

The WTO and Global Governance

Future Directions

Edited by Gary P. Sampson



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Introduction and overview: Future directions

Gary P. Sampson

Introduction

The General Agreement on Tariffs and Trade (GATT) had far-reaching objectives: full employment, higher standards of living, growth of real income and expanded production and trade. With the World Trade Organization (WTO) came the added goal of the optimal use of the world's resources in accordance with sustainable development. Taken together, these objectives on the part of more than 150 governments have created for the WTO a vast area of diverse responsibilities.

It is therefore not surprising that WTO rules impact widely on national and international policies and that they extend to what many consider to be non-traditional areas of trade policy. Sometimes this has been by design – with the incorporation of trade in services and intellectual property rights into the WTO; or sometimes on a de facto basis through the dispute settlement process. There are many examples of its extended reach.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) raises a number of ethical questions, such as the patenting of life forms, the rewarding of indigenous tribes for the exploitation of local genetic resources and the provision of essential medicines to impoverished people. Governments placed negotiations to reduce subsidies that deplete fish stocks on the Doha Development Agenda at the WTO Ministerial Conference in Doha in 2001, along with the negotiation of the relationship between the WTO and multilateral environmental

agreements. The WTO dispute settlement mechanism has been confronted with topics far removed from traditional trade policy; disputes have raised questions about the role of science in the management of risk, regulations relating to public health, the conservation of endangered species and trade in genetically modified organisms.

As with other multilateral treaties, governments have voluntarily circumscribed their national sovereignty by accepting WTO rules. And for good reason: having undertaken a commitment to a degree of market openness, market access commitments would be undermined – as would the predictability and stability of the trading system – if governments were free to afford protection to domestic producers arbitrarily. The reality is that the degree of national sovereignty forgone in accepting WTO obligations is far in excess of that under GATT.

Not only is national sovereignty circumscribed under WTO rules, but governments have also undertaken complementary or overlapping commitments in other international agreements. Determining the borderline between WTO rules and national sovereignty, as well as commitments under other international treaties, is an important consideration in the context of global governance.

As Pascal Lamy notes, “governance” is not “government”.¹ Governance is a decision-making process based on permanent negotiation, an exchange of agreements and the rule of law. It implies not the transfer of political sovereignty but, rather, the organizing of cooperation between existing entities on the basis of agreed and enforceable rules. According to Lamy, governance takes the form of institutions generating permanent dialogue and debate as a prelude to common actions; *governance* generates common rules, whereas *government* commands political will.

The objective of this overview is to identify future directions for the WTO in global governance. I first discuss why the importance of the WTO has increased greatly in recent years. The reasons are many and varied, with some more obvious than others. They extend, however, far beyond the increased importance of the value and volume of trade between nations. I then examine some “fundamentals” in terms of concepts, principles and rules that underpin the WTO. I believe it is necessary to review these if future directions are to be discussed. These fundamentals extend to economic, legal and institutional considerations, as well as WTO relationships with other organizations.

The chapter then draws on the contributions of the authors to address possible future directions for the WTO. Many clear-cut proposals emerge. However, owing to the complexity of a number of the issues identified, clear-cut solutions are not evident. I nevertheless believe that, by exploring this complexity and flagging alternative approaches, well-

informed decisions will be taken in the future and important mistakes avoided.

The changing role of the WTO

There are many examples of the changing role of the WTO in international affairs. Some are more obvious than others.

One obvious change is the dramatic increase in both the value and the volume of world trade to which WTO rules apply: world trade has grown more rapidly than world production in almost every year since World War II. Countries trade a far greater share of their domestic production, and trade rules apply to more than a quarter of world production. The rules extend to textiles, clothing and agricultural trade – which were hitherto outside the reach of the WTO – as well as to the critical sectors of services and intellectual property rights, which have been added to the WTO agenda. Admission to the WTO, unlike the GATT, requires all members to sign on to all WTO agreements. The original 23 members of the GATT have grown to over 150 with the final membership likely to surpass 170. The levels of development, specific cultures, political systems and past colonial or other histories differ greatly across these countries, rendering consensus-based agreement in the WTO all the more difficult.

Even the larger value of trade understates the reach of WTO rules because the rules themselves have become more demanding. Domestic regulations relating to patents, financial services, subsidies and support measures for agriculture are among those now subject to WTO disciplines. They reach deep into the domestic regulatory structures of WTO member countries and raise key issues of public concern that far transcend those associated with conventional trade policy. The Agreement on Trade-Related Aspects of Intellectual Property Rights and the Agreement on Sanitary and Phytosanitary Measures (SPS) raise ethical questions about, respectively, the patenting of life forms and the role of precaution and public health; and the agricultural negotiations deal with the multi-functionality of agriculture.

The role of the WTO has also been expanded by continuing negotiations. Limitations on subsidies that deplete fish stocks and the relationship between the WTO rules and multilateral environmental agreements are part of the Doha Development Agenda.

The WTO profile has also changed because of the greatly strengthened dispute settlement mechanism. Unlike the GATT, the WTO dispute process moves forward automatically with panel and Appellate Body reports adopted unless there is a consensus against them. The rule of negative consensus, backed by a mechanism providing for compensation

and sanctions in the case of non-compliance, has greatly increased public awareness of the WTO. Recent high-profile disputes have dealt with sensitive areas such as the role of science in risk management, the conservation of endangered species and restrictions on the cross-border movement of genetically modified organisms (GMOs).

According to Bert Koenders, major policy issues such as precaution, the environment, biodiversity, labour standards and climate change could drift towards the WTO not by design but by default and, in his view, the WTO dispute settlement system is not properly equipped to deal with the emerging controversies and trade tensions that they generate. The relative weakness of other multilateral institutions in enforcing their rules has unfortunately, he says, increased the demands on the WTO to deal with issues that were not previously within its mandate.

The capacity of the WTO dispute settlement mechanism to limit national sovereignty is unique among international organizations. As Pascal Lamy observes, globalization critics assert that the WTO acts as a hegemon with respect to international rule-making. Its dispute settlement mechanism makes it the only international organization with an effective judicial tool to ensure compliance with its rules. According to Lamy, trade agreements gain an institutional superiority in the array of international norms. As a result of this de facto norm primacy, commercial imperatives and economic values are, he says, believed to trump other international concerns, including environmental protection, human rights and health concerns.

Two-thirds of WTO members are now developing countries. Having undertaken new and demanding obligations, they rightfully look to future market access to support their export-led growth strategies. Their legitimate expectation is that the WTO will provide a forum in which their views can be effectively expressed and their concerns adequately dealt with. They also look not only for improved market access through the Doha Agenda but for acceptance of the legal flexibilities needed to implement their appropriate development strategies.

At the same time, others – in particular the least developed countries – feel they have not been integrated into the trading system at all, and look to new initiatives to respond to their special needs, some of which have surfaced for WTO attention. For example, the WTO has gained a high profile because of the injustices that face the impoverished cotton-exporting countries of Africa. The difficulties of gaining access to essential medicines for AIDS-stricken victims have heightened the involvement of the least developed countries, development organizations, other public interest groups, researchers and some governments.

A further important change is that developing countries have greatly increased their negotiating clout. In the past, the Group of 77 (G77)

rallied around their common problem of poverty rather than around common or agreed policy approaches to meet their individual country requirements and priorities. Things have changed. As Sylvia Ostry notes, a “new geography” in the form of coalitions of southern countries became evident at the WTO ministerial meeting in Cancun. The G20 included the Big Three – Brazil, China and India – as well as a number of other developing countries. Despite repeated efforts to eliminate it, the G20 has persisted, and the other coalition that emerged in Cancun – the G90 of African and other poor countries – has also endured.

Sylvia Ostry also makes the point that the complexity of the WTO agreements requires knowledge, that knowledge enhances power, and that the WTO houses what she calls a *knowledge trap*. The strong are stronger in the WTO because of their store of knowledge, and the weak are weaker because of their poverty of knowledge. The weak lack autonomy in any system, but in the WTO complexity creates reinforced asymmetry and diminished autonomy. However, as Pascal Lamy notes, the technical assistance afforded by the WTO and other institutions has gone a long way to rectifying this shortcoming.

According to Louise Arbour and Shervin Majlessi, the Doha Agenda, with its new negotiating authority, has placed development issues and the interests of developing countries at the heart of the WTO’s work. However, whatever the result of this round of trade negotiations, they say the WTO must keep its focus on development but with an approach that takes into account human rights considerations.

Sylvia Ostry does not attach much likelihood to a successful conclusion to the Doha Development Agenda. The Round, which was supposed to deal with development, in reality does not. What is absent is the need to confront the profound asymmetry in the system. For Ted Turner, failure is not an option. If the WTO gives up on global trade agreements, we can predict the outcome: the big countries will go off and do separate bilateral and regional deals with their favoured trading partners, raising the inevitable question of who will be left out. It will be the very people the WTO was created to include – the developing countries, which will have to bargain alone against the giants of international trade, leading us right back to where we are today: to a world where billions of people live in poverty.

Although the WTO has increased its importance on a number of fronts, has it also been diminished through the proliferation of preferential trade agreements? According to Dr Supachai, global economic governance and the role of the WTO are being tested by the profusion of regional trade agreements. Trade between partners to these agreements reached 50 per cent of total trade during 2007, and, given the growing number of agreements, their membership and trade coverage will have a

significant impact on the international trading system. For Dr Supachai, an inward-looking approach by these agreements must be avoided; it hampers trade with third parties and undermines the multilateral trading system.

There is no doubt that the continuing growth of preferential arrangements has sparked a new interest in their motivation and effect. Do they extend WTO commitments, consolidate them or undermine them? Although in the most general terms the answer for many is not clear, Celso Amorim notes that bilateral agreements between some developed and developing countries present a serious threat to access to medicines. A cursory glance, according to Amorim, reveals provisions that attempt to bring patent protection beyond the standard set by TRIPS; they ensure extended protection to expired patents via the granting of exclusive rights over undisclosed test data. These provisions, he claims, make it harder for producers of generic versions of medicines to enter the market after patent expiry, and present a serious obstacle to better access to medicines. This is particularly the case for developing countries, since cheaper generic medicines are responsible for ensuring access to medicines at affordable prices.

In some instances, the role of the WTO has changed through events over which it has no control. One example is genetic engineering, which creates concerns for many because it permits genetic information to be transferred between organisms too distantly related for natural cross-breeding. At the centre of concern are WTO rules that could constrain the regulation of the cross-border movement of GMOs. It is hard to imagine that such issues were foreseen at the time of negotiation of the relevant WTO agreements. Another example is the proliferation of multilateral environmental agreements (MEAs), such as the Kyoto Protocol, with important potential trade implications that could not have been foreseen at the creation of the WTO.

The heightened interest in the WTO has also come against the backdrop of an incredible revolution in the speed with which information – true or false – can be communicated globally and in the cost of that communication. Sylvia Ostry remarks that we are undergoing a new technological revolution in information and communication technology, a revolution that is creating a global market for goods, services, capital and labour. The speed and breadth of change are unprecedented. This “Great Transformation” has an ongoing effect on government, individuals, corporations and values, and its role in penetrating public awareness is of profound and increasing importance.

Non-governmental organizations (NGOs) are now linked through broad networks and coalitions that render them more effective and more sophisticated than their earlier counterparts. The public image of the

WTO – as well as public interest in it – has been greatly influenced by the information conveyed through these electronic means. Although many of these groups are not against trade per se, others are intensely protectionist, putting them on a collision course with supporters of an open and liberal trading system. The events in Seattle, Hong Kong and elsewhere – fuelled by coalitions of NGOs built on the World Wide Web – placed the WTO for the first time at the centre of a vital public policy discussion hitherto dominated by governmental representatives in closed meetings.

Finally, the profile of the WTO has been raised in very general terms because of the increasing awareness of the crucial role it plays in world affairs. For Pascal Lamy, there is a widening gap between global challenges and the traditional ways of devising solutions, and no country, no matter how powerful, can successfully tackle these challenges on its own. Therefore, not only is multilateral cooperation a more peaceful means of solving conflicts; it will become the only effective means of achieving results in the face of global challenges. Developing an effective framework for global governance will become increasingly necessary as these new challenges arise. It is our generation's responsibility to deliver. Given the WTO's economic and political dimensions, it can be a fundamental player in the building of a system of global governance. It can build bridges. Yet it will not and cannot be the only one to do so.

Future directions: Some fundamentals

In this section, I review some of the fundamental aspects of the world trading system that are important in charting its future directions. It does not intend to be comprehensive in terms of identifying all relevant considerations, but it does seek to illustrate the complexities involved in looking at possible future directions.

Economic fundamentals

The basic premise of well-functioning market-based economies is that prices register the relative scarcity of resources and consumer preferences. One of the results of market-based prices is that they allocate resources efficiently. The welfare of society can be undermined, however, through trade restrictions and distortions that send misleading signals relating to the optimal use of resources. Trade liberalization therefore has the potential to improve resource allocation and to increase national income and welfare. In the case of the environment, for example, economists argue that trade liberalization leads to more efficient resource use; a more efficient relative price structure (because the trade restrictions

themselves are market distortions); more resources available for environmental management programmes (owing to a growth in real income); and an increase in the availability of environment-related goods and services (through market liberalization). Thus, the removal of trade barriers is itself a goal to be pursued, based on its potential for improving the environment.

However, trade liberalization is far from a panacea in terms of social (and economic) objectives. It ensures neither an equitable outcome nor the optimal use of resources from a social perspective. According to Dan Esty, trade policy – and particularly trade liberalization – inescapably affects the natural environment. In particular, freer trade promotes expanded economic activity, which often translates into industrialization, increased pollution and the consumption of natural resources. If environmental regulations are optimized and all externalities internalized, environmental harm need not accrue. But where regulation is inadequate and externalities are not fully internalized, overexploitation of open-access resources and inefficiently high levels of pollution are likely to result, a fact that trade experts and the WTO itself have come to acknowledge.

Non-discrimination

The principle of non-discrimination in the form of national and most-favoured-nation treatment dictates that WTO members cannot discriminate between imported products that are “like” nationally produced products or “like” those coming from other countries. It is one of the most important determinants of the role of the WTO in global governance. It limits governments’ use of trade measures to restrict imported goods produced through child labour or those that have caused unacceptable damage to the environment. In all of this, the key concepts are non-discrimination and the “likeness” of products.

Products have generally been considered to be “like” based on their physical characteristics, end-use, consumers’ preferences or tariff classification. In colloquial language, “like” means having the same physical characteristics or qualities, such as identical shape, size or colour. However, it may also mean “similar”, raising many interpretive questions about the characteristics or qualities that are important in assessing the likeness of products and, therefore, the nature of imports that can be discriminated against. A diesel bus and an electric tram, for example, are alike in that they both provide transport for the public, but they may be very different when it comes to polluting the environment. Adding one gene to many thousands of others can turn a non-offensive food product into an allergy-causing nightmare. Further, the additional question arises

of just whose perspective should be used to judge likeness: a slug and a snail are like products to a vegetable grower but not to a French gourmet.

From a governance perspective, the interpretation of “like products” is critical; it determines the legality of a national restriction on an imported good. Nevertheless, “likeness” has never been definitively established in GATT and WTO jurisprudence, and it is open to interpretation.

One manifestation of the importance of the interpretation of “likeness” is that a government may wish to differentiate between products according to the manner in which they were produced. Perhaps a production process was considered offensive by the importer because it emitted excessive greenhouse gases. Should imported eggs be banned if they were laid by hens kept in battery cages rather than by free-ranging hens? Are these eggs “like” the eggs of free range hens? And what of imported fur products, banned because wild animals are caught in steel-jawed leg traps? Or what of food products derived from GMOs? Are they “like” non-modified products, and can they be banned if they are physically indistinguishable from them? Are imported carpets made by children under the age of 12 like carpets knotted by adults? Should imported shrimp – physically the same as any other be banned if caught in a manner that inadvertently kills turtles?

Not surprisingly, “likeness” means different things to different organizations. Louise Arbour and Shervin Majlessi make the point that discrimination in the trade field is not the same as in other disciplines; the trade principle of non-discrimination is primarily directed towards reducing trade protectionism and improving international competitive conditions rather than achieving substantive equality. Accordingly, “national treatment” does not permit discrimination in favour of nationals even if the national provider of a “like” product is in a weaker position. For them, treating unequals as equals is problematic for the promotion and protection of human rights and could result in the institutionalization of discrimination against the poor and marginalized. For example, the non-discriminative application of trade rules that do not take into account the need to alleviate rural poverty can increase the vulnerability of small farmers and the rural poor. Arbour and Majlessi conclude that, as two sides of the same coin, non-discrimination and equality should provide the foundations for the free and equal enjoyment of human rights.

Thus, some human rights activists, environmentalists, animal welfare groups and others maintain that the WTO should change its interpretation of “likeness” and legitimize trade restrictions on the basis of how goods are produced. For them, some social, environmental and other injustices are so obvious that if the WTO prohibits trade restrictions it is acting irresponsibly from a governance perspective.

Ideally, determinations as to whether discrimination in trade is appropriate for social or environmental reasons should not be the task of the WTO. Rather, the task of establishing and enforcing internationally accepted standards should be handled through international agreements outside the WTO.

Dan Esty maintains that, for the WTO to continue to play a leading role in global governance, it must further refine its structure of rules and procedures so as to accommodate environmental values, and other concerns such as poverty alleviation, within the trading system. According to Esty, the long-term legitimacy and durability of the international trading system will be enhanced to the extent that international economic policy evolves in ways that intersect constructively with other policy-making realms, such as the emerging regime of global environmental governance. WTO decisions will not win the degree of popular acceptance that they must have to keep the trade system functioning smoothly unless the organization's decision-making processes are seen to be authoritative, effective and fair, both procedurally and substantively.

Standards

As barriers to trade are removed, the relative competitiveness of countries is increasingly influenced by different national standards. Dr Supachai notes that environmental, health and food safety requirements in particular have become more stringent and complex – a trend set to continue given concerns about food safety, energy efficiency and climate change. Many such requirements are now imposed by the private sector, coexisting and interacting with mandatory governmental requirements. Private standards, he says, are widely believed to be outside WTO disciplines and thus pose challenges in terms of justifiability, transparency, discrimination and equivalence.

Although standards can both facilitate trade and protect consumers, they can also be protectionist in intent and unnecessarily restrict trade. If all countries adopted the same standards, there would not be a problem in determining the intention behind them.

The reality is that international standards do not exist to meet the needs of all countries, and regulations that bear on the competitiveness of traded products differ across countries for very good reasons. Physical conditions differ, meaning varying absorptive capacities for air pollution, different effects from water run-off on levels of artesian water basins, and different impacts of timber-cutting on deforestation and desertification. A further complication is that, even if physical conditions are identical across countries and the risks are well known, societies may well wish to manage these risks differently. North American consumers, for example,

may be less concerned about the consumption of food products derived from GMOs than are consumers in the European Union,² even with the same scientific information at hand.

The key WTO agreements dealing with standards are the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS). Neither agreement obliges countries to adopt minimum standards. They do, however, create rules that are to be respected to ensure that market access rights are not undermined through regulations that are disguised restrictions on trade. They also recognize that, for many reasons, common standards, far from being barriers to trade, work to promote trade.

From a trade policy perspective it is important that governments have the autonomy to adopt measures necessary to meet their national requirements. The question then arises of whether or not a liberal, global trading system can coexist with the very different trade and non-trade regulations that have been adopted by governments and that bear heavily on the competitiveness of products and services. As with the discussion above relating to discrimination, the WTO enters on the scene not to determine whether national policy choices are appropriate but to determine whether measures used to implement national policy goals are used for protectionist purposes. This, however, is not an easy task.

Trade and development

Many developing countries have reaped very considerable benefits from the market access openings provided by the WTO. They have adopted outward-oriented development strategies and legally binding WTO obligations to lock in domestic policy reforms. Their legitimate expectation is that the WTO will provide a forum where their views can be effectively expressed and their concerns adequately dealt with. However, many least developed countries feel they have not been integrated into the system at all. As Pascal Lamy notes, whereas some emerging economies in the developing world – most notably in Asia – are reaping the benefits of trade, the poorest countries of the world still have difficulties benefiting from global growth. In his view, integrating the group of least developed countries into the global market will be of utmost importance to meeting the challenge of poverty reduction.

Developing countries look to the WTO – and the Doha Agenda – to improve their access to markets. However, from a rules perspective, it is also crucial that the WTO legal framework provides them with the flexibility to implement their “appropriate” development strategy, and that, in turn, requires a decision on what an “appropriate” development strategy might be. Addressing this question raises critical governance issues.

GATT recognized the need for infant industry protection, flexibility in the use of balance of payments measures, non-reciprocity in trading tariff concessions and preferential market access for the manufactured exports of developing countries. These provisions were based on the premise that equal treatment of unequals is unfair. The “needs” of developing countries were dealt with by absolving them from a number of obligations undertaken by their developed counterparts. Just as poor people pay lower taxes, developing countries should pay less when they are poor and more as they develop. The legal flexibility created in GATT constituted the core of what came to be known as special and differential treatment, with its withdrawal described as graduation.

Today, there are 155 specific provisions in the WTO aimed at addressing the various concerns of developing countries. They come in many forms. Some are directed at increasing developing countries’ trade opportunities whereas others are aimed at safeguarding their interests. Others provide for flexibility in the implementation of commitments, permit the use of otherwise WTO-unacceptable policy instruments or involve technical assistance. These provisions may be mandatory or non-mandatory. A large number are considered completely useless by developing countries or excessive by developed countries. However, the important question from a governance perspective is: do these provisions sit comfortably with what is perceived as an “appropriate” development strategy in the context of the WTO legal framework?

Although there is a growing acceptance of the link between trade liberalization and economic growth, there is also a clear recognition that open markets do not automatically guarantee success in trade-led economic growth. Factors such as the availability of human resources, investment, sound macroeconomic policy and low corruption are crucially important. Dealing with this reality sets the scene for today’s debate.

Multilateral environmental agreements

There is no doubt in my mind that MEAs are the best way to tackle global and trans-boundary environmental problems. WTO members have made clear on numerous occasions that they do not look to the WTO to become a policy-making organization or standards enforcement agency for environmental matters. WTO rules permit governments to adopt whatever trade measures they wish to protect their domestic environments. For environmental problems beyond their borders, however, WTO members agree that regulations should be devised and enforced through international agreements and not unilateral coercion.

Since the WTO’s establishment, one of the most actively discussed topics has been the possible conflict between trade-related measures in MEAs and WTO rules. Because the WTO and MEAs represent two

different bodies of international law, it is important that the relationship between them is coherent and fully understood by all concerned. This is not the case at the moment. Given the importance of the global trade and environment regimes, any clash over their rules would have unfortunate ramifications for both regimes. Behind the question of which rules would trump the others lies another real governance issue.

Trade in services

The General Agreement on Trade in Services (GATS) extends trade rules into a huge and still rapidly growing area of international commerce. It holds the potential to greatly change the global patterns of investment, production and consumption in services such as telecommunications, transport (air, maritime and inland), finance (banking, insurance and securities trading), professional services, tourism, construction and engineering, and many others. These sectors include sub-sectors such as medical and hospital services and other areas of public health, and infrastructural services such as the supply of water, electricity and public utilities. I am not surprised that the GATS provokes a great deal of interest – and anxiety – among some governments and interest groups.

Much of this is related to the fact that “trade” has a very different meaning in terms of the GATS compared with other WTO agreements. For example, according to the GATS, trade in services may well take place through a foreign commercial presence of the service provider, without anything crossing borders. Specific commitments are undertaken in sub-sectors identified by governments, with limitations and conditions placed on their liberalization. There is no parallel in any other multilateral, plurilateral or bilateral agreement dealing with international commerce of any kind. Clearly, the division of responsibility between national authorities and negotiated international commitments in the WTO is crucial.

Overlapping responsibilities

In the absence of a world government, the responsibilities of international organizations are not clearly delineated. Nowhere is this more evident than in the pursuit of sustainable development, now a core objective of the WTO. As a result, there are overlapping objectives across a number of international agreements. Indeed, the Director-General of the WTO has noted: “Given the evolution of the rules-based trading system, as well as the growing attention paid to policies designed to achieve sustainable development, there has been an increasing overlap between what have now become ‘trade’ policies and policies relating to sustainable development.” He continues that, in this respect, a crucial question

that emerges is “whether a clearer mission for the WTO in support of sustainable development implies major institutional reforms”.³

At the most general level, the objective of sustainable development stands on the pillars of economic development, environmental management and social responsibility. In Doha in 2001, trade ministers stated that the dual objectives of upholding and safeguarding an open and non-discriminatory multilateral trading system and acting for the protection of the environment and the promotion of sustainable development can – and must – be mutually supportive. Less than one year later, at the World Summit on Sustainable Development in Johannesburg, environment ministers called for urgent action to promote an open, equitable, rules-based, predictable and non-discriminatory multilateral trading system that benefits all countries in the pursuit of sustainable development. They also called for the successful completion of the work programme of the Doha Development Agenda. There is clearly common ground in terms of political objectives in the areas of both trade and sustainable development, and this is as it should be.

However, in the respective declarations, there are more than 20 overlapping areas of activity.⁴ They include the need to remove trade distortions that damage the environment; to clarify and improve WTO disciplines on fisheries subsidies; to deal with global environmental problems through international consensus; to promote the mutual supportiveness of MEAs and WTO rules; to avoid arbitrary or unjustifiable trade measures that are disguised restrictions on international trade; to avoid trade measures that deal with concerns outside the jurisdiction of the importing country; to ensure that the TRIPS Agreement does not prevent WTO members from adopting measures to protect public health; to recognize the importance of core labour standards in the International Labour Organization (ILO); and many more.

In a speech to the United Nations Environment Programme (UNEP) Global Ministerial Environment Forum in 2007, Pascal Lamy remarked: “Sustainable development should be the cornerstone of our approach to globalization and to the global governance architecture that we create. If I have come to this forum, it is to deliver a message: **the WTO stands ready to do its part.**”⁵ The governance question that emerges here is: how to ensure coherent and mutually supportive approaches to the common objective of sustainable development.

Future directions

According to Pascal Lamy, the WTO is only part of a more global system in which several sets of rights and obligations exist, and there is a need to

ensure coherence between international treaties while preserving the necessary policy space to favour non-WTO concerns. However, while ensuring that “policy space” is available for other international institutions, some questions emerge: to what extent is the “policy space” filled satisfactorily by other international agreements; do they have a compliance mechanism to enforce obligations effectively; and can the WTO make a more useful contribution to meeting the objectives of other institutions by changing its own behaviour? Lamy’s view is that, although the WTO is powerful and sophisticated, it remains imperfect and its institutions contain shortcomings. I believe that addressing them will be critical if the role of the WTO in global governance is to be effective.

Strengthening UN agencies and coherence

It would seem logical that, if non-traditional trade issues come to the WTO, they should be transferred to United Nations specialized agencies that have the mandate and expertise to deal with them. Although this would seem a natural course of action, there are shortcomings in this approach. Pascal Lamy observes that the most evident failure of the general international legal system lies in its limited enforceability, and cites the former UN Secretary-General Kofi Annan’s address to the 2004 General Assembly in which he states that, although an impressive body of international norms and laws exists, it is “riddled with gaps and weaknesses. Too often it is applied selectively and enforced arbitrarily. It lacks the teeth that turn a body of laws into an effective legal system.”⁶

Pascal Lamy notes that WTO rules are better enforced, but its framework by no means resolves the problem associated with the lack of an international hierarchy of norms. Each international organization creates its own set of rules, according to its specialized mandate. Yet, once negotiated, no single body adjudicates conflicts between these agreements. The international principle of “good faith”, which obliges governments not to agree to contradictory rules, is not enforced. His view is that the WTO’s dispute settlement system does not provide the answer to this normative chaos in international law, for an adjudicator can only apply existing rules.

If the WTO is the body with the “teeth”, perhaps a case can be made that the specialized agencies of the United Nations should be strengthened and given the same enforcement powers as the WTO. The WTO could then deal with a narrower agenda than it is now acquiring. However, the reality is that the political will is not there for governments to give the same enforcement powers to the UN specialized agencies as has been given to the WTO. If this political will is lacking, the implications

may be an even wider gap to be filled by the WTO. What is needed in this case is a coherent approach to common objectives.

In terms of common objectives, Bert Koenders questions whether anyone could be against compliance with basic labour standards; the prevention of child labour; the promotion of sustainable development and the protection of biodiversity; and environment and animal welfare. To which Koenders replies no, but the question then arises of how to promote these objectives effectively, and whether the use of trade measures should be allowed. Here Koenders notes that most countries have undertaken commitments in these areas in other international agreements such as those of the ILO and the conventions on human rights, biodiversity and environmental issues. To the question of whether or not that makes a convincing case to allow unilateral trade measures to pursue these objectives via measures not explicitly authorized in these agreements, his answer is again no. I very much agree. The question then turns to how to promote these objectives effectively, and whether there are circumstances in which trade measures should be allowed.

In a similar vein, Louise Arbour and Shervin Majlessi say the WTO has already made a very important contribution to enhancing multilateralism and a rule-oriented international trading system. The challenge facing the international community is the development of a system of trade liberalization that benefits everyone, leaving no individual, group or state behind in the globalization. The WTO, through coordination with other global governance actors, clearly has a crucial role to play in the development of such a system.

According to Juan Somavia, over recent decades the policies promoting globalization have been extremely coherent but the outcomes have been far from fair. So the issue is not about coherence in itself, but about coherence around what objectives. Policy coherence is a means to a goal, but, according to Somavia, policies also need to make sense in their own right and to be able to achieve what they are meant to achieve. Both of these conditions then – policy coherence on shared goals and policies that make sense – bear on countries' prospects to realize the benefits of globalization.

Somavia also notes that trade policies and labour and social policies interact, and that greater policy coherence in the two domains can help to ensure that trade reforms have significantly positive effects on both growth and employment. He points out too that those trade policies have a significant impact on the level and structure of employment, wages and wage differentials, as well as on labour market institutions and policies. At the same time, labour and social policies influence the outcomes of trade policies in terms of the growth of output and employment and the distribution of income. For Somavia, there is a less clear

understanding of how the interaction between trade and labour market policies can be designed in a more coherent manner to allow countries to reap the benefits of trade while simultaneously achieving good labour market outcomes.

Similarly, Louise Arbour and Shervin Majlessi note that, whereas the legal framework for the economic aspects of the liberalization of trade is provided by the multilateral trading system, the legal framework for addressing the social dimensions of trade liberalization is provided by human rights norms and practices. Meeting the challenges of globalization requires a governance structure that provides for coherent multilateral cooperation.

Cooperation and coherence can come in many forms. Celso Amorim points to the Declaration on TRIPS and Public Health as an example. In the United Nations, the Millennium Development Goals adopted in 2000 provide a substantial basis to support the claims of countries that have concerns about the effect that too-stringent patent protection might have on access to medicines. He notes that, in 2006, the UN General Assembly adopted a Political Declaration during the Follow-up meeting on the Declaration of Commitment on HIV/AIDS, which reaffirms the importance of the Doha Declaration on the TRIPS Agreement and Public Health.

Sylvia Ostry notes that one of the intents of the Uruguay Round was to improve cooperation and coordination among the main international economic institutions. Driven largely by the experience of the wide exchange misalignment of the 1980s and its impact on trade, the euphemism “international coherence” was devised. In this context, a Functioning of the GATT System (FOGS) Group was created, which produced a Ministerial Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking.⁷ Ministers recognized that “difficulties the origins of which lie outside the trade field cannot be redressed through measures taken in the trade field alone”. They acknowledged that the “interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies”. The Declaration went on to state that the “World Trade Organization should therefore pursue and develop cooperation with the international organizations”. This served as the basis for the comprehensive and formal agreements between the WTO, the World Bank and the International Monetary Fund.

In Sylvia Ostry’s view, little has emerged from the objective of greater coherence apart from rhetoric and agreements about who should attend what meetings and when. Bert Koenders says it is high time that WTO members agreed to properly define the relationship of the WTO with

other relevant international bodies that use trade instruments to pursue their objectives. The principle, he says, should be to avoid conflict between different bodies of international law, especially where not all the parties are members of the WTO. In my view, the basic thrust of the Declaration on greater coherence in global economic policy-making would appear to be equally applicable to bringing greater coherence to global trade and non-trade-related policy-making.

Sylvia Ostry proposes a “policy forum”, and recalls the Consultative Group of 18 (CG18), established in 1975 on a recommendation of the Committee of Twenty Finance Ministers, which came after the breakdown of the Bretton Woods system. The composition of the membership was based on a combination of economic weight, regional representation and regular rotation. The forum involved senior officials sent from capitals to participate. The CG18 was never officially terminated but meetings ceased at the end of the 1980s. In her view, establishing a WTO policy forum would be a great step forward.

My own view is that the minimum that is called for is an inventory of issues that require a coherent approach to be successfully dealt with. This should of course extend beyond the WTO and the Bretton Woods institutions, as required as a result of the Uruguay Round Declaration on coherence. Identifying the relevant issues would facilitate the task of determining the appropriate process for dealing with them within the WTO.

The importance of process

As non-trade concerns have gravitated to the WTO, they have been dealt with through different processes with differing outcomes, and much can be learned from past experience.

Bert Koenders asks if WTO rules need to be changed in order to accommodate non-trade concerns and argues that exploring courses of action other than rule change and looking for mechanisms already available in the WTO would make sense and be less contentious than changing rules. He has in mind options such as interpretations of the existing rules or Ministerial Decisions and Declarations. Pascal Lamy observes that, when faced with a political stimulus, the WTO manages to put forward legislative solutions throughout the chain of decision-making to respond and adapt to the new realities faced by WTO members. He cites considerable evidence of the evolving institutional nature of the WTO and concludes not only that the WTO can decide on rules by negotiation and adoption of international agreements but that there already exists a domain for WTO bodies to complement these traditional treaties through “secondary legislation”.

In attempting to identify the “way forward” for the WTO, I think it is particularly useful to look at the manner in which a selection of non-traditional trade matters has been dealt with in the WTO:

- Some issues have been addressed in **committees** specially created to deal with the area of contention. Examples include trade and environment – dealt with in the Committee on Trade and Environment (CTE) – and trade and development – dealt with in the Committee on Trade and Development (CTD). As elsewhere in the WTO, these committees are open to all member governments.
- Some issues emerge from legal **agreements**. For example, the Technical Barriers to Trade (TBT) Agreement deals with eco-labelling and environmental standards; the protection of plant and human life and health is dealt with by the SPS Agreement; obligations relating to patents and regional appellations are found in the TRIPS Agreement; and the GATS provides for negotiated access to education and other public utility services.
- Other non-traditional trade concerns are dealt with through **formal negotiation**. The Doha Development Agenda envisages negotiations on fishing subsidies and fish stock depletion, the relationship between WTO rules and MEAs, and the liberalization of trade in environmental goods and services.
- There are **disputes** that directly touch on non-traditional trade concerns relating to – inter alia – endangered species, public health and genetically modified organisms.
- There are also WTO **decisions** such as the Singapore Ministerial Decision on labour standards and the Doha Ministerial Declaration on TRIPS and Public Health.

In reality, the WTO has had a rich experience in dealing with non-trade concerns. A closer look at some of them throws useful light on alternative ways forward. The list is long, and the examples I have drawn on are indicative only:

Trade and environment

In the early 1990s, concern about the possible clash of trade and environment policies figured prominently on the trade agenda. “Greening of the GATT” became the catch cry, launched by Dan Esty⁸ and taken up by many environmentalists. Esty called for a Green Round of trade negotiations aimed at refining WTO rules and procedures so as to ensure that the international trading system would work to promote both open markets and environmental protection.

Dan Esty recalls that the original GATT agreement of 1946 did not mention the word environment and, for decades, trade policy-makers

did not recognize the intersection between their policy domain and the environmental realm. After considerable public discussion and negotiation between governments, the CTE was created along with the WTO. Its mandate was to recommend modifications to WTO rules to accommodate environmental concerns. With its first major report in 1996, and much to the chagrin of environmentalists, no rule change was recommended.

In the past decade, however, the situation has changed and, for Esty, it is now clear that, for policy-makers, trade and environmental policies cannot be kept on separate tracks. Today, trade policy-makers at both the national and global levels understand that the trade–environment link is inescapable and must be managed systematically. Esty goes on to note that, in the intervening years since *Greening the GATT* was published, the debate has shifted from *whether* to integrate trade and environmental policy-making to *how* to do it; the focus on the trade–environment relationship is not really a choice, but rather a matter of descriptive reality for those engaged in managing international economic interdependence.

The interesting question is why there has been this change in sentiment in both the trade and environment community. Based on my own experience as Director of the WTO Trade and Environment Division, the principal reason is a far better understanding on the part of both trade officials and environmentalists of the nature and complexity of the issues. This can be attributed to an active debate at the academic level, as well as to the process that handled the issue in the WTO.

Since the creation of the WTO there has been a sharing of information through reports of CTE meetings and public information seminars, which have greatly enhanced the understanding of the link between trade and the environment. These symposiums have been attended by academics and by representatives of government ministries, NGOs, MEAs and UN specialized agencies. There have also been joint technical cooperation missions involving both WTO and UNEP staff that have enhanced an understanding of the issues.

Another reason for the turnaround in sentiment is that the secretariats of those MEAs with trade provisions have regularly addressed the CTE. The end result is that, although many MEAs provide for potentially non-conforming WTO trade measures, no trade dispute relating to legal inconsistencies between trade and environment treaties has ever come to the WTO: nor will it in the future, in my view.

Fishing subsidies

It is clear why the WTO finds itself centre stage in dealing with fishing subsidies. The WTO Subsidies Agreement is the only multilateral agreement that monitors subsidies and provides for countervailing

measures. The WTO has among its objectives the optimal use of the world's resources, including fish stocks. Moreover, it has a powerful dispute settlement system to enforce any eventual disciplines on fisheries subsidies.

There has been transparent discussion of fishing subsidies in the WTO, primarily in the CTE. Summary records and background documents have been freely available, and interested parties have conveyed their concerns to negotiators through WTO seminars. Research and policy analysis on fisheries resources and management information have been provided by intergovernmental organizations such as the Food and Agriculture Organization, the United Nations Environment Programme, Asia-Pacific Economic Cooperation, and the Organisation for Economic Co-operation and Development.

Had the matter been dealt with as a WTO dispute, the views of countries – including those not directly involved in the dispute – would have been far from transparent. Through negotiations, in contrast, the positions of all WTO members are revealed. Public interest groups can direct their energies to convincing the appropriate governments of their cause rather than lambasting the WTO. With national positions on the table, it is clear where pressure needs to be applied by NGOs and others for movement to be made in the direction they wish to take. Further, and without question, irrespective of the decision by the panel and/or the Appellate Body, there would have been dissatisfaction on the part of some. The WTO (and in particular the dispute settlement system) rather than the governments involved in the negotiations would have been the object of attack.

Not surprisingly, the Appellate Body has consistently made the point that negotiated agreement, not WTO litigation, is the way to deal with disputes involving non-traditional trade matters. This is clearly the way forward not only for fishing subsidies but for other similar issues.

Declarations

Other non-traditional trade issues have been dealt with through Ministerial Declarations. One example is patent protection that restricts access to essential medicines. Flexibility provisions in the TRIPS Agreement do provide for the production of pharmaceutical products under specified conditions and without the authorization of the patent-holder. Nevertheless, a number of developing countries sought assurances that these provisions would be interpreted in a sufficiently flexible manner. Thus, a Ministerial Declaration was negotiated to deal with this concern.

According to Celso Amorim, the Declaration on TRIPS and Public Health, adopted at the Doha Ministerial Conference, recognizes that “the TRIPS Agreement does not and should not prevent members from

taking measures to protect public health” and, in particular, that countries enjoy “the right to grant compulsory licenses and the freedom to determine the grounds upon which such licences are granted”. Amorim asserts that the Doha Declaration goes beyond the mere reaffirmation of provisions inscribed in TRIPS. It acknowledges that health issues have a precedence vis-à-vis patents and that countries enjoy the policy space to adopt measures aimed at ensuring access to medicines. His view is that this had fundamental consequences for negotiations of the Development Round as a whole, and to date is one of the few results of the Round clearly recognizable as “development friendly”.

The relationship between trade and labour standards provides a further example of the use of Ministerial Declarations. Although there has been considerable pressure for some years for the WTO to play a role in the enforcement of minimum labour standards, this is seen by governments to be the role of the ILO. With a view to clarifying matters, trade ministers affirmed at the 1996 Singapore Ministerial that the ILO was the competent body to set and enforce labour standards, whereas the role of the WTO was to promote economic growth and development through trade liberalization, with trade-induced growth seen as a contributor to the promotion of core labour standards. They correctly rejected the use of labour standards for protectionist purposes, and affirmed that the comparative advantage of low-wage developing countries must in no way be put into question.

There are many options for dealing with non-traditional trade matters in the WTO. In my view, past experience is important in this respect because it indicates that other options of a less confrontational and more transparent nature can be resorted to before calling for rule change or engaging in financially and politically costly disputes.

National responsibilities

There is no automatic process that accompanies trade liberalization to ensure a positive impact on social conditions, the environment or income distribution. The question then emerges of whose responsibility it is to deal with potential problems. The WTO view – and that of the GATT before it – has been that, when adverse production and consumption externalities are adequately integrated into decision-making processes, trade liberalization and the attainment of non-trade-specific objectives can be mutually supportive.⁹ For trade-induced growth to be sustainable, appropriate domestic policies need to be in place. The predominant view of WTO members is that this is a national choice, with differences in domestic policies properly regarded as domestic choices reflecting domestic trade-offs. In my view, this approach must be preserved.

Thus, Juan Somavia notes that, if trade is being liberalized, then countries with well-designed social and labour market policies are better positioned to reap the benefits and cope with possible adverse effects. Louise Arbour and Shervin Majlessi point to a link between trade, development and human rights: trade can help guarantee the enjoyment of human rights by improving opportunities for economic growth, job creation and the diffusion of technology and capital, and can contribute to development and the eradication of poverty. Trade can, however, also threaten human rights in some situations. Their conclusion is that it is a national responsibility to promote and protect human rights when negotiating and implementing international rules on trade liberalization. In order to ensure the most appropriate human rights regulations, assessments of the impact of trade policies are fundamental. It is the role of national governments to study the impact of trade agreements and liberalization.

Dani Rodrik argues that, in terms of globalization more generally, a range of institutional complementary measures in both rich and poor countries is required in order to deliver its benefits in full and remain sustainable. In the advanced countries, the complementary measures relate in large part to improved social safety nets and enhanced adjustment assistance. In the developing countries, he continues, the requisite institutional reforms range all the way from anti-corruption to labour market and financial market reforms.

Rodrik argues that the greatest bang for the global reform buck lies in pushing for increased openness and market access, while ensuring that the adverse consequences of openness are taken care of; the challenge becomes not “how do we liberalize further” but “how do we create the *policy space* for nations to handle the problems that openness creates”. His argument is that it is lack of policy space – and not lack of market access – that is the binding constraint on a prosperous global economy. There should be sufficient policy space to allow rich nations to address issues of social insurance and concerns about the labour, environmental and health consequences of trade; and to allow poor nations to position themselves better for globalization through economic restructuring and diversification.

Louise Arbour and Shervin Majlessi note that, in the trade policy community, trade expansion is often viewed as an end in itself and is used to measure the success of these policies; a view that in turn can be reflected in the methodologies, agenda and review mechanisms of the organization. They argue that, to ensure the sustainability of trade law and policy from a human rights and development perspective, WTO bodies and mechanisms – including the Trade Policy Review Mechanism and the Dispute Settlement System – should adopt a methodology and view that examines trade law and policy comprehensively, focusing not only on

economic growth, markets or economic development but also on health systems, education, water supply, food security, labour, political processes and so on.

The bottom line is that the way forward, as Juan Somavia observes, is for each country to find its own way to best address the challenges posed by trade liberalization. For example, social dialogue between workers, employers and governments at the national level can be an effective way to find solutions that take the needs of each side into account. He also poses the question of whether traditional trade theory downplays some of the important implications of trade liberalization that can be observed in many countries: greater inequality that results from increased skill premiums and/or a shift from labour to capital incomes, and a loss of employment security in industrialized countries. If left unaddressed, both create opposition to globalization and can make it politically and socially unsustainable. Somavia argues moreover that labour and social policies are required in order to redistribute some of the gains derived from trade from winners to losers.

The role of discrimination

If the WTO were to legitimize trade discrimination without all WTO members agreeing to forgo their rights in this respect, it would profoundly change the nature of the WTO. However, it is precisely here that the greatest pressure is brought to bear on the WTO to create linkages with non-traditional trade areas. There are those who argue that there currently exists a strong multilateral rules-based trade regime, attained through the WTO, which is essential to developing a system of governance of global markets. It is reasoned that the trading system cannot act in isolation when there exists a wide variety of issues that rightfully belong on the trade agenda.

The thought of importing goods that have degraded the environment, accelerated the extinction of endangered species or been produced with child labour is clearly anathema to many. The question is not whether such matters should be dealt with at the international level; the controversy turns on whether the WTO is the appropriate body to deal with them.

As Bert Koenders points out, pleas can be heard to add policies in the country of origin as conditions for market access; conditions such as the local labour conditions or the implementation of national laws in line with international agreements in other areas. He cites as current examples the European Union's minimum sustainability criteria – currently in the making – for biofuels based on meeting minimum savings of greenhouse gas emissions over the whole lifecycle (compared with the fossil

reference product) and the protection of bio-diversity. He also includes pleas for import prohibitions on products produced with the worst forms of child labour, or on agricultural products that fail domestic animal welfare standards in the European Union.

Similarly, as Louise Arbour and Shervin Majlessi note, the WTO mechanisms entrusted with the task of implementation and interpretation of the rules and settlement of disputes involving human rights considerations and obligations of states should ensure that these two processes – progressive realization of socio-economic rights and progressive trade liberalization – can be implemented simultaneously and coherently. This will require, according to Arbour and Majlessi, at a very minimum, that the states' international trade commitments not be interpreted in a manner that will undermine the fulfilment of their international human rights law obligations.

The way I see it is that if governments agree on when to discriminate in trade, then there is no problem: they agree that narcotics and stolen goods should be discriminated against. However, what weight should be assigned to other agreements if all WTO members are not parties? Or what if countries decide to act unilaterally in restricting trade, even if there is no multilateral agreement to do so?

For Bert Koenders, governments will always, for different reasons, search for linkages between issues and policies that may be unrelated to considerations of market access and competition. Although such linkages will undoubtedly complicate negotiations in the WTO, they could still deliver beneficial outcomes. From the perspective of global governance and enhancement of global welfare, he says such linkages should therefore not be rejected out of hand; cross-linkages between trade and climate change negotiations, for example, have become very topical and require urgent attention.

As Dan Esty points out, environmental programme and policy choices often affect trade, and in some cases become intertwined as a function of ecological realities. Furthermore, a number of environmental challenges are global in scope. Esty cites numerous examples that cannot be dealt with on a national basis, from the depleted fisheries in many of the world's oceans, to the need to protect the ozone layer, to the build-up of greenhouse gas emissions that may produce climate change. In such cases, says Esty, countries that seek to address worldwide problems unilaterally inevitably find that they cannot resolve the issue through their own efforts: international cooperation is essential. From the perspective of public goods economics, successful "collective action" requires mechanisms to promote collaboration and to discipline "free riders".

Indeed, a unique provision of the WTO is that the Dispute Settlement Understanding rules out all unilateral measures, with only the WTO able

to decide whether a member's measures or actions are inconsistent with WTO rules. For Pascal Lamy, forcing powerful members to abide by dispute settlement rulings and generating a rules-based mechanism for dealing with disputes represent a major achievement of the WTO, placing it ahead of other organizations, where compliance is most often the result of diplomacy and the balance of powers.

WTO processes do in fact defer to other agreements (e.g. in the SPS Agreement) or take into account "soft law" or "best endeavour" commitments. The Appellate Body is a case in point. It determined that certain turtles should be considered an "exhaustible natural resource" because they were listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). With respect to the Precautionary Principle, the Appellate Body noted that "it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question".¹⁰ The Precautionary Principle had not yet "crystallized" to become a general principle of law.

The Appellate Body has taken the view that WTO provisions cannot be read in clinical isolation from public international law, and that the international rights and obligations of WTO members are to be taken into account when reading and interpreting their respective WTO obligations. This recognizes that the WTO is only part of a more global system that includes several sets of rights and obligations. No priority can be given to WTO norms over other international norms; there is a need to ensure global coherence in the interpretation and application of all values, rights and obligations. Lamy believes that, in leaving members with the necessary policy space to favour non-WTO concerns, the WTO also recognizes the specialization, expertise and importance of other international organizations.

The Appellate Body does indeed use discretion in its rulings and takes public opinion into account. In reality, WTO exceptions referring to non-trade concerns are to be interpreted according to the ordinary meaning of the non-trade policy invoked. In its interpretation of the important concept of "likeness", the Appellate Body says "likeness" evokes "the image of an accordion which stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion ... must be determined by ... the context and the circumstances that prevail in any given case".¹¹ Similarly, in terms of sustainable development, the Appellate Body believes that in its rulings sustainable development "must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement".¹² The Appellate Body is responsible for "squeezing" the accordion and the "colouring in" exercise. Assigning an importance to "soft law" is a

sensitive course of action because it necessarily interjects a subjective element into rulings. A judgement call is required.

So what is the way forward? Some wise advice is offered by the late Bob Hudec.¹³ His view is that, in circumstances where discretion is required, most tribunals decide the case as best they can by making a “seat-of-the-pants judgment” about whether the defendant government is behaving correctly. Once the tribunal comes to a conclusion about who should win, it fashions an analysis – in terms of the criteria it has been asked to apply – that makes the case come out that way. So long as the tribunal gets it right most of the time – that is, decides its cases according to the larger community’s perception of right and wrong behaviour – Hudec says the decisions tend to be accepted.

Viewed from this perspective, the eventual political acceptability of the WTO’s policing function over domestic regulatory measures depends not on the persuasiveness of the legal standards being applied but on the ability of WTO tribunals to find the right answers; in other words, their ability to know when to prohibit regulatory measures viewed as illegitimate by the larger community, and when to let pass those measures that the community views as bona fide regulation. If the answers are largely right, according to Hudec, the “occasional absurdity” of the legal rationale will probably not matter.

In the final analysis, although many would like to see WTO rules changed to permit trade measures to be used to enforce preferred standards relating to production processes outside the importing country, I am quite convinced this would seriously undermine the credibility and usefulness of the WTO. If countries will not agree to forgo their rights not to be discriminated against and for the WTO be the adjudicator of whether discrimination is appropriate in the absence of agreement, the WTO would find itself at the top of a slippery slope dealing with social, environmental and other non-trade concerns.

MEAs and WTO rules

The potential problems surrounding the inconsistency of measures, trade agreements and MEAs fall into two groups.

The first covers trade-related measures taken by a party to an MEA against another party, where the measure is not specifically provided for in the MEA. The party taking the measure may justify it in terms of achieving the objectives of the MEA. Both parties could be members of the WTO, in which case the measure could then be challenged as being WTO inconsistent. Professor Matsushita provides the example of WTO members that are also parties to the Cartagena Protocol and find themselves faced with a serious conflict between the SPS Agreement and the

Protocol; the former requires a measure to prohibit GMO products based on scientific evidence, whereas the latter permits the application of the precautionary principle. In his view, although panels and the Appellate Body have no choice but to apply the SPS Agreement over the Cartagena Protocol, the eventual conflict should be resolved through negotiations as to the proper scopes of each agreement.

The second group of problems relates to WTO-inconsistent measures that are specifically provided for in an MEA, and taken by a party to the MEA against a non-party that is a WTO member. The WTO member may challenge the legitimacy of the measure in the WTO dispute settlement process. The defending government could seek an exception for the WTO-inconsistent measures and cite the existence of the MEA as a justification.

Matsushita remarks that the scope for exemptions from WTO obligations is not entirely clear, and it is left to panels and the Appellate Body to decide this relationship. The problem for the dispute settlement process is deciding on the importance to ascribe to the existence of the MEA. Ultimately, he says, this issue also needs to be addressed as a subject matter of future negotiations.

Professor Matsushita also predicts that tensions may arise between WTO agreements and MEAs – such as the Kyoto Protocol – even though WTO disciplines and the Kyoto Protocol may not themselves be in conflict. For example, to reduce carbon dioxide, a member of the WTO may introduce a measure to encourage electric cars by taxing cars that run on gasoline more heavily. If cars run on gasoline were then to be imported, this preferential tax could be challenged by other members as a violation of the national treatment principle if the cars are like products.

These potential problems are well known to governments. In such instances, the WTO finds itself in the role of an arbiter in environmental matters, something members have specifically stated that they wish to avoid. This concern finds its expression in the Doha Development Agenda, where governments are mandated to conduct negotiations in order to clarify the relationship between WTO rules and those found in MEAs. The way forward is to bring these negotiations to a successful conclusion.

The reality of the situation is that MEAs do – and should – have the power to invoke WTO-inconsistent measures to achieve their goals. Given the importance of the global trade and environment regimes, any clash over the application of rules agreed to among nations would have unfortunate ramifications for both regimes. To remove this possibility, and to avoid the WTO being the arbiter of environmental disputes, any WTO-inconsistent measures should be clearly spelled out and agreed to by the parties to a broad-based multilateral environmental agreement.

Disagreement about the legality of MEA measures in any MEA should then be dealt with by the compliance mechanism in the MEA itself, and should not be left to interpretation by a WTO dispute panel or Appellate Body report. This course of action requires effective MEAs, characterized by clearly specified trade measures that may be taken for environmental purposes, broad-based support in terms of country membership, and a robust dispute settlement system. My opinion is that effective MEAs are critical to avoid environmental disputes gravitating towards the WTO and inhibiting the smooth functioning of the WTO itself.¹⁴

Developing countries

In looking to future directions for the WTO, Dr Supachai observes a need for a fundamental reassessment and renewal of global governance and identifies a number of issues that are priorities for debate: what should be the objectives of governance, including what should be the optimal weighting and mix of values and objectives related to efficiency and market competition, on the one hand, and equity and development solidarity, on the other; what, and how far, to govern or leave to market outcomes; how best to achieve coherence in the governance of interrelated issues such as trade and finance, and across different levels of governance – national, bilateral, regional, plurilateral or multilateral – taking into account questions of sovereignty and interdependence; what types of governance norms, institutions and mechanisms to utilize, and how to design or reform these in a manner that enables all stakeholders, including weaker players, to have their interests or viewpoints taken into account.

The answer to many of these questions is heavily influenced by the development model adopted by the country in question. For some years, the “Washington Consensus” has been the mainstream prescription for economic development, with liberalization as the trade policy component. However, not all subscribe to the “Washington Consensus”. In the view of Dani Rodrik, for example, successful developing countries are not those that have adhered to the Washington Consensus. According to Rodrik, even the simplest of policy recommendations – “liberalize your trade” – is contingent upon a large number of judgement calls about the economic and political context in which it is being implemented. He says the tendency in international trade negotiations has been to reduce the scope for government action with respect to industrial policies and productive restructuring. For these reasons, he concludes that maintaining the necessary policy space to pursue development strategies that reflect the human and institutional infrastructures in developing countries will be key to the success of any future trade round.

Dr Supachai notes the importance of developing countries' ability and scope to use national policies to pursue trade and development goals, something that was increasingly reduced as the WTO embraced and legislated deeper "behind the border" trade regulations. These rules and commitments, which in *legal* terms are equally binding for all countries, in *economic* terms might, according to Supachai, impose more binding constraints on developing than on developed countries. This is owing to differences in their respective structural features and levels of industrial development, which limit the possibility for developing countries to have recourse to certain development policies in areas such as subsidies, balance of payment measures, infant industry support, trade-related aspects of investment measures (TRIMS) and TRIPS. These rules, he concludes, make it more difficult for developing countries to create the competitive supply capacity needed to take advantage of improved export opportunities.

Although the debate on the virtues of the Washington Consensus will continue, what is increasingly apparent is that each country is unique. The simple reality is that the term "developing countries" masks very different country characteristics, to which the relevance of any development model is inextricably linked. They include natural resource endowments; cultural heritage; characteristics of leadership; and institutional and other arrangements. Successful reforms are those that package sound economic principles around local capabilities, constraints and opportunities. As these local circumstances vary, so do the reforms that work. An immediate implication is that growth strategies require considerable local knowledge.

Based on past experience, I am convinced that special treatment for developing countries should come in the form of special and *differentiated* treatment that depends on the country-specific circumstances. The challenge is to identify the legal flexibilities that are appropriate for individual country circumstances.

In this respect, Dr Supachai posits the view that "development" must be explicitly mainstreamed into the multilateral trading system of rights and obligations – including by way of reinvigorating and strengthening the concept of special and differential treatment. According to him, allowing developing countries – with a wide diversity of levels of development – effectively to manage their domestic economic policies in the light of national development and public policy objectives, within the multilateral framework of rights and obligations, would signify an adequate degree of policy flexibility for economic governance.

According to Patricia Francis, negotiations that improve access to potential markets do not automatically result in expanded trade. For Francis, trade can promote economic development only if we get the

framework right, and the right framework is one that is broad enough to address legitimate concerns about globalization and to help developing countries build the skills they need to be competitive in world markets.

Francis goes on to emphasize the role of the private sector and says that accessing markets requires the skills of private enterprises to take advantage of the market opportunities. This calls for an ability to listen to business leaders, trade institutions and policy-makers and to design a range of innovative approaches that are targeted to the needs at hand.

Patricia Francis stresses the importance of the Aid for Trade initiative. The term “Aid for Trade” means different things to different people, as Francis rightly points out, and needs to be properly defined to facilitate the dialogue among so many players. For her, there are four broad areas that constitute Aid for Trade.

The first relates to policy, by which she means national, inter-country and global dimensions of policies needed to support trade development. Along with cross-border facilitation, global facilitation and rule-making, national strategies for trade – including export strategies – are required as part of national development plans. The second relates to physical infrastructures, which must be created and improved to support trade, including assistance to industrial facilities. Third, there must be compensation for tariff reduction, preference erosion, the cost of conforming to standards and the like. Finally, trade-related technical assistance is critical to help with supply-side constraints and to build the human and institutional capacity to trade effectively.

In my opinion, the importance of special and differential treatment within the WTO legal system lies in the fact that it is the mirror image of not only the physical, institutional and other characteristics of the country in question, but also the human and institutional infrastructure of the country itself. Developing countries require special and *differentiated* treatment that provides them with the necessary legal flexibility to pursue their appropriate development strategy, in line with their national human, physical and institutional characteristics.

Trade in services

The GATS is frequently criticized by special interest groups. One of the main reasons is the perception that countries – particularly developing countries – undertook more commitments in joining the GATS than is the case. The reality is that the GATS is very much a bottom-up agreement with only minimal obligations undertaken at the outset. Any additional commitments are undertaken according to national preferences and are inscribed in the national schedule. These are selective with

respect to the sectors concerned and permit a wide range of limitations and restrictions to be placed on market openings.

The fact that commitments have been minimal is not surprising. Given the sensitive and strategic nature of many services regulations, governments took care in negotiating the GATS not to undertake general commitments that would restrict national policy objectives. The way forward is for negotiators to give substance to their commitment to liberalize trade in services progressively, to pay special attention to the needs of developing countries and to allay fears that the GATS is by its nature a particularly intrusive instrument.

Dispute settlement

It has been argued that the Appellate Body has extended its authority beyond what was granted to it. The Dispute Settlement Understanding (DSU) limited the jurisdiction of the Appellate Body to issues of law covered in panel reports and to legal interpretations developed by panels. It prohibited the Appellate Body from changing the rights and obligations provided for in WTO Agreements. A number of countries have argued – in a disapproving manner – that there has been an “evolutionary” interpretative approach adopted by the Appellate Body, which has given a new interpretation to certain DSU provisions and overstepped the bounds of its authority by undermining the balance of rights and obligations of members.

Professor Matsushita proposes a small group of experts on WTO law and economics to periodically review rulings of the Appellate Body. This group would be established within the WTO as a sort of advisory group, with no power to overturn the rulings of the Appellate Body. Its function would be limited: to review the decisions of the Appellate Body, assess them for jurisprudential and economic soundness, and publish its views. It would be composed of academics, lawyers, judges and economists of established renown and authority. Reviews of decisions of the Appellate Body made by this group should, in his view, be based on neutral, jurisprudential and economic theories and not on the political desirability of the rulings of the Appellate Body.

Matsushita also makes the useful point that the WTO dispute settlement procedure is premised on the assumption that all members are equal in their legal capacity to present their position in dispute settlement. In this regard, the WTO dispute settlement procedure is likened to the process in civil and commercial litigation in which parties are equal and it is their responsibility to adduce sufficient evidence and to present persuasive legal arguments. If a party is unsuccessful in producing good evidence and persuasive legal arguments, that party fails. The question,

however, is whether WTO members are truly equal in their legal capacity in dispute settlements. In fact, there is a great deal of difference between developing country members and developed country members with respect to their legal capacity – despite the Advisory Centre on WTO Law established in 2001 – and this may hamper developing country members in effectively utilizing the WTO dispute settlement procedure.

Institutional considerations

It is often argued that participation in the WTO should be broadened to include non-state actors. In this respect, the WTO has no mandate from members to enlarge official membership beyond governmental representation. The organization thus faces the inherently difficult task of striking a subtle balance between preserving the inter-state nature of WTO talks while opening up to new actors. States promote their national interests whereas civil societies pursue issues-based objectives. I share the view of Pascal Lamy that because the WTO remains first and foremost a negotiating forum in which states express interests of the utmost importance to them, the admittance of civil society groups to negotiation bodies would be inappropriate.

Because the WTO is an intergovernmental organization, its members are presumed to be acting in the collective interests of their diverse constituents. Although governments liberalize trade and agree to rules to secure benefits for their economies as a whole, they are aware that some interest groups may be adversely affected in this process. The WTO is frequently the object of adverse public opinion.

One reason for the expression of adverse public sentiment has been a lack of understanding about what the WTO can and does do. The reasons for this are many, not the least being the non-transparent workings of the GATT, many of which were carried over to the WTO. Matters have, however, greatly improved in recent years. In addition, the Doha Declaration emphasizes that members will “continue to promote a better public understanding of the WTO and to communicate the benefits of a liberal, rules-based multilateral trading system”, particularly “through the more effective dissemination of information and improved dialogue with the public”. This is certainly one important “way forward”.

Understanding of the WTO by public interest groups has increased greatly, and many are particularly well informed. One frequently heard complaint is that the WTO has extended its reach “too far”.

Celso Amorim sums up the situation with respect to access to essential medicines. According to Amorim, the fact that the WTO was increasingly meddling in issues that transcended the sphere of trade, when millions of people were left unprotected in terms of their health necessities, gave rise

to a significant change in the way world public opinion perceived the WTO in general, and the relation between intellectual property and health in particular. In his capacity as Ambassador in Geneva, Amorim witnessed how public opinion began to put trade issues in perspective, especially when it came to matters affecting access to medicines. This, he says, was due in part to the involvement of NGOs such as Oxfam and Médecins sans Frontières. To a certain extent, this change signalled that the prevailing view during the Uruguay Round – that trade liberalization would bring development – had shifted to one more prone to fulfil social concerns and development needs. Thus, in his view, the NGOs played a crucial role in this change.

But what does “too far” mean precisely? Does it relate to subject matter, the nature of the regulations the WTO enforces, its country membership, the non-trade issues that are gravitating towards it, or some other feature of its operations? In addition, “too far” in whose eyes? The 150-plus governments that have set its parameters or the public interest groups that find its role intrusive in national affairs? Or has its reach been extended not by design but unwillingly or unwittingly by governments themselves? For example, have major issues gravitated towards the WTO on a de facto basis, or have the implications of the agreements for which the WTO is now responsible turned out to be more far-reaching than originally foreseen?

In this context, sight is often lost of the fact that all WTO decisions are made on the basis of consensus, thereby taking in the views of all members. Agreements are negotiated by national officials, agreed to by trade ministers and signed off by domestic parliaments or some equivalent procedure before coming into force.

It is an unfortunate fact of life, however, that not every WTO member has the same power in the negotiating process. The more economically powerful countries are listened to more carefully. And, because agreement is by consensus frequently achieved by trade-offs, powerful countries have more bargaining chips and therefore greater leverage in reaching decisions by consensus. Nevertheless, smaller countries have an authority in the WTO through recourse to the dispute settlement process, the consensus rule and the new-found success in forming negotiating coalitions.

The question that arises for me is why sovereign states would spend years negotiating agreements that excessively undermine their sovereignty. If the answer is that nation-states unwittingly erred in joining or creating the WTO, then the option is there to leave. All that this requires is six months' notice; yet no country has ever expressed an interest in leaving either the GATT or the WTO. And if WTO agreements mean a loss of national sovereignty, why would 25 sovereign nations be so intent on acceding to the WTO and forgoing this sovereignty?

Policy conclusions: The way forward

A principal reason for the support for the WTO from both large and small governments is that they see adherence to multilateral rules – rather than political or commercial power – to be in their national interests. Rules bring predictability and stability to the world trading system and, although rule-governed trade may not guarantee peace, it does remove a potent cause of conflict, offering an alternative to reliance on unbridled force in the trading relations among states. Although sovereignty is forgone on becoming a member of the WTO – as with any significant international agreement – what is gained is the opportunity for participation in the global economy through cooperation.

The increasing role of the WTO in global governance comes from the confidence that governments have placed in it. This in turn is attributable to the certainty that comes from the legal enforcement of trade rules adopted on the basis of consensus, along with legally binding commitments to liberalise trade. Changing these rules to permit discrimination in trade to enforce labour, environment or human rights standards would further increase its role in global governance. To my mind, this is not at all desirable.

However, the WTO agenda has acquired many non-traditional trade issues, and more will come. This will further increase its governance role. In my view, the “way forward” rests on four pillars. All have been explored in detail in the foregoing paragraphs.

First, there must be a strong resistance on the part of governments to changing rules that would alter the role of the WTO as a trade organisation. In the case of challenges to rules, to the extent possible, this should be dealt with through negotiation and not litigation. Negotiations on fishing subsidies provide an example.

Second, the continued creative use of new and existing mechanisms to deal with non-trade issues is the pragmatic way forward. Discussions in specially created committees, Ministerial Declarations and many other avenues have so far been successfully used to deal with these complex issues. The Ministerial Declaration on TRIPs provides an example.

Third, there is a need for greater coherence across international organisations dealing with overlapping issues. The areas of overlap should be clearly identified, and a means to address them agreed on. This has certainly been the case in what was the very controversial area of trade and environment.

Finally, governments must maintain their right to implement domestic policies to meet national goals. However, policy measures should not be protectionist in intent, unnecessarily trade restrictive or be resorted to when a bilateral, regional or multilateral agreement is the proper way to go. The Shrimp-turtle dispute provides an example.

The WTO is far from perfect, and there are many proposals for change in the foregoing chapters. But at the most fundamental level, it must remain a **trade** organisation based on **non-discrimination** while retaining its **inter-governmental** character based on **consensus** decision making.

Notes

1. Unless specifically indicated otherwise, all references to authors relate to their chapters in this volume.
2. In formal terms, the European Union is referred to as European Communities within the context of the WTO. In the following chapters it is also referred to as the European Community.
3. See the “Foreword” by Pascal Lamy in Gary P. Sampson, *The WTO and Sustainable Development*, Tokyo: United Nations University Press, 2005, pp. vii and xi.
4. These can be found in Sampson, *The WTO and Sustainable Development*, pp. 38–51.
5. Pascal Lamy, address to the UNEP Global Ministerial Environment Forum, Nairobi, 5 February 2007, original emphasis; available at http://www.wto.org/english/news_e/spl_e/spl154_e.htm (accessed 10 June 2008).
6. Kofi Annan, “Address by Kofi Annan at the Opening of the General Debate of the Fifty-Ninth Session of the General Assembly”, New York, 21 September 2004, at <http://www.un.org/Pubs/chronicle/2004/issue3/0304p4.asp> (accessed 10 June 2008).
7. See “Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking”, in WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, Geneva: WTO Secretariat, 1994, p. 386.
8. Daniel C. Esty, *Greening the GATT: Trade, Environment and the Future*, Washington, DC: Institute for International Economics, 1994.
9. Since the publication of a GATT Secretariat study requested for the proceedings of the United Nations Conference on Environment and Development in 1972.
10. WTO, *European Communities – Measures Concerning Meat and Meat Products* [EC Hormones], WT/DS26/AB/R, WT/DS48/AB/R, adopted 16 January 1998, para. 123.
11. WTO, *Japan – Alcoholic Beverages*, Appellate Body Report, WT/DS8,10,11/AB/R, adopted 1 November 1996, p. 114, fn 58.
12. *United States – Import Prohibition of Certain Shrimp and Shrimp Products* [Shrimp-Turtle], Panel Report, WT/DS58/R, circulated 15 May 1998, and Appellate Body Report, WT/DS58/AB/R, circulated 12 October 1998. Paras 152–154.
13. Robert E. Hudec, “GATT/WTO Constraints on National Regulation: Requiem for an ‘Aim and Effects’ Test”, *International Lawyer*, Vol. 32, No. 3, 1998; reprinted in Robert E. Hudec, *Essays on the Nature of International Trade Law*, London: Cameron May, 1999, pp. 359–395.
14. For an elaboration of this approach, see Gary P. Sampson, “Effective Multilateral Environment Agreements and Why the WTO Needs Them”, *The World Economy*, Vol. 24, No. 9, 2001, pp. 1097–1108.

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The WTO and Global Governance: Future Directions

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The World Trade Organisation (WTO) is mandated by governments to achieve full employment, a steady growth in real income, and higher standards of living for its 150 – plus member countries. Its role is also to ensure the optimal use of the world's resources in accordance with sustainable development. As a result, the WTO has greatly extended its reach into non-traditional areas of trade policy. This has taken place against the reality that the WTO is only part of a more global structure of international agreements with overlapping objectives and commitments, many of which now find their place on centre-stage at the WTO.

These commitments serve to shape domestic policy choices and constitute a principal feature of global governance. The WTO has a principal role to play in determining the borderline between domestic policy choices and international commitments. While the extended reach of the WTO is lauded by some as one of the greatest achievements in international cooperation, others see it as anathema, and an encroachment on national sovereignty. The question which presents itself is: What should be the role of the WTO in global governance?

This book contains a variety of views of prominent people – all influential in their respective areas of international affairs – as to the proper role of the WTO in global governance. It explores the policy implications of WTO trade related issues that overlap with other institutions, and proposes future policy directions that could ensure coherent and consistent policies at the national and international level.

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