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# Will the Success of Trade Policy Undermine the World Trading System ?

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L'évolution des politiques commerciales constitue-t-elle une menace pour le système commercial multilatéral ?

Mots-clés :

OMC, droit international, commerce international, bœuf aux hormones, OGM, résolution des disputes commerciales

*Will the success of trade policy undermine the world trade system ?*

Key-words:

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**Résumé** – Les relations internationales connaissent un profond bouleversement. L'influence des acteurs supra-nationaux s'accroît et la coordination internationale, après avoir traité longtemps des questions de barrières tarifaires, aborde aujourd'hui les questions ayant trait aux barrières non-tarifaires, telles que les normes de sécurité sanitaire des aliments, qui étaient traditionnellement la prérogative des seules instances de décisions nationales. C'est au niveau du système commercial multilatéral que cette transformation est la plus visible, comme en témoignent les efforts de l'OMC pour traiter les problèmes de barrières non-tarifaires. Cette entreprise se révèle très délicate car il est extrêmement difficile (et coûteux politiquement) pour les États de se conformer aux recommandations de l'OMC en termes de politiques non-tarifaires, étant donné les enjeux institutionnels et politiques internes. Dans cet article, nous nous intéressons à ces situations, où l'objectif de libéralisation des échanges se heurte aux préférences des consommateurs. Nous suggérons que de telles situations constituent une menace pour l'OMC et que la seule solution pour qu'elles ne conduisent pas à remettre en cause le système commercial multilatéral est que les États apprennent à apaiser et même à éviter ce genre de disputes.

*Summary* – A great transformation is under way in international relations. The influence of non-state actors is rising, and the focus of intergovernmental coordination is shifting from border measures, such as tariffs, to a myriad of policies that traditionally have been the sole province of national decision making, such as food safety standards. This transformation is most evident where international cooperation has been most successful: international trade, in particular the efforts within the World Trade Organization (WTO) to manage non-tariff barriers to trade. In many cases it has proved extremely difficult for nations to comply with WTO strictures on non-tariff policies because these policies are embedded within an array of political supporters and institutions that democratic governments find difficult (and politically costly) to unravel. We focus on these "problem cases"—where the goal of liberalizing trade conflicts with popular consumer preferences—and suggest that these pose a threat to the legal integrity and political sustainability of the WTO. Ironically, cases marked by relatively low economic stakes may pose the greatest threats because these cases are less likely to be linked to other important benefits of international cooperation, and thus governments are less likely to seek an intergovernmental solution to avert non-compliance in such situations. We suggest that formal remedies to this problem are unlikely to be successful; rather, restraint by key states is likely to be the most effective way for the world trading community to learn to avoid and abate these problem cases before they overwhelm the world trading system.

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MANY international relations theorists argue that the rising flow of goods, services, and money is eroding state power. Businesses, non-governmental organizations (NGOs), and disaggregated states are now the key actors in the international arena. Transnational links between non-state actors are supplanting the state and state-controlled international institutions<sup>1</sup>.

Nevertheless, we argue that globalization requires more of states and intergovernmental fora, not less. States remain at the center of an evolving international arena; they continue to be the agents and enforcers of policy, and the most capable enforcement mechanisms are state-dominated intergovernmental fora. Yet governments must now exert their power in a far more complex and constraining environment. This new environment asks them to exercise unprecedented maturity and sophistication. It asks that they be accommodating and flexible, that they make subtler and more nuanced policy decisions even as their leverage over their own national policy declines. Most important, it requires that governments pick their battles wisely.

## MODERN MATURITY

It is true that a great transformation is under way in international relations, and that the influence of non-state actions on policy is growing. From above, international agreements and organizations such as the European Union (EU) and the North American Free Trade Agreement (NAFTA) are beginning to constrain state policy in ever-more-visible ways, mandating and proscribing specific actions in arenas that previously were the exclusive domain of national politics – such as food safety, energy policy, telecommunications, medicine, even the judiciary. On the horizon are the Free Trade Area of the Americas Agreement (FTAA) and the International Criminal Court (ICC), both of which would only further constrain how states can act on currently “domestic” policy issues. From below, lateral networks of non-governmental actors have consolidated international partnerships in sectors from the financial to the environmental (Keck and Sikkink, 1998). Even the focus of national security policy – long the area where states have most jealously guarded their freedom of action – has shifted away from a state-centrist perspective: international terrorist organizations sharing ideologies rather than borders confound traditional approaches to threat prevention

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<sup>1</sup> In particular, see Mathews (1997), Slaughter (1997, 1995), Fearon (1997), Rabkin (1999), and Busch (2000).

and reduction, allowing for expansive justifications for intervention within the internal affairs of other territorial states (US National Security Strategy, September 2002). While these organizations are not a new phenomenon, their visibility and strength has been increased substantially, as has the world community's determination to combat them.

Yet as experts maintain, governance is not a zero-sum game; states are adapting to this new frontier of policy-making by disaggregating in their own right into international networks of regulators, both on a formal and an informal basis. While states must respond to new forces and operate in new venues, they still have the final word in nearly all areas of politics. Supranational organizations are comprised of voting member states, and to a large degree non-governmental organizations exist to sway and coordinate state decisions – not supplant them (Slaughter, 2003).

This transformation in governance stems not only from factors such as advances in information technology and the end of the Cold War. In addition, traditional modes of international cooperation, which focus on coordinating government policies and on border measures such as tariffs, have been so successful that they deliver diminishing returns today. Deeper international cooperation is forcing governments to cross a new frontier to coordinate policy reform behind national borders; this need is most evident where the great transformation is most advanced: international trade, in particular the efforts within the World Trade Organization (WTO) to manage non-tariff barriers to trade. Our focus is the area where new international trade rules have been the most politically sensitive – rules that discipline how nations regulate food and environmental quality. The transformation will bring new and stronger storms to buffet the WTO. We ask: What can governments do to keep the WTO steady and upright?

## TRADING WORLD TRANSFORMED

For centuries, international law has been concerned with the external conduct of states. It has sought to leverage and regulate how governments interact with other governments; it has been a tool that governments use to protect and control action at the borders. A separate domain – domestic politics – governed conduct behind borders. Often these two worlds of international law and domestic politics would interconnect. But the norm was separation, not unity.

From 1947 to the onset of the Uruguay Round in 1986, international trade law operated mainly in the normal interstate tradition of international law. Agreements focused on policies that distorted trade by protecting or promoting producers – protectionist tariffs, quotas, pro-

ducer subsidies, and the like – implemented, for the most part, at the border. The trading system was built on the simple but compelling logic that, except for a few circumstances such as those outlined in the famous Article XX of the General Agreement on Tariffs and Trade (GATT), there was no justification for countries to maintain producer-protecting impediments to trade. The objective – remove them all – was clear and (in principle) widely accepted. Through rounds of negotiations, GATT members linked together thousands of bilateral agreements and tariff concessions. GATT's requirement that all GATT member countries treat each other as "most favored" ensured that multilateral packages emerged from these bilateral deals. Because the ultimate goal was to eliminate essentially all trade impediments, the "round" approach was ideally suited to getting the best deal since it ensured as wide a terrain for deal-making as possible. Governments proposed concessions that they could deliver; if they failed to deliver, simple reciprocity could bring them into line. The system was largely self-enforcing because it focused almost entirely on border measures that governments controlled; the threat of retaliation kept each country in line.

Beyond the threat of retaliation, the GATT architecture offered weak formal mechanisms for handling violations or disputes. Definitive judgment on disputes required universal consent by GATT members – a nearly impossible standard to meet because few countries would agree to accept an adverse decision. The system was not completely hamstrung, but the ability to block consensus meant that, in essence, states could defer the most inconvenient commitments (Hudec, 1993; Busch, 2000).

For example, the longest-standing and highest-profile unresolved dispute began in the early 1970s as a European challenge to US tax legislation for Domestic International Sales Corporations, or DISCs, that effectively subsidized exports from US firms. (GATT bars most export subsidies, but in practice – as the DISC case showed – subsidies are often woven through complex but legitimate national tax measures.) The United States adjusted the tax law on DISCs to eliminate the most blatant violations of GATT rules, but the adjustment only went part of the way to alleviating European objections. In the end, the United States refused to make further adjustments; it also refused to accept GATT panel rulings against DISCs and lashed back at the Europeans with a counter-dispute against European tax rules. Neither the original dispute nor the counter-dispute was fully settled; together, they became glaring symbols of GATT's inability to behave as a true judicial system capable of imposing its rules even when they are inconvenient for countries to follow. (Revisions to tax law on DISCs produced a new US tax provision for Foreign Sales Corporations [FSCs], and a new dispute under the WTO; we return to the FSC dispute below.)

Similarly, when European countries and then the European Community banned meat hormones in the early 1980s, the United States sought to dispute the measure as incompatible with the Standards Code,

adopted by some GATT members as part of the round of negotiations that ended in 1979, that limited the types of technical barriers to trade that countries could impose. When European governments refused to accept the jurisdiction of the Standards Code, because it was separate from the core GATT commitments, there was little more that the United States could do to prosecute the case within the GATT legal system.

The combination of early exclusive focus on producer distortions, broad self-enforcement through reciprocity, and a weak dispute resolution mechanism explains the international trading system's initial momentum. As progress continued and options for tariff reductions waned, this momentum could have been expected to level off. The Uruguay Round launched in 1986 marked a turning point, however. Regulation expanded into areas previously privy to states alone: behind-the-border barriers to trade. Notably, international standards now affect not only producer measures but also consumer-oriented regulations. Examples include competition policy and the protection of intellectual property rights, as well as technical standards (*e.g.*, labeling) and sanitary and phytosanitary (SPS) measures (Dunoff, 2001).

Because such commitments intrude into domestic politics, reaching and maintaining them is often much more complex than it has been in years past. Unlike producer-oriented trade distortions, there is no simple and assured rule that governs which consumer-oriented regulations are inappropriate. Rules motivated by fears of health and safety risks are widely viewed as acceptable; merely protectionist rules are not (Miller and Conko, 2001). But sifting protectionism from genuine safety concerns is extremely difficult and politically sensitive in these instances. Because some degree of risk will always be present, even the requirement that national policies be based on "scientific risk assessment" – which is the standard test for assessing whether food safety rules, for example, are judged to be acceptable within the WTO<sup>2</sup> – does not settle the debate. Preferences and tolerances for risks – especially low probability risks – vary considerably. For one example, French citizens tend to embrace nuclear energy more readily than their American counterparts; the situation is reversed with regards to genetically-engineered food crops<sup>3</sup>. And even within these broad generalizations there are wide variations.

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<sup>2</sup> This test is found in Articles 2 and 5 of the WTO Agreement on Sanitary and Phytosanitary Measures and was given its first judicial interpretation in the Meat Hormones cases brought by Canada and the US against the European Union. See the Appellate Body Report from the Hormones case ([www.wto.org](http://www.wto.org)).

<sup>3</sup> These have been dubbed "genetically-modified organisms" (GMOs), or simply GM foods.

In addition to facilitating the transition from border measures to behind-the-border trade barriers, from producer – to consumer-endorsed price distortions, the Uruguay Round changed the face of international trade by establishing a strong enforcement mechanism – the Dispute Settlement Body – that marches according to strict time tables and delivers impartial and definitive judgments. Countries may no longer use the GATT requirement for universal consent as a shield to protect non-compliant behavior.

The Uruguay Round therefore caused a sea-change in international trade law. Since the round concluded in 1994, nearly the entire world economy has shifted to trade rules of dramatically greater scope. The new areas of discipline are no longer simple border measures that governments may trade away to zero, but instead include non-border measures that touch on the core legitimate functions of national government, such as protection of consumer safety and taxation. Moreover, although many of these new disciplines are likely to be inconvenient, a strong enforcement mechanism severely constrains the ability of countries to skirt inconvenient rules. In essence, the old system was stable because it remained in shallow water. The Uruguay Round moved the trading system into deeper, more turbulent seas that threaten its ability to stay upright.

## CONSEQUENCES OF THE TRANSFORMATION

Three consequences logically follow the transformation of international trade law from a system that focused on the coordination of border measures to one that acts behind borders. First, the transformation creates vast new potential for reducing trade barriers, which is good news for promoters of free trade.

Second, instances of noncompliance with international legal commitments will increase. These episodes are a consequence not only of willful disregard for the law but also massive expansion of international trade rules into arenas where governments are often unable to adjust policy to conform to international disciplines. Previously, when international trade negotiations focused on border measures that governments controlled themselves, agent and principal were nearly one. After a round of negotiations and adoption of unified tariff schedules, implementing legislation was a relatively straightforward matter. Certainly there were battles over interpretation, and certainly interest groups that lost cherished protectionism were aggrieved and opposed. But it was nonetheless relatively easy for governments to ensure compliance. Today that is no longer true. Under the Uruguay Round agreements, governments must implement reforms to their patent systems, technical regulations, and



sundry other areas of policy. The level of reform that is required to pass muster is unknown in many cases. If analysts actually attempted to measure the level of compliance with a strict interpretation of WTO rules, they would probably find a very low level – even, perhaps, in the United States, which crafted WTO rules in its own image and therefore already applies key provisions.

Food safety illustrates the problem. The WTO's Sanitary and Phytosanitary (SPS) Agreement declares that countries are in compliance if they adopt international standards. Elsewhere, however, Victor (2000) has shown that implementation of those standards is extremely low. When countries don't apply international standards, the SPS Agreement requires that countries base their SPS measures on risk assessment. Yet countries apply risk assessment in different, inconsistent ways – if they apply it at all. Several years ago, governments did not need to worry much about trade disputes caused by inconsistency in how they applied risk assessment; today they must.

The so-called “precautionary principle” embedded in the Cartagena Protocol on Biosafety and in Article 5.7 of the SPS Agreement compounds the problem by allowing looser burdens of proof on the imposition of trade barriers in situations when the results of risk assessment tests are indeterminate and scientific research is still ongoing. Since establishing “certainty” is impossible in fields of science that are characterized by risk distributions rather than central estimates, the broad sweep of the precautionary principle can embrace a wide range of assessment results. Where the burden of proof is placed on the party that does not perceive the risk, odds are high that the risk assessment process will result in deadlock as the more risk-averse party may refuse to accept even the risks that lie in the far tails of the distribution (Sunstein, 2003).

Third, the use of enforcement provisions will increase. This is not merely the consequence of decreased compliance, since the international trading system has always had a large overhang of unprosecuted cases. Rather, the greater use of enforcement provisions is the product of an enforcement system that can deliver assured results. Tiny Ecuador can now bring a case against the EU's discriminatory banana import regime and win. With 146 members in the WTO (and growing), the number of Ecuadors is rising, and they are becoming aware of their power. The WTO's enforcement system has not eliminated the importance of might – Ecuador is still fearful of harming itself if it actually implements the retaliatory sanctions it won against Europe – but effective legal systems often operate in the shadow of power.

Increased enforcement is also the consequence of an emerging legal culture that prizes enforcement as evidence that the law is taken seriously. Previously, disputes such as the GATT's DISC case symbolized the failure of international trade institutions to impose change on reluctant

parties. Formal disputes were few because all parties, knowing they were dead ends, saw them as symbols of weakness in trade institutions rather than strength. By contrast, recently the WTO celebrated its 295<sup>th</sup> claim of noncompliance.

The good news is that these consequences are the growing pains of a legal system under transformation. The US Supreme Court experienced similar pains – for seven decades starting in the late 18<sup>th</sup> century, state courts and politicians often undercut central authority by blatantly disregarding central judgments. Only after the Civil War were the Court's decisions (even those that were inconvenient for state and local authorities) truly the law of the land (Movsesian, 1999).

The bad news is that the characteristics and consequences of the transformation – more intrusive international law; decreased compliance; and stronger, more automatic enforcement – create complex “problem cases” that threaten to arrest the dynamism of the international trading system. WTO rules are forcing policy changes in areas where governments find it extremely difficult to dismantle offending measures because they are endorsed by consumers; therefore, public support for the offenses is deep. And because these measures can serve legitimate (*e.g.*, food safety) as well as illegitimate (*e.g.*, protectionist) purposes, the emergence of powerful “Baptist-bootlegger” coalitions is more likely.

Consumer regulations are the product of democratic policy processes that politicize some issues while ignoring others, making it impossible to apply risk assessment in an even-handed manner. Worse, consumer sentiments are highly malleable; the difficulty is more than merely one of distinguishing protectionism from legitimate regulation, but of preventing protectionist forces from distorting legitimate safety concerns. As a dispute over the measures unfolds and becomes more salient, political pressure to defend popular trade barriers grows – exemplified well by as the meat hormones case. In democratic countries especially, there are strong incentives for countries to paint themselves into a corner by encouraging public support for an offending measure. Scientific risk assessment tests are thus likely to be both overinclusive and under inclusive – non-negligible risks will be overlooked when consumers are tolerant and negligible or indeterminate risks will be magnified by consumer disapproval.

The limitations of risk assessment tests run deeper than scientific uncertainty and political persuasion. As scholars note, the precautionary impulse is fueled by human cognition, which interprets potential losses as more dire than hypothetical benefits; moreover, humans tend to neglect probability when weighing the risk of a bad outcome, focusing only on the outcome itself (Sunstein, 2003). These cognitive factors affect real-world political pressures that form around risk policy, suggesting that even highly sophisticated risk assessments do not avoid the

problem of choice – rather, they help to inform and frame a deliberation. We do not lament this outcome – it is a wonderful fact of the democratic process – but underscore that the indeterminacy of outcomes poses severe limits on the extent to which international trade institutions can put bounds on internal national policy processes. It is practically impossible – except in the most obvious cases – for international rules to discipline what is, in essence, the democratic process of deliberation.

The first formal WTO dispute on this issue, the meat hormones dispute, was one such “problem” case. The lesson learned from that experience by countries seeking to impose restrictive rules that are the product of popular democratic processes was to embed such rules in ongoing – and therefore indeterminate and uncertain – scientific risk analysis. Wide tails in probability distributions have become essential umbrellas under which different democratic processes using the “same” science can arrive at highly varied decisions.

In the past, these problem cases in which science and consumer sentiment diverge have caused bruises but not open wounds for the international trading system; offending governments could simply defer inconvenient trade rules and disputes. Today, however, the existence of an automatic enforcement mechanism magnifies the risks to the trading system by ensuring that states will be held accountable. Once a problem case is formally launched, the system marches inexorably toward final judgment and penalties. Keeping the transformation on track will require that states work hard to either avoid or defuse these frequently thorny, sometimes intractable, problem cases. The hormones case is an existing example; others, such as those involving GMOs, loom on the horizon. The problem for policymakers, however, is that there is no easy way to institutionalize a mechanism for resolving or preventing these problem cases.

## THE PATHOLOGY OF PROBLEM CASES

Problem cases tend to have particular characteristics that make them difficult to avoid and difficult to settle once they are formalized. First, they tend to emerge among democratic countries, whose governments must be especially responsive to mass public intent, even when public pressure is not aligned with international rules. They tend to involve mainly consumer-endorsed price distortions that evolve through Baptist-bootlegger coalitions.

Second, problem cases are often characterized by “phantom risks”, which are chronic, cumulative, low dose, uncertain, and irreversible. Examples include meat hormones and GMOs. Because they are so difficult to measure, phantom risks mandate inconsistent behavior. The com-

bination of powerful constituencies and phantom risks yields a 'culture of concern' that is wary of reforming behavior in the absence of conclusive evidence. Yet what constitutes proper risk assessment in these cases is difficult to determine and harder to universalize. This ambiguity makes consumer regulations ripe for Baptist-bootlegger coalitions, not least because bootleggers are less able to use traditional measures – such as tariffs and quotas – to achieve protectionism.

Third, problem cases generally have low financial stakes; the more money at stake in a dispute, the more likely the dangers will be spotted early – and the more likely that the highest levels of government will be engaged to dampen the dispute. The recent progress made toward settling the FSC dispute brought by the EU against the United States illustrates this phenomenon. Faced with the knowledge that the FSC issue is a tinderbox stoked with billions of dollars of tax consequences, the United States is starting to back down and working to find a way to conform to WTO rules on export subsidies.

Problem cases are important because they create festering wounds that weaken the legal system at the core of the transformation. Though they probably account for only a small fraction of the total number of potential trade disputes – and it is unclear exactly how many such wounds a robust legal system can tolerate – they are disproportionately damaging because they become unstoppable once they start. Once the WTO's legal machinery is in motion, the outcome is Kabuki-like: unambiguous judgment, a clear obligation to reform offending behavior, and retaliation if compliance does not follow swiftly. Yet the offender won't budge because its national policy is at stake, and it has built democratic credibility on the defense of the offending measure. The prospect of retaliation further entrenches both sides. The system can do little to soften the blow because the law is aligned with scientific risk assessment rather than the political winds.

Again, the meat hormones case offers a clear example: European support for the hormones ban has grown as the public has become aware of the issue; a clear ruling from the WTO has not made it easier for Europe to comply; the United States has exercised its right to retaliate and redoubled the stakes with the threat to rotate (carousel) its retaliation sanctions every six months. What was a small-stakes problem in economic terms has managed to assume enormous proportions.

A quite similar case is now unfolding over genetically-engineered foods. In the wake of regulatory scandals such as mad cow disease and HIV-tainted blood, European consumers became especially wary of novel crops. The UK, where a few supermarkets had undertaken successful trial marketing of GM tomato paste, adopted a strict anti-GM position practically overnight. Groups that had destroyed field trials of GM plants and previously been viewed as fringe moved to the mainstream, and even Prince Charles heaped his disdain on food engineering as a

threat to organic production. By contrast, in the US, similar groups also sought tighter regulation of GM crops as well as tight labeling requirements, but their message gained little traction. Despite access to the same scientific assessment, two markets arrived at quite different policies on the risk of these foods. In the US an ever-growing array of engineered seeds were approved for planting and farmers embraced the technology more rapidly than any other major innovation in the history of modern agriculture. In the EU the Commission imposed a moratorium on approving new varieties that, in effect, banned US commodity exports that commingled old varieties with new (yet unapproved) strains. At this writing, the US has launched a formal dispute to undo the EU's moratorium; at the same time a new tracing and labeling system might lead to a lifting of the moratorium that will render the dispute moot. Both sides have dug in for a fight – the EU wrapping its rules in risk assessment and public fear, and the US wrapping itself in the same risk assessment and public acceptance (Victor and Runge, 2002a and 2002b; Paarlberg, 2000).

## REMEDIES

Five possible remedies for problem cases present themselves. First, international agreements could allow countries simply to opt out of inconvenient commitments. That, in essence, was the approach taken earlier, when there were few international disciplines on behind-the-border measures and when inconvenient enforcement actions could be ignored. The obvious flaw in that approach is that it does not solve the underlying problem – trade barriers that are disguised as or interwoven with legitimate policies. An alternative is a limited escape hatch such as the precautionary principle embedded in Article 5.7 of the SPS Agreement, which allows countries to impose strict (temporary) SPS measures without a full risk assessment in cases where scientific information is incomplete. Already, governments have figured out that this is one of the best ways to protect dubious measures, and it is particularly well suited for cases characterized by phantom risks. All three of the first SPS-related disputes were decided, in part, by the fact that governments had put final measures into place; had the measures been temporary, they might have been easier to defend under Article 5.7. Now, especially controversial measures are carefully described as interim and precautionary. This strategy is a way to avoid some disputes; the open question, of course, is how elastic the precautionary principle will become.

Second, governments could devise an impartial test to determine which measures are valid. That is the approach already attempted in the SPS Agreement with the requirement that risk assessment be the arbiter of valid and invalid measures; the Technical Barriers to Trade Agree-

ment has similar requirements. The risk assessment test is probably as clear and robust as possible; yet obviously it is not a contraption into which scientists plug numbers and bureaucrats turn a crank that produces policy. In some cases, risk assessment is not used at all; in most others, it is merely one factor among many that determines policy outcomes. There might be a convergence under way toward the use of risk assessment as part of “good policy”; the SPS Agreement is probably helping to accelerate that convergence, but the process is a slow one.

Third, offending governments could simply offer compensation. When a politically popular but dubious trade measure causes harm and is declared invalid, the offending government could avoid the extremely difficult task of dismantling the offending measure by simply compensating the losers. Next to removal of the illegal measure, compensation is the remedy most often envisioned in the international trading system. But compensation may be extremely difficult to supply. For governments that are under strong domestic pressure not to admit error, compensation remains politically difficult; few parties blatantly disregard the law, agree with judgments that declare them scofflaws, and then willingly compensate the harm. Moreover, the traditional form of compensation is to offer countervailing relief by reducing border measures – which is hard to do when tariffs and other border measures are already approaching zero. Other forms of compensation, such as cash payments, might work, but politically they are difficult to deliver because they are so transparent and are visible on government budgets.

Fourth, a political body could interpose itself between the technical and legal process of delivering a judgment and the politically problematic act of compliance. This approach too has been tried already and is a limited feature of the current system. Under the old GATT system, unanimous consent was needed to convene a dispute panel and decision – which ensured strong political input as well as gridlock. The WTO system requires unanimous consent to *block* enforcement decisions, which also offers an opportunity for political intervention – but it probably never will be deployed because governments will not be unified in their views. The problem with interposing a political body is that it is difficult to design the rules that would govern that body’s operation; by design, the body would become highly politicized and perhaps a lightning rod for dissent. A better approach is to empower a body that can masquerade as an objective, technical entity but insert political judgments about what is good for the system as a whole where necessary. The Appellate Body, in part, fulfills that function today, but it is limited in how far it can and should stretch the law to accommodate political winds. Its decision in the shrimp-turtle cases illustrates the critical importance of its sensitivity: as a matter of politics, its approval (in principle) of the use of trade sanctions for protecting endangered species helped to blunt some of the WTO’s severest criticism from the environmental community. Yet as a rule, the Appellate Body must stick to its



mandate, which is mainly to create a coherent body of law that is faithful to the WTO agreements.

Fifth, governments can exert restraint. The miracle of the WTO is not that the system is celebrating its nearly 300<sup>th</sup> dispute but rather that there aren't more. Perhaps that is because governments are overwhelmed and unable to bring more disputes; more likely, it reflects a measure of caution and restraint. Restraint in bringing problem cases is mandatory to the survival of the WTO. Because the problems are political rather than legal, strategies for dispute settlement must also be political rather than legal. Primed to the typical characteristics of problem cases, however, governments can look ahead and envision the train wreck that would result if they dragged more cases like the hormones dispute through the system.

Ironically, responsibility for exercising restraint lies with the aggrieved state rather than the offending state; the hands of the offending state are already tied by domestic consumers. How will aggrieved governments know when to exercise restraint? As a general rule, when the offending behavior poses small trade effects but large political consequences. Aggrieved states initially underestimate these political consequences, which occur both within the offending state and between the disputants. However, the danger lies in the fact that the consequences necessarily grow as the dispute proceeds.

In particular, governments should attend carefully to the strength of consumer preferences and the context in which these preferences operate. First, they should avoid cases where consumer preferences are most at odds with scientific risk assessment. This advice may be especially difficult to follow; it suggests that governments should be most cautious about bringing the cases that their legal advisors will declare most ripe for victory. Second, they should avoid cases where the offending measure is backed by passionate democratic support. Such cases are probably growing in number as consumer groups become better organized and more influential; they also involve situations where democratically elected governments will find it most difficult to align with the WTO and against their constituencies. Third, restraint will be hardest (but most important) when consumer preferences vary internationally. In those cases, the aggrieved country will be under the strongest public pressure to prosecute a case, and its public will be least likely to understand the need for restraint. That remains the situation today in the hormones dispute as well as the unfolding dispute over genetically-engineered crops. In the case of GMOs, for example, the main driving force for the US dispute is pressure from farmers in the states that export commodity crops to European markets who feel (without much solid proof) that they are suffering dire harm at the hands of the EU's moratorium. (There are some indications, however, that GMO-phobia is spreading to America as well, which will narrow the divergence).

The danger of restraint as a solution to problem cases is that, like the precautionary principle or honor code, it invites abuse. Under the assumption that the aggrieved party will use more restraint in more extreme cases, the temptation for offending governments is to exaggerate their predicament when their dubious policies come into the cross-hairs. Incidences of Baptist-bootlegger coalitions might increase as offending governments bank on the fact that others will get the message and back off.

In essence, the criteria for exercising restraint require governments to behave as unitary strategic actors who pay close attention to the preferences of both domestic and international consumers. That is a tall order for democratic governments – perhaps especially for the United States, where power is often divided between warring parties. Nonetheless, this may be the only way to keep the WTO afloat as it transfers international law to discipline behind-the-border consumer safety regulations. A functional WTO therefore depends on, rather than supercedes, the self-discipline of the nation-state.

## CONCLUSION

The beefed-up international trading system offers states more leverage over one another's behavior: the new trade rules are more intrusive, and enforcement is more effective. However, the transformation of trade law also grants states the power to destroy the institution by using this leverage to the wrong ends and on the wrong issues. As advocates of free trade, we are sanguine about the potential gains for further reducing trade barriers that the recent transformation may grant. We are also aware of the power of consumer preferences – and the need for democratic countries to respond to these. When the goal of freer trade conflicts with consumer preferences, problem cases will arise and threaten the transformation. We have offered some remedies, but none is a silver bullet. To some degree, the WTO can snuff out some of these problem cases as they arise, but its capacity is limited.

Moreover, the cost of inflamed domestic coalitions is being felt already in many ways, as the debacle of the Seattle round of WTO negotiations made painfully clear. Negotiations on further liberalization – be they in the form of the Doha round of multilateral trade talks or bilateral and regional trade pacts that could contribute to the multilateral process – are more difficult to manage in the context of these festering wounds. While we have focused on food safety, similar arguments could be made for other highly intrusive international rules, such as those on the enforcement of intellectual property rights.

The remedy that we suggest is not for governments to aspire to less robust international rules but for key members, the states that are most



able to get their way when power prevails over rules, to exercise restraint where it is most needed: where the stakes are small and the offending party is unlikely to change its democratically chosen domestic rules. Ironically it is the US – the world’s hyperpower and the country with the most to gain from liberal trade rules – that is most likely to feel unconstrained in allowing its domestic pressures to buffet the international trading system. Yet forbearance rather than aggression may be the only way to keep the WTO’s new powerful legal machinery from grinding itself to a political halt.

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