

WTO: FROM TRADE ORGANIZATION TO NODE OF GLOBAL GOVERNANCE

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INTRODUCTION

Since its foundation ten years ago, the World Trade Organisation (WTO) has become the focus of debate about governance of the world economy. It has been denounced by its critics and lauded by its supporters as a standard-bearer for free trade. In practice, it has become a central battle-ground over fairness and justice in a wide range of global economic regulation issues. The current suspension, probably abandonment, of the Doha Round is the latest in a series of setbacks for the organisation.

The WTO has been fighting for its future since the collapse of the Seattle Ministerial conference in the closing days of the last century. Since then, progress has only seemed possible by trying to keep talks low-key and reducing the ambitious scope of negotiations. The negotiating agenda agreed at the relatively closed and secretive Doha ministerial ran into trouble at Cancun in 2003, as a new grouping of developing countries led by Brazil, India and South Africa (the G-20) made an effective input which, linked with pleas from the poorest countries for an end to unfair practices by the rich, especially in commodities such as cotton, forced a reformulation. New issues, such as investment rules (seen as an attempt to revive the failed and unlamented Multilateral Agreement on Investment, the MAI), were taken off the table. This helped to refocus the negotiations onto the core trade issues of agriculture and non-agricultural market access (NAMA), although services also remained important. Yet slow progress was made in the preparations for the Hong Kong ministerial in December 2005, and although some further advances were made in Hong Kong, they were clearly insufficient to enable the negotiations to meet the timetable set by the deadlines fixed by the expiry of the US negotiators' trade promotion authority on 30th June 2007. It was no surprise when the Director General Pascal Lamy, who chairs the Trade Negotiating Committee, recommended to the General Council meeting of 27-28 July 2006 that due to lack of progress the negotiations should be suspended 'to enable serious reflection by participants', which was accepted.

In the meantime, the central role of the WTO as a multilateral organisation is being threatened by the rapid growth of preferential agreements, mainly bilateral. These are of dubious validity under WTO rules, which formally only permit 'regional' agreements, and only under specified conditions, in particular that they should eliminate substantially

all barriers among participants.¹ Some 211 such agreements notified to the WTO are currently in force, but taking account of those proposed and under negotiation it has been estimated that almost 400 could be in place by 2010 (Lamy 2006). A substantial proportion of world trade now takes place under such arrangements,² and they increasingly cover many issues other than tariffs, including services, investment, competition, labour mobility and intellectual property (World Bank 2005: 35, 97-118). The traditional regional free trade areas or customs unions between geographically contiguous countries have now been greatly overtaken in number by bilateral agreements, often between distant partners (Crawford and Fiorentino 2005). Although there is some trend to regional clustering, the overall pattern so far is a 'spaghetti bowl' of intersecting arrangements (World Bank 2005, 39). The resulting range of tariff rates has been accompanied by varying provisions on rules of origin, which are inevitably complex in today's world of global supply chains, and bewilder both exporters and customs officials.

These developments could, optimistically, be viewed as a stage towards a new level of greater multilateral economic integration, or more pessimistically as a fragmentation of the multilateral system.

THE ACHIEVEMENTS AND LIMITS OF MULTILATERALISM

The outcome of the Uruguay Round was by any measure a stupendous achievement, the creation of the WTO as a global economic organisation centring on trade but governing, directly and indirectly, many other aspects of economic regulation. Although widely both lauded and criticised for establishing open markets and free trade, in fact the WTO Agreements erected a complex framework of rules governing many aspects of international economic activity.

The complex and comprehensive set of agreements to which all WTO members must subscribe are almost entirely concerned with setting limits, or in WTO language 'disciplines', on national state regulation. However, they generally leave to other organizations the task of developing substantive international standards and regimes.

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¹ See GATT art. XXIV and GATS article V; also relevant is the so-called Enabling Clause, the Decision of 28 November 1979, allowing agreements which give special and differential treatment to developing countries. Although GATT art. XXIV requires prior notification, this has generally been disregarded. Combined with the need for a decision on compatibility to be by consensus (which effectively gives the participants in the agreement a veto), it has meant that preferential agreements have been tolerated (Matsushita et al. 2003, 349-50).

² According to World Bank estimates, one-third of world trade now takes place between PTA members, although only 21% is actually preferential trade, and only 15% benefits from an 'economically meaningful tariff preference' (World Bank 2005: 41).

Thus, as an institution, the WTO is riven by the contradiction between the neo-liberal ideology of liberalization and deregulation which dominated its period of gestation in the 1980s, and the realization that markets depend on regulation. This is partially expressed in the tension between free trade and fair trade, which has been preoccupying economists and lawyers concerned with the future of the trade regime (Bhagwati and Hudec 1996). The free trade perspective rests on the assumption that optimal economic welfare will result from exchange under conditions of equality in competition, and that this is best achieved by a minimal level of government action. Competitive equality is expressed in the principles of non-discrimination which are the foundation of the General Agreement on Tariffs and Trade (GATT), and permeate the many complex provisions of the WTO agreements.

However, the WTO's non-discrimination rules inevitably cut across a wide range of national state regulations. In the abstract, the principle of non-discrimination is neutral, and does not interfere with the national state's 'right to regulate'. In practice, the equal treatment test cannot easily be applied to regulatory requirements or standards without having regard to the purposes or objectives of those requirements. Issues of equal treatment are inseparable from fair treatment, which requires the evaluation of public policies establishing regulatory standards, for the protection of consumers, producers, and the natural environment (Cottier and Mavroidis 2000, Picciotto 2003). The broad non-discrimination rules of the WTO continually raise questions about the validity of many economic regulations which inevitably involve making distinctions between different products or services, including those concerning how and by whom goods and services are produced (in WTO terminology, processes and production methods, or PPMs). Should a tomato which has been genetically modified be treated like other tomatoes (some of which may have been bred by traditional selection techniques)? Is beef or milk from cows which have been fed growth-promoting hormones like the beef or milk from other cows? Are building products made from asbestos fibre like those made from other materials? Is a doctor, a nurse, an accountant, or a software engineer trained in India or China like one who has qualifications from Canada or the UK? Is a pharmaceutical product produced by a patent-holder like one manufactured under a compulsory licence? In practice, rules which are facially neutral may be said to be based on an invidious distinction; while conversely, differences in treatment may be justified by relevant distinctions depending on the purposes of the rules.

This generates inevitable potential conflicts, and therefore linkages, between the free-trade, market-opening obligations of the WTO and a wide variety of regulatory arrangements. These tensions present a dilemma about the nature and future of the WTO which confronts both the advocates and critics of market-driven globalization. If the liberalization of international trade is inevitably entangled with a much wider range of economic regulatory arrangements, does this make the WTO the super-regulator of the world economy? On the other hand, if the WTO confines itself to ensuring that markets are open to 'free trade', it would simply be a scythe cutting down the regulatory standards established by states and even international bodies. The view of regulatory differences as trade barriers implies a need for extensive international harmonization, but whether and how this should take place is very much an open question.

Thus, a central issue for the WTO is how to accommodate its functions and powers to those of other public bodies in the complex system of multi-level governance of the contemporary global economy. Hence, several authors have stressed the importance of ensuring greater sensitivity in the application of WTO obligations to its own proper limits as a trade organization, and to the specific competences and roles of other public bodies, especially national states and international organizations (Howse 2000, Helfer 1998, Picciotto 2003). This institutional question lies behind the conflicting views which portray the WTO either as a tool of the powerful trading blocs or a bulwark for smaller states, a protector of the consumer or of transnational corporations (TNCs).

The Emergence of Linkages

The central dilemma facing the world trading system began to emerge in the 1970s, as the attention of GATT negotiators began to shift from to the 'behind the border' barriers posed by domestic regulations, which were termed 'non-tariff barriers' (NTBs). The GATT's success in making sharp reductions in quotas and tariffs on manufactured goods during the period of economic growth from 1954 to 1974 did not usher in a nirvana of free trade. Instead, exporters became more aware of the ways in which regulatory standards create market barriers. This was especially so in the US, where the tariff reductions and the strong dollar had sucked in imports, leading to a large merchandise trade deficit. At the same time, the increased sophistication and complexity of manufactured goods and their production methods generated increased concerns about potential harms, leading to a growth of regulatory measures to protect consumers and the environment. It is hardly surprising if such measures are shaped by governments and legislatures to suit local conditions and local firms, so that foreign producers may regard the resulting standards as inappropriate and protectionist.

Yet global harmonization of the entire range of regulatory standards affecting goods and services would be an immense task. At the regional level the European Community, with its more developed institutional structure, struggled long and hard to develop a system of regulatory coordination, involving a combination of mutual recognition and harmonization of standards (Dehousse 1989; Bratton et al. 1996: 29-43), and the EU has been described a 'regulatory state' (Majone 1993), or a 'network state' (Castells 1998 vol.III, ch.5).

In contrast, the GATT was a trade organization. It was not equipped to harmonize product standards, let alone standards in areas such as intellectual property, environmental protection, professional and technical services, taxation, investment incentives, or employment conditions. The original GATT provisions resulted from a series of compromises between free trade aims and the need for national autonomy in setting domestic regulations (Goldstein 1993). Hence, the broad obligations of non-discrimination in articles I and III, as well as the prohibition of quantitative restrictions in article XI, are counterbalanced by a series of exclusions and exceptions. In particular, the General Exceptions of article XX left states free to set their own standards (and to exclude goods which did not comply with those standards) in key areas such as the protection of human, animal or plant life or health, and intellectual property rights. The right to set national standards was subject only to the important proviso that such national

regulations should not be applied in an arbitrarily discriminatory manner or constitute a disguised trade restriction.

The balance between international liberalization and the maintenance of national standards of protection (described as 'embedded liberalism' by Ruggie, 1982) became harder to maintain in the era of 'deep integration' of the world market. At the same time, heightened public concern over matters such as product safety and environmental protection led to an exponential growth of regulatory requirements. This greatly sharpened the conflicts between market access obligations and the right of states to set regulatory standards. This was first tackled in relation to technical product standards, and a Code on Technical Barriers to Trade was negotiated in the 1970s,³ a revised version of which was adopted as an Agreement in the Tokyo Round in 1979, but binding only on states accepting it. This obliged the participating GATT states to base their domestic technical standards on those developed by relevant international bodies, although there were significant exclusions especially for health and environmental protection standards.⁴ This gap was filled, in relation to human, animal and plant health standards, by the negotiation of the agreement on Sanitary and Phytosanitary Measures (SPS) during the Uruguay Round.

Thus, in the area of product standards an interesting and novel form of legal and institutional linkage has been created between the GATT/WTO and the work of a number of international standard-setting organisations. The TBT and SPS Agreements in effect convert those standards, which the organisations themselves consider voluntary,⁵ into

³ A draft was ready by 1975 for a proposed GATT Code of Conduct for Preventing Technical Barriers to Trade (see document MTN/NTM/W/5, 21 April 1975, p.9 Annex), which included the following key provisions: 'Art. 2 (b) Where mandatory standards are required and relevant international standards exist or their completion is imminent, adherents shall use them, or the relevant parts of them, as a basis for the mandatory standards, except where such international standards or relevant parts are inappropriate for the adherents concerned. (c) With a view to harmonizing their mandatory standards on as wide a basis as possible, adherents shall play a full part within the limits of their resources in the preparation by appropriate international standards bodies of international standards for products for which they either have adopted, or expect to adopt, mandatory standards.'

⁴ Article 2.2 of the Tokyo Round TBT Agreement reads '2.2 Where technical regulations or standards are required and relevant international standards exist or their completion is imminent, Parties shall use them, or the relevant parts of them, as a basis for the technical regulations or standards except where, as duly explained upon request, such international standards or relevant parts are inappropriate for the Parties concerned, for inter alia such reasons as national security requirements; the prevention of deceptive practices; protection for human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological problems.'

⁵ Standards are defined very broadly: in the TBT Agreement (Annex A) as any 'Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory'; the SPS Agreement refers broadly to 'standards, guidelines and recommendations'. This led the Secretariat of the Codex Alimentarius Commission to write to the SPS Committee for clarification on whether any differentiation would be made regarding the status of Codex standards, guidelines or recommendations. The Committee responded that 'how a Codex text was applied depended on its substantive content rather than the category of that text' and that this content 'might have some bearing on how a Member could show

binding legal obligations on WTO member states. Formally, the obligation is to 'base' national regulations on the international standard, not to apply it as such. However, the leeway allowed by the term 'based on' is not a wide one.⁶ Furthermore, this obligation applies regardless of whether the national regulations are discriminatory or protectionist in intent.⁷ Thus, the addition of the TBT and SPS Agreements in the WTO went considerably beyond the GATT non-discrimination principles.

This has given a greater importance and impetus to the work of the standards organizations, significantly transforming the range and character of their work. For example, in response to the changing landscape at the GATT, the International Plant Protection Convention (IPPC) became formalized as an organization and began an ambitious programme of standard setting from 1992.⁸ The work of standard-setting is done in cooperation with the WTO, the staff of the various organisations keep in close touch with those of the WTO, and they are present as observers in the meetings of the relevant WTO committee, while WTO staff attend theirs. However, the standards bodies do not function merely as subsidiaries of the WTO: their participants are generally technical specialists only some of whom also attend the related WTO committee, and they do not always view the need to agree international standards with the same urgency as do the WTO bodies. There is also some overlap in the scope of work of the bodies, and there can be disagreement among member states as to which should take on a particular task.⁹

The problem of how to deal with regulatory differences creating non-tariff barriers was far from confined to product standards, as can be seen by the growth of conflicts from the 1970s onwards. The bulk of GATT complaints concerned NTBs and other 'unfair trade practices', and the proportion increased as the overall number of complaints grew in the

that its measure is based on an international standard, guideline or recommendation' (Document G/SPS/W/86/Rev.1, 13 March 1998).

⁶ The Appellate Body (AB) in *EC-Hormones* (WT/DS26/AB/R, WT/DS48/AB/R, 13th February 1998) reversed the Panel and decided that 'based on' does not mean 'conform to' (paras. 168-171), so that it allows a state for example to adopt part only of the standard or make appropriate variations for local conditions; in *EC-Sardines* (WT/DS231/AB/R 26 Sept. 2002), the AB said that the similar term 'as a basis for' in the TBT means more than simply the existence of a 'rational relationship' between the two, and certainly the national measures cannot contradict the international standard; also the phrase 'or relevant parts of them' in TBT 2.2 means *all* the relevant parts, a state cannot select only some (paras. 247-250).

⁷ Thus, in *EC - Hormones*, the EU was obliged to justify its ban on hormone-treated beef under the SPS agreement, regardless of whether it could be justified as non-discriminatory under the GATT.

⁸ In 1992 the FAO established a separate Secretariat for the IPPC, followed by the formation of a Committee of Experts on Phytosanitary Measures, and negotiations for revision of the Convention which was achieved in 1997.

⁹ For example, there has been disagreement in the SPS Committee on whether it should develop procedures for recognition of disease- and pest-free areas of exporting countries, or leave this to the standards bodies (interview information).

1980s.¹⁰ These covered a diversity of issues, several of which were again revived under the WTO. They included consumer protection and food safety regulation,¹¹ corporate taxation (the long-running DISC/FSC dispute),¹² intellectual property rights, and environmental protection rules (the notorious Tuna-Dolphin cases).

Package Deals and Forum-Shifting

At the same time, other factors were also widening the GATT agenda beyond tariffs. The by now endemic US merchandise trade deficit had highlighted the contribution of 'invisibles' to the balance of payments, while employment in manufacturing production was declining in developed countries, due to mechanization and relocation to lower-wage countries. The transition to a post-Fordist knowledge-based economy, or 'cognitive capitalism' led to the highlighting of the importance of services and of intellectual property.¹³ Not only were these activities accounting for a rapidly growing proportion of output and employment, they also came to be seen as key underpinnings of the economy and society as a whole.

These factors led policy-makers and trade negotiators of developed countries to argue for a further broadening of the negotiating agenda of GATT's Uruguay Round. However, neither services nor intellectual property rights (IPRs) could properly be said to be 'trade' issues. Although they affected cross-border transactions, they both raised issues going far beyond that, which were relevant to investment and business regulation more generally. These were well beyond the remit of the GATT, and were dealt with by other organizations, notably UNCTAD.

¹⁰ Hudec calculated that of the complaints brought under the GATT, about half concerned NTBs and a further quarter other kinds of 'unfair' trade practices (subsidies and antidumping measures), 75% in total; the combined proportion rose to 86% in the 1980s (Hudec 1993, 338).

¹¹ Notably, US complaints in 1987 against EC prohibitions of meat imports, in relation to slaughterhouse standards, and then against hormone-treated beef; and in 1989 against Thailand's taxation of cigarettes.

¹² In 1972 the EC initiated a GATT complaint against one of the Nixon administration's 1971 measures, the DISC (Domestic International Sales Corporation), a form of tax exemption for export sales, which the EC attacked as an export subsidy. The dispute ran for 12 years, until the Congress replaced the DISC with the Foreign Sales Corporation (FSC) (Hudec 1993, ch.5). This dispute brought the Panel procedure to new legal-diplomatic heights, as the US case was managed by the Treasury Department's General Counsel's office, which brought a counterclaim against three European states, and insisted that the claims be heard by a single Panel, including a tax expert. These tactics partly succeeded, in that the GATT Panel balanced its finding against the US with a rather elliptically-worded ruling against the European measures also. Probably intended to secure adoption of the report by consensus, this backfired, since most governments supported the Europeans, and disagreed with the Panel on this point (Hudec 1993, 82-3). The stalemate was only eventually resolved by a compromise under which the reports were accepted subject to an ambiguous 'understanding' (ibid. 91-2), which simply sowed the seed for a subsequent renewal of the dispute under the WTO.

¹³ There were both European analyses of post-Fordist and post-industrial society (e.g. Aglietta, Boyer, Touraine) and an influential American work on post-industrial society, with a rather different perspective (Bell 1973)

The provision of services had traditionally been regarded as ancillary to 'real' economic production and even unproductive, but they now came to be considered as value-creating in their own right. International transactions in services had been recognized as 'invisibles', contributing to the balance of payments. The OECD countries had included provisions for liberalization of invisibles in a Code of 1961, and in 1972 an OECD high-level group on the prospects for trade in the run-up to the Tokyo Round coined the concept of 'trade in services' (Drake and Nicolaidis 1992: 40). In the US in particular, access to foreign markets for services was placed on the trade agenda, leading to the enactment of a procedure encouraging firms to identify 'trade barriers', under s.301 of the 1974 Trade Act. These required the US Trade Representative (USTR) to act on complaints by US firms about 'unreasonable or discriminatory' practices barring their access to foreign markets.¹⁴

Despite the inappropriateness of the concept of 'trade in services' the issue gained in momentum. This was partly due to US pressures and persistence, but largely because it offered a basis to generate a broad coalition of business interests, both users and suppliers of services. The arguments for international liberalization of services provision as an extension of the trade regime were articulated and developed by an 'epistemic community' of specialists (Drake & Nicolaidis 1992), and quickly became the dominant discourse (Kelsey 2003). Other OECD countries joined the US in urging inclusion of services in the Uruguay Round agenda, and developing countries' concerns were allayed by adopting a 'twin-track' negotiating procedure, albeit as a 'single undertaking'.

Where services had led, the media and pharmaceuticals industries followed on behind. The 1984 revisions of the US Trade Act extended s.301 to intellectual property rights, which were strengthened by the 'super-301' provisions added in 1988, and these were selectively activated against key countries during the UR negotiations. In this case, however, it was not a case of inventing a new paradigm, as with 'trade in services', but of strategic forum-shifting (Braithwaite & Drahos 2000). A range of mainly US-based high-tech industries (chemical and pharmaceutical, computer software, film and music, electrical and auto) organized and lobbied to secure the inclusion of IPRs in trade negotiations, and were highly influential in the actual drafting of the resulting Agreement on Trade Related Property Rights (TRIPS) (Ryan 1998, Drahos & Braithwaite 2002, 2004). This established for the first time as an international standard a relatively high level of IPR protection. It targeted issues regarded as key by these business lobbies, notably copyright protection for software, patent protection for all technical processes and products, a minimum 20-year period for patents, limitations on exclusions from IPRs and on compulsory licensing, and extensive provisions for enforcement of IPRs. These were all issues on which agreement could not easily be reached in the relevant forum, the World Intellectual Property Organization (WIPO).

¹⁴ The annual Trade Barriers Report later became a powerful weapon, although it was criticized as consisting 'merely of a compilation of self-serving industry claims and anecdotal hearsay' (Barfield, in Bhagwati and Patrick 1990, 105)

Thus, the linkages between the trade regime and related areas of economic regulation were used in a strategic way by powerful firms and states to provide a basis for the grand bargain of the Uruguay Round which created the WTO. The linkages were not artificial, but had a real basis.¹⁵ However, the extension of the GATT to these issues took it into areas far beyond its remit. They were unfamiliar and in many ways inappropriate to be dealt with in the language and context of trade bargaining developed under the GATT. The forum-shifting had the effect of side-stepping or side-lining the international organizations with direct responsibility for the issues in question: WIPO for IPRs, and organizations dealing with specific service areas, such as ITU for telecommunications. The UR negotiators succeeded in taking advantage of the possibilities for trade-offs created by these linkages (Ryan 1998).

However, it left a very difficult legacy for the WTO.

Liberalization, De-Regulation and Re-Regulation

Closer international economic integration clearly requires some degree of international coordination and harmonization. However, the forms and extent of such cooperation will inevitably vary according to the specific area of regulation and economic sector.

Approaching these issues from the perspective of liberalization obligations as developed in the GATT introduced an impetus for deregulation. As Drake and Nicolaidis cogently point out:

‘The very act of defining services transactions as "trade" established normative presumptions that "free" trade was the yardstick for good policy against which regulations, redefined as nontariff barriers, should be measured and justified only exceptionally.’ (Drake & Nicolaidis 1992: 40)

This was seen clearly in the UR Services negotiations, where they created inevitable difficulties in crafting an agreement:

‘By beginning from the baseline of labeling as potential NTBs anything that restricted competition, the diverse social purposes of existing regulations were obscured. Negotiators thus encountered problems when considering measures that restricted trade but served important purposes. The GATT context channeled the process towards a trade agreement but complicated the search for a balance between trade and regulatory objectives.’ (Ibid.: 70)

The recognition of the need for such a balance led to the early rejection of the idea initially proposed by the US that GATT itself could simply be extended by adding the

¹⁵ Under the GATT, IPRs were treated as matters for national regulation and hence exceptions in article XX, but there had been disputes about alleged discriminatory effects of IPRs: a 1987 EC complaint against US procedures for seizing IP infringing goods (renewing a Canadian complaint of 1981), and a 1988 complaint by Brazil against US s.301 trade measures attacking Brazil’s local working requirements for patents.

two words 'and services'. Instead, the result was a 'framework agreement', the General Agreement on Trade in Services (GATS), which combines a sweeping potential coverage with a cautious but complex 'bottom-up' system for negotiation of actual commitments. The four 'modes of supply' extend well beyond cross-border exchanges, to foreign direct investment as well as more short-term presence of service providers and access by consumers, so in principle embracing free movement both of capital and labour. However, few general obligations are immediately imposed on states by the GATS. The key 'disciplines' of National Treatment (NT) and Market Access (MA), apply only to the extent that commitments are made. Furthermore, states are permitted to list both NT and MA conditions on their commitments. In principle, therefore, GATS recognizes states' 'right to regulate' by allowing each state to exclude both horizontal and sector-specific regulations in its own Schedule of Commitments. GATS article 6 establishes some very general procedural requirements with which domestic regulations should comply, and it envisages the development of further 'disciplines' on 'measures relating to qualification requirements and procedures, technical standards and licensing requirements'

The importance of the 'right to regulate' became more apparent after the mid-1990s, following the experience in a number of countries of crises in key services sectors following deregulation and privatization. These included dramatic failures of electricity supply, a deterioration of safety, reliability and often frequency of transportation systems, and financial failures and crises. In addition, there have been growing concerns about the inequality of the benefits from liberalization, and even its impact on basic human rights, especially when applied to basic services such as water, healthcare, and education (UNHCHR 2002).

It is difficult, if not impossible, to develop adequate or effective regulation in the many specific areas of services in the context of GATS and the WTO. Although in principle each state can preserve its national regulations by listing the relevant provisions in its Commitments schedules, in practice the complexity of the procedures makes this difficult and hazardous. Even the USA, the most powerful and resourceful single negotiator in the WTO, apparently unexpectedly found that it failed to preserve its right to regulate internet gambling (WTO-AB 2005). In any case, national regulations may themselves be inadequate or inappropriate, especially if a country wishes to attract foreign services suppliers. This has been recognised in the negotiations on Basic Telecommunications Services, which it is widely accepted require a positive regulatory framework. This is dealt with in the so-called Reference Paper, which is annexed to national commitments, and lays down basic principles of regulation for this sector, including prevention of anti-competitive practices, interconnection and universal service obligations, and the establishment of an independent regulator. The GATS Council adopted in 1998 some Disciplines on Domestic Regulation in the Accountancy Sector.¹⁶ Aside from a very widely worded general obligation that regulatory measures should not be more trade-restrictive than necessary to fulfil a legitimate objective, it essentially established procedural standards (transparency, fairness in licensing procedures). Interestingly, it did

¹⁶ S/L/63 14 December 1998.

include a linkage similar to those in the TBT/SPS to 'internationally recognized standards of relevant international organizations', but only as a factor which should be 'taken into account' when deciding on conformity of national measures. Instead of continuing a sectoral approach, this work has shifted to considering professional services in general, while the Working Party on Domestic Regulation has adopted an even more generic approach.

Legalization

Hence, the WTO Agreements now establish general global standards or 'disciplines' to ensure that national regulations do not act as barriers to market access. These are essentially negative obligations, with the significant exception of the TRIPS Agreement. However, even TRIPS operates restrictively, in limiting the freedom of states to establish what they may regard as the most appropriate balance between private rights and the public interest in relation to IPRs (Drahos and Mayne 2002, Picciotto 2003). The WTO rules therefore act as a type of disciplinary meta-regulation which could potentially apply to almost any aspect of economic activity.

The management of the interaction between WTO liberalization obligations and national or international regulation has entailed a legalization of the trade regime (Reich 1996-7). The aspect which attracts the most attention is the judicialization of the Dispute Settlement (DS) system. However, this is in many ways the tip of the iceberg of the wider system of procedures and rules. For example, as already outlined above, the TBT and SPS Committees maintain a continuing monitoring role in relation to the development of product standards,¹⁷ although the actual development of standards is left to the relevant bodies. States are required to notify any national measures which are not based on international standards (either because such standards do not exist, or in the cases of SPS standards if the state wishes to adopt a higher standard following a risk evaluation).¹⁸ This gives other members the opportunity to comment, and to seek modification where appropriate, with the ultimate right of recourse to the complaints procedure. The TRIPS Agreement has an even broader requirement of notification of all laws, regulations, final judicial decisions and administrative rulings, and the TRIPS Council conducts reviews in which states are expected to explain and defend their national IPR systems.

For some, it is indeed the merit of the WTO Agreements that they constrain national policy choices. Thus, defenders of the WTO argue that national state regulation tends to be protectionist because it is the product of the 'capture' of states by special interests. For example:

'Free trade and democratic government face a common obstacle - the influence of concentrated interest groups. ... The WTO and the trade agreements it administers

¹⁷ SPS Article 12.4; the procedure adopted in 1997 was modified in 2004, see G/SPS/11/Rev.1, 15 November 2004.

¹⁸ In practice, states often notify new standards without regard to whether or how far they are based on international standards.

act to restrain protectionist interest groups, thereby promoting free trade and democracy.' (McGinnis and Movesian 2000: 515).

State power must be confined, in this view, in order to safeguard the rights and liberties of individuals.

However, this view conveniently ignores the converse process: the deployment of the economic power of some sections of big business to secure the capture of the WTO by sectional interests, and thus to restrict the regulatory powers of states. As pointed out above, it was the capture of US trade policy by lobbies representing the services and IP-intensive sectors and the deployment of s.301 that enabled these special interests to capture the trade policy arena and secure favourable provisions in the WTO Agreements. In response, the EU introduced its Trade Barriers Regulation, which similarly encourages firms to bring complaints and hence to set the trade negotiation agenda (Shaffer 2003). Hence, restraints on national measures may restrict the power of domestic interest groups, but they strengthen those able to access international arenas.

Against this, it is emphasized that the WTO stands for the rule of law in the world economy, as a constraint against the unilateral use of power. After the organization was shaken by the debacle of the Seattle Ministerial meeting, a speech by the then Director-General Mike Moore concluded as follows:

'People do not want a world government, and we do not aspire to be one. At the WTO, governments decide, not us. ...But people do want global rules. If the WTO did not exist, people would be crying out for a forum where governments could negotiate rules, ratified by national parliaments, that promote freer trade and provide a transparent and predictable framework for business. And they would be crying out for a mechanism that helps governments avoid coming to blows over trade disputes. That is what the WTO is. We do not lay down the law. We uphold the rule of law. The alternative is the law of the jungle, where might makes right and the little guy doesn't get a look in.'

The centrepiece of the WTO legal system was the transformation of the DS procedure into a fully-fledged adjudication system. The key elements of this were the creation as a standing appeals tribunal of the Appellate Body (AB), and the automatic adoption of reports.¹⁹

¹⁹ The Dispute Settlement Body must adopt the Reports unless there is a consensus against, which ended the veto which a losing state could wield against a decision it did not wish to accept. These two aspects related, since governments were reluctant to agree automatic adoption without some form of appeal, due to the difficulties caused by some of the GATT Panel reports which were generally considered misjudged (Steger, 483).

The legitimacy of such system rests on the assumption that the rules are adopted by an accountable political process, leaving to independent adjudicators the task of applying them. In this perspective, the WTO Agreements entailed political decisions by states to make 'credible commitments', the application of which they delegate to adjudicators operating within a formalist rationality (Abbott and Snidal 2000: 426-7). However, the Agreements have been described as 'trip-wire texts' which reflect diplomatic fudges by negotiators, so that cases referred for adjudication under them are likely to be politically charged (Alter, 793).

Although the WTO agreements are extensive and detailed, their provisions often remain indeterminate, for two main reasons. Firstly, the agreements retain many ambiguities reflecting policy disagreements between the negotiators which remain to be resolved. It is significant that a substantial number of the early cases taken to the AB have involved issues dating back to the GATT and which were well-known during the Uruguay Round negotiations. These include the US corporate tax treatment of exports, and the EC ban on hormone-treated beef,²⁰ as well as its bananas regime. Trade negotiators had every opportunity to resolve these long-running concerns in an unambiguous manner, and conspicuously did not do so.

The second reason flows from the particular characteristic of liberalization obligations which are characteristic of the GATT/WTO, and rely on abstract general principles which must be applied to particular cases. Even as basic a matter as the allocation of a product to a tariff group may be debatable, as seen from an early decision in which the AB overturned a Panel's view that the EC was wrong to reclassify some types of computer equipment from 'automatic data processing' to 'telecommunications' equipment.²¹ The general structure of the WTO agreements also entails the evaluation of interacting general rules. Thus, a central principle in the GATT, which also runs through the WTO agreements, is non-discrimination, which prohibits less favourable treatment of 'like products'. This broad obligation is subject in the texts to various conditions and exceptions, so that the evaluation of the legality of a particular measure must consider whether it entails differential treatment of 'like products', and if so whether it may be justified under one of the exceptions.

As Trachtman points out, 'Each step in this analysis has involved a good deal of creativity on the part of the dispute resolution panels and now the AB; in none of these cases is the language of the treaty regarded as determinate' (Trachtman 1999, 346). Further complexity and uncertainty is created by the interaction of WTO rules with those

²⁰ . Although the beef-hormones dispute was very live during the UR negotiations on the SPS, the issue was not raised in any of the formal meetings during the entire Round. Another issue of concern was the prohibition of beef imports to protect importing countries from foot and mouth disease, and on this point the US requested that the OIE be formally asked by the WTO's Working Group on Agriculture to develop guidelines, which received a favourable response (GATT Document WGSP/W/13, 19 March 1990).

²¹ *European Communities - Customs Classification of Certain Computer Equipment*, AB 1998-2; the AB's decision and its reasoning were in turn criticized by Trachtman (1998).

of other regimes, such as food safety or technical regulations established by international standards organizations. Hence, for example, the sharp conflict over the legality under trade law of different approaches to the regulation of GM foods has been said to be 'submerged in considerable ambiguity and ... uncertainty' not only in the WTO agreements but also in the 'bewildering labyrinth of rules' which regulators must negotiate (Covelli & Hohots, 774, 776). It is hardly surprising that the outcome of the highly politically-charged complaints by the US and Canada against some aspects of the EU's regulation of GM foods was a mammoth Panel Report of over 1000 pages, which nevertheless equivocated over the issue (WTO-Panel, 2006).

The WTO's reliance on the rule of law for its legitimacy places an enormous burden on the AB, which it is ill-equipped to carry. The AB is expected to carry out a technical function of applying the agreed texts in an independent manner. In doing so, it is expressly prohibited from 'interpreting' the texts, since this task is reserved to the General Council.²² The AB has been obliged to tread very carefully in this labyrinth, to avoid being accused of creative interpretation of the rules. Consequently, it has adopted a formalist approach, stressing a literal approach to interpretation (Picciotto 2005). The importance to the WTO as a whole that the decisions of the DS system should be widely accepted as legitimate suggests further moves towards its juridification. Certainly, commentators have suggested reforms which would turn it into a full-blown judicial body, with standing Panels acting essentially as courts of first instance, hearings in public, and open acceptance of submissions by non-governmental organizations.²³ Significantly, however, the proposals put forward by governments have been much more modest.²⁴

A shift towards greater procedural juridification would extend the accountability of the DS system beyond governments, and could encourage the AB to address its decisions more overtly to a broader public. This would entail a much more explicit articulation of the values underlying the WTO, and in particular the interaction of its market-opening liberalization principles with regulations embodying socially-constructed preferences such as health and environmental protection. This has certainly been advocated by some (Bronckers 2001, Alter 2003). Others have taken a different tack, and have advocated the

²² Art. 3.2 of the DSU firmly states that 'rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements', while the WTO Agreement itself (art. IX.2) specifies that 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations ... of the ... Agreements', which requires a 75% majority of states; art.X provides for the adoption of amendments.

²³ See e.g. Weiler 2001; Davey 2002, 2003. The AB has taken a cautious step towards this last, by stating that such *amicus curiae* briefs may be accepted if they are 'pertinent and useful' (*EC – Trade Description of Sardines* AB-2002-3, para. 160). This met with hostility from many governments, and it was stressed in the DSB that the AB should not adopt any changes to its working procedures without consulting the DSB (DSB Minutes of 24 July 2000, WT/DSB/M/84, para. 86). The AB has diplomatically said in most cases that it has not taken such briefs into account as they have not been helpful.

²⁴ See Report by the DSB Chairman to the Trade Negotiations Committee, TN/DS/9, 6 June 2003.

`constitutionalization' of the WTO based on individual human rights (Petersmann 2002, 2003). This view has been criticized, both as involving a very narrow concept of human rights and its `takeover' by trade law (Alston 2002), and as providing only a limited basis for balancing the aims of market liberalization against other social preferences embodied in regulation (Picciotto 2006).²⁵

Thus, the AB is caught on the horns of an institutional dilemma. It feels restrained from expressing in more open terms the policy considerations which underpin its interpretations, for fear of usurping the political legitimacy of the governments to which it is primarily accountable. They in turn are motivated by a reluctance not so much to concede power as to admit to their domestic constituencies how much power has already been transferred to supranational instances such as the AB. Until the political system faces up to this, it will be difficult for global governance institutions such as the AB to develop in ways that are more directly accountable to a global public, and hence to contribute to new forms of democratic deliberation appropriate for multi-level governance (Picciotto 2001; Joerges and Neyer 2003).

CONCLUSIONS: THE DILEMMAS OF DOHA

This analysis should help to explain the uncertain progress of what became termed the Doha Development Round (DDR). For some, the only way for the WTO to fulfil its task was to continue in the same way, by stitching together a package deal involving trade-offs. This would confirm the trajectory on which the organization was launched in the Uruguay Round, prioritising liberalization.

This approach unravelled, leading to the present impasse, for two main and related reasons. One was that many, especially from the developing countries, considered that the UR bargain was an unequal one. In exchange for the enormous concessions involved in transforming the GATT into the WTO and the inclusion of services and IPRs, developing countries obtained only meagre concessions on agriculture, many of which have not been realised yet (and may never be). This led to their very firm rejection of further `new issues', and insistence that the negotiations should focus on the core issues of trade, especially agriculture. They have, justifiably, targeted the enormous subsidies paid out by the main developed country blocs, which are indefensible from the perspective of trade liberalization.

Secondly, however, it is perhaps now becoming clear that the management of the global economy must involve far more than the simple mantra of liberalization, the removal of barriers. In this era of governance by regulation, economic integration depends on effective management of regulatory interactions.

²⁵ However, it has also been pointed out that a form of constitutionalization is already taking place through the AB's `judicial norm-generation', using devices such as rational relationship testing, proportionality, and less restrictive means, to delineate both the legitimate scope of national state regulatory powers impinging on trade, as well as the relationship of the trade régime to related international regulatory regimes (Cass 2001, 2005)

For example, the focus in the agriculture negotiations on the phasing out of subsidies, which has been so strongly resisted by the US and the EU, is based on a grand illusion. The Agreement on Agriculture only prohibits support which is directly coupled to production and price (the `amber box`), and seeks reductions in support which is indirectly price-related (`blue box`). The EU is introducing reforms to its Common Agriculture Policy (CAP) which essentially aim to convert these into decoupled support, such as the single farm payment, which the EU treats as permitted `green box` measures. Similarly, the US is shifting to direct farm payments. It does not require sophisticated economic analysis to understand that these allow farmers to accept prices lower than their direct production costs. Since the negotiations do not at present envisage any serious reconsideration of the green box criteria, much will depend on whether successful challenges can be brought under the WTO's rules. An alternative strategy for agriculture has been put forward by NGOs such as the Coordination Sud alliance, which would aim at food sovereignty. This would require both the ending of all types of subsidies affecting export prices, as well as permitting countries to defend their producers against dumping of below-cost sales. Beyond this, it proposes global production and supply management, administered by the FAO, rather than the WTO's heedless encouragement of trade, which fosters increasingly intensive agriculture, degrading the environment and sacrificing local and more high-quality food production.

These perspectives are hostile to the WTO's liberalisation ethos. However, in the related area of fisheries, some very similar policies are under development, prompted by the global crisis of fish stocks, which are more likely to be adopted by the WTO. These focus on the elimination of fishing subsidies, and exemptions for artisanal or local fishing. As with agriculture, this would require very careful definitions and stringent monitoring of amber and green support measures. It also entails, as has been stressed in a study done for the World Wildlife Fund (WWF) and the UN Development Programme (UNDP), that the WTO should deal only with trade-related aspects, but in conjunction with fisheries management measures to be operated by regional fisheries organisations (Schorr 2004).

Thus, the real challenge facing the WTO is whether it can develop principles of fair trade, as well as making an appropriate contribution to the development of effective international regulatory arrangements for the global economy.

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