WTO and Non-Trade Issues: Inside/Outside WTO

BOISSON DE CHAZOURNES, Laurence


DOI : 10.1093/jiel/jgw029
WTO and Non-Trade Issues: Inside/Outside WTO

Laurence Boisson de Chazournes*

There is no doubt that John Jackson had tremendous foresight. He foresees that the GATT would become a crucial institution and that the WTO would need to be soundly established. International economic law was the prism through which he would distill his analysis of international law. For him, WTO law was 'the central illustration of legal jurisprudential developments influenced by phenomena of our contemporary world'.1 His vision of the role of the WTO was always as an institution that was perceptive of the changes to come, most notably of the complexity introduced through the globalization of markets, communications, and transport. Institutions and rules needed to evolve to accommodate reactions and responses to this phenomenon.2 Jackson saw that non-trade policies had to be considered in connection with the trade policies of the WTO.3 The WTO should not be considered as omnipotent and would always need partnerships to be most effective. Complementarity is crucial to respond adequately to the challenges of a globalized and interdependent world. This complementarity can be understood in two ways: on the one hand, it implies 'externalizing' the regulation of some of the 'trade and ...' issues outside the WTO; on the other, it calls also for 'internalizing', within the WTO, regulatory approaches which have been negotiated in other fora. The case law of the WTO Appellate Body has laid the foundations for such an approach. The Shrimp-Turtle decision of the Appellate Body4 in particular has highlighted the need to address WTO law within the broader framework of the international legal system. Some WTO agreements contain explicit references to international norms and standards adopted in other fora.

* Professor of International Law and International Organization, Faculty of Law, University of Geneva; Associate Member of the Institut de Droit International. E-mail: Laurence.BoissonDeChazournes@unige.ch
2 As an experienced analyst, John Jackson was also influential. One should acknowledge his key role in influencing the negotiations in the Uruguay Round in the direction of the creation of the WTO as institutional framework. See Debra Steger, 'The World Trade Organization: A New Constitution for the Trading System', in Marco Bronckers and Reinhard Quick (eds), New Directions in International Trade Law: Essays in Honour of John H. Jackson (The Hague: Kluwer, 2000) 135–53.
3 Jackson, above n 1, at 189.

© The Author 2016. Published by Oxford University Press. All rights reserved.
Non-tariff measures (NTMs) also reveal the inside/outside facets previously alluded to above. They have been a topic of real interest, sometimes even of preoccupation, since the Tokyo Round when GATT Contracting Parties realized that the main threat to international trade was no longer tariff barriers to trade but rather non-tariff barriers (NTBs) to trade. It is interesting to note the semantic shift that took place over time. Trade-restrictive measures pursuing public policy objectives were mostly perceived as 'barriers' to trade within the multilateral trading system. As such, they were considered as having the potential to frustrate trade. This was followed by a paradigm shift. Trade-restrictive measures pursuing public policy objectives were no longer seen as 'barriers' to trade but as forming an integral part of the trade agenda. Hence, in contrast to the predominant approach during the GATT era, which survived for some years after the establishment of the WTO, the animosity towards so-called NTBs could not continue. In such a context, it made sense to adopt a more positive tone and use inclusive language by referring to NTMs rather than NTBs.

NTMs are not operating in clinical isolation from the multilateral trading system. There is a need to 'domesticate' more efficiently and more effectively NTMs within the WTO system and not outside of it. NTMs should not be considered as 'externalities' but 'internalities' vis-à-vis the WTO system. NTMs address vital WTO concerns. The question of whether the WTO system encourages or otherwise supports the adoption of NTMs by its members is of utmost importance and requires greater scrutiny in the future. Depending on how one answers the question of whether the WTO system instills NTMs, he/she will accordingly have a variable position regarding the impact of NTMs on non-discrimination obligations. The Asbestos case has shown all the difficulties and controversies that surround such a problem.

The WTO encourages the adoption of NTMs to a certain extent. The national treatment obligation in GATT Article III, for instance, could be interpreted to allow for NTMs that, despite being discriminatory, pursue a legitimate public policy purpose. It does not make sense to argue that a product that is potentially hazardous for health or for the environment and a product that is not are like products. NTMs that pursue public health or environmental objectives should be taken for what they are: public policy interventions. They should not be mainly analyzed in light of their effects on trade but of their effects on public health, on their protection of the environment, etc.

This being said, it would be easier to admit NTMs in the multilateral trading system if international cooperation on NTMs was fostered and strengthened through international treaties and regulatory instruments adopted in other international fora. Mutual supportiveness is a means to lessen these tensions. Mutual supportiveness relates to the need and concern for strengthening coherence, balance and interaction between trade and public policy objectives. It is part of the WTO's rationale since it has been incorporated in various instruments of the Organization, such as the Doha Declaration.

---
6 Paragraph 31 of the Doha Declaration. See Laurence Boisson de Chazournes and Makane Moïse Mbengue, 'A Footnote as a Principle': Mutual Supportiveness in an Era of Fragmentation', in Holger P.
In the context of NTMs, mutual supportiveness would imply that if an NTM is adopted on the basis of a non-WTO multilateral treaty (such as a multilateral environmental agreement or a WHO convention, for example), that NTM should be considered as WTO compatible despite its adverse effects on trade. Mutual supportiveness between WTO law and non-WTO law in assessing the legality of NTMs would, thus, contribute to improving international coherence. Indeed, if the international community recognizes that NTMs need to be adopted in order to achieve public policy objectives (health, protection of the environment, human rights, etc.), the trade-hindering effects of NTMs should not prevent WTO members from adhering to the ‘legal’ concerns of the international community.

The vehicle of international standards is important. However, international standards should not be the only yardstick by which the legality of NTMs is assessed within the multilateral trading system or the only foundation upon which international coherence is built. Multilateral treaties also play an important role in the diffusion of NTMs, and for that very reason the WTO should be permeable to them when confronted with NTMs. This assumption is valid both for the SPS and the TBT agreements albeit that these agreements place an important weight on technical standards.

Here the issue of the relationship of the WTO with other international organizations comes to the fore. Institutional cooperation is necessary, but we must also ask what type of cooperation? The report of the WTO’s Consultative Board of eminent persons, to which John Jackson belonged,7 underlined the challenge of better cooperation. Jackson’s firm belief in international institutions goes hand-in-hand with respect for ‘good governance’ principles and standards. The latter remains an open field for prospective thinking, especially in light of the multifarious cooperative mechanisms with different profiles and the need for checks and balances.

---

7 John Jackson was appointed in June 2003 by the WTO Director-General, Dr. S. Panitchpakdi, to the WTO Consultative Board, composed of eight eminent persons, and chaired by Peter Sutherland.