recognized in the GATT 1947. Does Article XXIV of the GATT 1994 mandate a system of supremacy for the WTO over customs unions and free trade areas, or a system of complementarity? And, in fact, is WTO supremacy the best policy choice? If supremacy is what WTO Members want, why have they been engaged in a frenzy of concluding preferential trade agreements? This matter requires more re.ection, particularly in the context of WTO reform.
C2.P59
VII. The move to mega-regionals C2.S7
In recent years a new phenomenon has emerged in international trade regulation, the concept of megaregulation. The concept evolved out of analyzing the Trans-Paci□c Partnership (TPP), which in its negotiated form involved 12 States across a wide area of the Americas and the Paci□c, from Chile and New Zealand in the south to Japan and Canada in the north. To the extent that this represented a region, it is a mega-region. TPP was characterized by the number of States, the total size of the economies included, the breadth and coverage of the economic disciplines included, regulatory alignment within national legal systems, and the provision of a space where economic enterprises could function within global value or supply chains across national markets. To a certain extent, TPP was a framework for a new form of transnational economic regulatory arrangement that went beyond the scope of existing FTAs and in many ways beyond what the WTO offered.
C2.P60
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The withdrawal of the United States from the TPP reduced the number of parties, and the extent of the economic market included within it. But, with a few exceptions, the agreement continued the comprehensive mega-regulation of the original draft that included the United States. The same kind of mega-regulation can be seen in the negotiation of the TTIP, between the United States and the European Union (although negotiations appear to have been suspended), involving two large markets, and the agreement between the European Union and Canada, CETA, although the combined market size is not in the same category. However, the breadth of coverage and the integration of supply chains is similar.
C2.P61
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p. 24
Mega-regulation provides a new orientation to international trade regulation. It integrates not only the expansion of trade regulation under the WTO, encompassing goods, services, and trade-related aspects of intellectual property, but incorporates non-WTO areas, such as investment, labour, environment, telecommunications, digital commerce, competition, regulatory coherence, transparency, and anti-corruption. Of course, some of these areas are related to WTO obligations through the operation of the exceptions under Article XX of the GATT 1994 or through WTO committees looking ahead to future issues. However, the megaregulation agreements deal with these matters directly and make them the subject of speci□c obligations. Moreover, unless speci□cally excluded, these new areas are also subject to the dispute settlement provisions of

the TPP. However, dispute settlement is not granted the role that it has in the WTO. Dispute settlement under the TPP was to be by ad hoc panel proceedings. The role of the panel was to resolve a dispute. Dispute settlement was not granted the systemic and almost constitutional role of WTO dispute settlement in clarifying the provisions of the agreement or providing stability and certainty in the operation of the TPP regime. Moreover, no appellate system was created. Thus, the de facto regulatory function of dispute settlement organs developed under the WTO was not contemplated in the TPP, in the subsequent CPTTP, or in other international agreements that share mega-regulation characteristics.
C2.P63
Although the TPP has not yet been fully replicated through the development of other mega-regional agreements, apart from CPTPP, it has an imitator to some degree in Regional Comprehensive Economic Partnership (RCEP), which was signed on 20 November 2020, and it has become a model for other agreements of lesser geographical scope. CETA has already been mentioned as well as the TTIP. However, its in.uence has extended to bilateral FTAs, which are now re.ecting TPP coverage, particularly in Latin America. Thus, TPP has been seen as having an impact beyond the agreement between the parties and as shaping the new rules of global trade.
C2.P64
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The other side of the mega-regional development is the question of whether there are limits to the linking of trade and other matters—the ‘trade and …’ agenda. While the linkages are intellectually viable and make economic sense, whether they are politically sustainable in the longer term is questionable. The agenda delves more deeply into matters of domestic regulation. For example, digital commerce, transparency, anticorruption, and regulatory coherence all encroach on matters of traditional domestic jurisdiction and enhance the claims about a lack of democratic legitimacy in international trade policymaking. The question is whether the reaction to the breadth of mega-regulation will foster a retrenchment in the coverage of trade regulation under future FTAs.
C2.P65
p. 25
VIII. The future of international trade regulation C2.S8
In the current era of fundamental uncertainty about world health and economic ordering, disenchantment with the WTO, the lack of political leadership in the major economic powers, and destructive approaches on the part of some, and the re-emergence of military con.ict in Europe, it is dif□cult to make any reliable assessment of the future of international trade regulation. The current circumstances may be transitory, dependent on the development of new vaccines and changes in governments and leadership. Alternatively, they may be deepseated, re.ecting fundamental changes to the world order that will not be altered simply through political change. This means that any discussion of the future on international trade regulation has to be seen as contingent and speculative. Yet some tentative indication of trends can be offered.
C2.P66
The WTO’s inability to foster and sponsor change and development in international trading relations means that it is unlikely that the WTO will be the driver for new international trade regulation. This does not mean that the WTO has become irrelevant. It still retains the monopoly of international trade dispute settlement, and that is unlikely to change. Current concerns over the demise of the WTO Appellate Body seem to suggest that this important function of the WTO is also in crisis, but the continual resort by WTO Members to WTO dispute settlement suggests that WTO Members in practice see a continuing need to have some sort of body to resolve their disputes. One of the main contributions of the WTO may have been to make dispute settlement an accepted and necessary part of international trade regulation.

Of course, the lack of an Appellate Body might suggest that a critical function of dispute settlement in the WTO of clarifying the obligations under the WTO agreements, and providing security and predictability under the WTO regime, will be lost. However, while this function might have been seen as the preserve of the Appellate Body, largely because it seemed to arrogate that role to itself, there is no reason why a panel system alone cannot equally ful□ll that role. Moreover, it is clear that over time panel reports have become more like Appellate Body reports regarding their approach to legal issues, their concern with the systemic implications of their decisions, and their attempts to ensure that the law applied is consistent over the range of panel decisionmaking. This is more dif□cult to do in a system based on ad hoc panels, but the prominent, albeit discreet, role played by the WTO Secretariat in panel decision-making and writing panel reports ensures that that certainty and consistency, as well as security and predictability, are maintained.
C2.P68
In any event, at least in the short term, the matter may be somewhat alleviated through an interim arbitral arrangement which is to act as the Appellate Body has done until it is reinstated or reformed and brought back.
p. 26 C2.P69
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With a WTO largely maintaining the status quo, developments in international trade regulation are occurring elsewhere, bilaterally through PTAs, but more broadly with plurilateral agreements that broaden and deepen the scope of international trade regulation. In part, this corresponds to the practical consequence of globalization. Money and goods have moved more freely, and patterns of investment and production have changed. The development of an understanding of global value chains where multiple jurisdictions may be involved in the investment in and production of goods has forced a rethinking about both who should be involved in regulating and how and what the subject matter of regulation has to be. The movements of services or products across borders today can implicate investment, □nancial regulation, competition policies, and the environment. This, in turn, broadens into digital commerce, labour rights, corporate social responsibility, transparency, and anti-corruption regulation.

C2.P70
In BITs, these were seen as ‘WTO-extra’ matters; in the context of mega-regulation, these matters became part of a central core. This was becoming a new shaping for global trade rules, seen in a much broader context, and a shaping that was taking place via plurilateral, regional, and bilateral agreements that were in effect providing the basis for a multilateralization of a new trade order.
C2.P71
Will these developments be the forerunner of international trade regulation of the future? They are not without their critics. Megaregulation is seen as the triumph of experts who do not have legitimacy in society generally. The TPP has been characterized as an ‘exercise in expert power and authority’ from the negotiations’ secrecy to the encroachment on national regulatory regulation. And the loss of policy space, it is argued, will have particularly negative consequences for the developing world. Thus, the legitimacy of trade negotiations continues to be questioned, and mega-regulation is a contested development. Whether the mega-regulation model is sustainable has yet to be seen. The refusal of the United States to participate in the TPP can probably be seen more as a matter of domestic politics since the broader approach to trade regulation re.ected in megaregulation is pursued by the United States in its other trade agreement negotiations.
C2.P72
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A further trend in trade regulation is the linking of security with economics and hence trade. This has manifested itself in the increasing invocation of the national security exception, Article XXI of the GATT 1994, in WTO trade disputes and its equivalent in Article 73 of the TRIPS Agreement. But it has broader application in the unilateral actions of the United States and China in their retaliations and counter retaliations over trade issues in recent years outside of the WTO context. This trend has been characterized as developing a ‘geoeconomic world order’ under which economics are invoked to achieve national security goals. In the short term, at least, this will inhibit the development of modes of international trade regulation.
C2.P73
p. 27
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The future of international trade regulation will depend in large part upon the way global trade develops. The existing regimes have been a response to globalization and a consequent need to develop a trading regime that re.ects the reality of how the movement of goods and services occurs around the world. This has led to a need to move beyond border measures to deal with internal regulation and to move from goods alone to services and the related aspects of integrating markets, including intellectual property, investment, labour, and the environment. As the net expands it also brings in competition policies, telecommunications, digital commerce and to move on to regulatory coherence and transparency. The expansion to mega-regulation was a response to the increasing complexity of economic management in a globalizing world.
The continuation of this deepening of international trade regulation is not inevitable and different models narrowing the scope of such regulation may develop. The increasing divisiveness among large economic powers makes it unlikely that in the short term at least there will be much of a role for the WTO in generating new regulation. However, the regulatory role through dispute settlement seems unlikely to abate. It also means that PTAs are likely to continue either on a bilateral basis or involving a larger group of States regionally and perhaps on a mega-regional basis. Whichever form is used, it would seem that the reality of cross-border economic activity will dictate that the substantive new areas of regulation that have emerged in recent years, and particularly as embodied in the TPP, with variations and different emphases will be included in these agreements.
C2.P75
But there is an important quali□cation whose impact cannot be assessed adequately at present. This concerns the consequences of the current COVID-19 pandemic. The enforced restrictions and quarantining requirements within States have had not only an impact on the volume of international trade, they also have implications for the way international trade regulation can develop. There are two levels at which this can operate. The □rst relates to dispute settlement. WTO dispute settlement is characterized by panels meeting in person on two occasions. The challenge for international courts and tribunals is to □nd a way to conduct hearings remotely through videoconferencing or other means. Arbitral bodies established under the PCA and ICSID are responding to this, as is the International Court of Justice. The challenge for the WTO is to adapt its dispute settlement process to accommodate this as well. The WTO’s inability to adapt in respect of trade liberalization has been a reason for the development of PTAs, so the question arises whether the WTO can adapt in respect of dispute settlement.
C2.P76
p. 28
The second consequence of the pandemic is that multilateralism that depends on large meetings of States cannot go ahead in its traditional form. Will this mean a further push towards bilateralism? It may be easier for States to revert to bilateral agreements rather than manage a multilateral negotiation by videoconference. But, at present, it is impossible to predict whether this will be a transitory trend or one of longer, far-reaching implications.
C2.P77
Finally, as this edition goes to press, the con.ict in Ukraine raises questions about the multilateral order and its economic regulation that could have far-reaching consequences for both the international legal order generally and the international trading regime.
C2.P78
The progression of international trade regulation from the GATT 1947 and on has been to widen and deepen the ambit and scope of that regulation. This has led to greater obligations on States, limitations on traditional

policy space, and greater use of mechanisms to enforce these disciplines. This progression has not been universally welcomed, nor has it been a continuous trajectory. But the genie is out of the bottle and short of a fundamental restructuring of the world economy and a return to the pre-GATT era (a possibility that cannot be completely ruled out at the time of writing), this trajectory is likely to continue.