

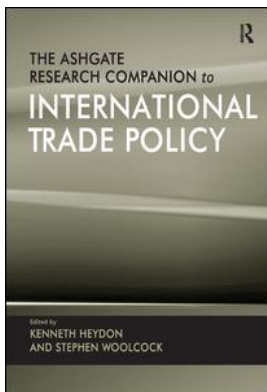
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Trade and Risk Assessment

David Robertson

Introduction

There is more risk evident in the international trading system today than at any time since the end of the Second World War. The difficulties surrounding the WTO Doha Development Agenda since it was launched in November 2001, and the widespread resort to preferential trade arrangements since the closing stages of the Uruguay Round are evidence that the multilateral trading system is under stress. Activist non-government organizations (NGOs) are pursuing anti-trade agendas at international meetings and conferences, while promoting environment protection agendas, social programmes and global governance, and attacking multilateralism and globalization. The uncertainties created are introducing new and unforeseen risks into international commerce.

The adoption of the GATT after the Second World War was intended to avoid the ruinous beggar-my-neighbour economic policies of the depressed pre-war decade, comprising increasing trade protection and competitive exchange rate depreciation. Post-Second World War recovery took time, but the economic disruptions that had occurred after the First World War were avoided. Global trade grew three times faster than GDP in the five decades after 1945. The GATT rules gave reassurance to international traders, and insurance costs of freight and transport covering trade risks soon adjusted. Unit costs of insurance (like transport costs) declined as a proportion of traded values as confidence returned and transport and communications technologies advanced.¹

The Final Act of the Uruguay Round trade negotiations (1994) established the World Trade Organization, which incorporated the GATT (1947) and included many new agreements, decisions and declarations on trade in goods and services. The complexity of WTO agreements, decisions and declarations increased the need for arbitration and interpretation of complex accords and new commitments. This has been referred to as *the lawyers' revenge* because whereas GATT disputes had

¹ For a description and analysis of post-Second World War international economics see Robertson (2006).

been resolved by negotiations between officials, the new WTO processes often require legal judgements to enforce and interpret decisions.

The fall of the Berlin wall in 1989 restored political freedom in Eastern Europe and the role of 'civil society' in easing the process to democracy enhanced the status of NGOs in western countries. The interference from NGOs, however, complicated the closing stages of the Uruguay Round negotiations, although little account was given to their concerns in the Uruguay Round Final Act (1994). Unfortunately, the special economic interests of new developing country members were similarly ignored. This allowed a natural alliance to form in international meetings between NGOs promoting their interests in areas such as the environment, health and safety standards and social justice and income disparities, and interests of developing countries.

The closing decade of the twentieth century produced contrasting successes. 'Globalization' brought economic prosperity, enhanced by the dispersion of new technologies, and their rapid adoption across the world. However, antipathetic groups formed that, for a variety of motives, opposed 'globalization'. These NGOs represented interests stretching from insular nationalism to advocacy of global governance, built around the United Nations (UN).

As the 1990s progressed, NGOs began to combine their activities to achieve greater impact, sometimes resorting to violence. International meetings became key targets, including the GATT (and later WTO) meetings. NGO activists demanded participation in GATT/WTO meetings, alongside governments, and proposed that trade measures should be used to prevent 'damage to the environment', to assist development in poor countries, and in other ways to improve the world. Among the more extreme groups, it is doubtful if they saw any virtue in trade liberalization raising living standards. The NGOs demanded that they should be permitted to attend and to speak at WTO meetings, alongside governments. That the WTO (GATT) is an inter-government agency was lost on these protesters. Apparently, NGO definitions of 'democracy' require that anyone who wants to speak – or protest – at any forum should be able to do so at any international meeting.

These independent voices have complicated international agencies and their agendas. Moreover, their 'actions' make good copy for the 'media'. Minority opinions are broadcast not only through legitimate journals and programmes, but any sensational statement on the Internet (true or not) is likely to be repeated – and exaggerated. Official responses from governments and international agencies are then evaluated against the NGO's claims. Blocking official action by governments and international agencies is the driving force for many NGOs, which much of the media encourages.

The Precautionary Principle

One of the most effective instruments in the NGOs' armoury is 'the precautionary principle', which was inflicted on the world in the chaos of the UN Conference

on Environment and Development (UNCED), held in Rio de Janeiro in 1992 ('The Earth Summit'). This gathering exposed the whole world to fears about damage to the global environment from economic growth. It forced many ill-prepared governments to accept far-reaching commitments that were not properly understood at the time. This was a triumph for the United Nations Secretariat, but above all for the well-organized 'green movement'. The meeting generated several new UN agencies, which have provided convenient platforms for NGOs.

'The precautionary principle' became the foundation of many new agreements that imposed restrictions on economic and scientific activities. Since it was incorporated into the UN Environment Programme (UNEP) in 1994,² the precautionary principle has been reiterated in UN circles at every opportunity.

The Rio meeting in 1992 granted thousands of 'green' activists free access to meeting rooms, where they could contact and influence national delegations. Such NGO intrusions into UN conferences became common. When some national governments objected, the UN Secretariat had to intervene, but some official delegations continue to include NGO representatives in their delegations as advisers.

Formulations of the precautionary principle had appeared in general discussions since late in the 1960s. By the 1980s it was appearing in UN documents, which suggested that when potential adverse effects are not fully understood, activities should not proceed. The European Community adopted the Precautionary Principle in 1990 (later revised to match the UN definition).

In 1998, the EC definition was revised again and made stronger:

The precautionary principle is an approach to risk management that is applied in circumstances of scientific uncertainty, reflecting the need to take action in the face of potentially serious risks, without awaiting the results of scientific research. (EC Commission, Feb. 2000 COM(2000)1)

This seems to authorize action even without due cause.

Cass Sunstein (2005) suggests there are 20 or more definitions of the precautionary principle in use, stretching from the cautious versions where lack of decisive evidence of harm should not be grounds for refusing to regulate or to act even if cause and effect relationships are not established scientifically. The risk of trading with the EU when environmental agencies are free to act in such peremptory fashion is disturbing. Sunstein claims that European courts have no uniform definition, and some require that risks should be reduced 'to the lowest level reasonably imaginable'.

GATT article III states that 'measures to discriminate against products in international trade because of the manner in which they are produced' are not permitted. Yet this is precisely what NGOs seek to achieve; to differentiate and

² The precautionary approach should be applied where there are threats of serious or irreversible damage; lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent damage to the environment.

to target selected products, processes and producers they consider might damage the environment, often without presenting satisfactory evidence or scientific assessments. In GATT terms, an imported product must not be treated differently from an equivalent product made in the home market, regardless of production methods.

Many governments are under pressure from their consumers and resident 'green' groups (such as Greenpeace, WWF) to ban imports or trade dealings with 'offending' companies. These 'moralist' campaigns can damage international relations. Unfortunately, where their propaganda proves to be wrong, supporting media ignore the error and unfavourable incidents slip from the community memory.

GM Foods and Crops

In the closing years of the twentieth century, European governments and consumers were alerted by news that substantial proportions of US farmers' staple crops were produced using genetically modified (GM) seeds and that GM substances were used in some food processes. GM plant varieties had been progressively introduced into North American agriculture during the 1990s and these crops were harvested and treated as equivalent to traditional harvests. Frequently, these GM crops were stored with conventional varieties. No harmful consequences had been identified.

When this news that GM seed was being used reached the European media, the 'green' NGOs pounced on this opportunity to attack US farmers, with support from protectionist EU farmers, who were denied the benefits of the new technology. European environment ministers introduced bans on trial plantings of GM crops. EU consumers succumbed to the green propaganda quickly, because food safety standards in several EU countries had been inadequate to deal with previous food scares.³ Imports that might contain so-called 'Frankenstein foods' were banned, and complaints arose over European food labelling. The hysteria generated by alarmist and unsubstantiated reactions in the EU spread quickly to other countries frightened of facing new EU trade discrimination. Farmers in EU countries that were trialling GM crops were threatened and their crops destroyed during a period of media madness.

The hysteria generated by NGO propaganda – and supported by the media – invoked 'the precautionary principle' without any genuine attempt to assess risks. Green groups forced commonly used processed foods that might contain imported GM ingredients to be withdrawn from shelves (such as tomato paste, soya breads). Consumer groups joined with 'the greens' to demand tougher labelling regulations.

³ These included dioxins in Belgian pork and chicken, the Bovine Spongiform Encephalopathy (BSE) outbreak in Britain (causing hysteria in France) and swine fever in the Netherlands.

GM refers to modern techniques of genetic enhancement which allow improvements in desirable properties beyond those that can be readily achieved by natural selection and breeding. This genetic engineering is more certain and quicker than traditional breeding methods, but not fundamentally different at the molecular level.

The media dug up some insignificant (and irrelevant) evidence of damage from GM seeds,⁴ but no firm evidence of harm from GM-modified plants or animals was found. In fact, GM experiments have benefitted mankind immensely. Plants and animals have been selectively bred for centuries, and without such experiments the world's population would be much smaller and poorer. Without the Green Revolution in the 1970s,⁵ many Asian developing countries would not have been able to feed their populations and to sustain their industrialization. Concerns over rising food prices increased in 2007–8 as living standards in middle-income economies increased, only to be curtailed by the global financial crisis. However, according to US Department of Agriculture forecasts, food prices in 2011 would return to 2008 levels, even with good harvests that year.⁶

Mankind depends on microorganisms for everyday staples such as bread, wine, cheese and beer. These products were derived centuries before anyone heard of microbiology or genetic manipulation. Since the 1970s, biotechnology has created commercial industries and medicines (such as insulin), as well as enhancing agricultural and food processing. Many biotechnology inventions are used in fields such as chemical and textiles industries, mineral industries, and so on. Opponents of genetic manipulation tend to condemn all GM activities as a group. Yet GM is crucial to modern techniques of genetic enhancement for desirable properties, which improve life for everyone. It is not sorcery!

'Transgenic' refers to genes transferred between species that cannot be achieved using traditional breeding methods; such as inserting genes from bacteria into plants to make them resistant to insect attack. The infinite variety of such transfers could bring risks to food safety, but proper testing controls that. Unfortunately, anti-GM lobbies deny that they have similarities with normal breeding methods. Toxicologists know that there are no effective methods for testing conventional foods, some of which are known to be poisonous if not properly prepared (for

⁴ A cause célèbre was a claim that American monarch butterflies that breed in the US mid-west corn-belt were affected by plantings of GM maize that carried a natural insecticide. After several months of academic dispute and Greenpeace invective, this link was rejected (Losey et al. 1999). Similarly, experiments where laboratory rats were force-fed raw GM potatoes to prove harmful effects were also discredited (Ewen and Pusztai 1999, cited by Robertson and Kellow 2001).

⁵ Dr Norman Borlaug (Nobel Laureate 2006) invented short-stem grain varieties used to enhance food production.

⁶ To some extent this relates to another 'green' neurosis. Corn prices have almost doubled in the past year because of increasing demand for ethanol (*The Financial Times*, 25 February 2011, 'US forecasts rising food prices').

instance kidney beans, almonds, manioc), while many plants that have natural protections against pests can be toxic (potatoes, fruits).⁷

Environmental lobbies seem most concerned about third-party damage; for example pest-resistant pollen escaping to cross-breed with weeds and create varieties resistant to weed-killers. The opportunity cost of not adopting the genetic alternatives is the continuation of serious environmental problems (and higher prices for popular consumables). Moreover, incorporating pesticide and insect-resistant genes into plant species reduces the quantities of chemicals applied to crops, most of which end up in waterways.⁸

The disruption and anxiety caused by this EU precautionary programme over GM revealed the consequences of precipitate action by authorities when faced with untested demands from NGOs. One of the principal barriers to marketing GM varieties in the EU was the insistence of member countries' governments that they should enforce their own rules on food safety. In consequence, the EU Commission could not enforce on EU member governments the WTO's 2006 Dispute Settlement Panel ruling against EU restrictions – a ruling dismissed as irrelevant by the EU trade commissioner Peter Mandelson.⁹ (This was a convenient cop-out for the Commission because EU member governments cannot appear before WTO committees. As a result, the United States and Canada did not pursue their dispute further.)

The consequences of NGOs' campaigning to block GM products from EU consumers have not, of course, been evaluated. Moreover, the income losses of US and Canadian farmers (and others) have not been addressed. NGOs, and the irresponsible press and electronic media, produced no tangible evidence of dangers. Gradually, European farmers and food companies have begun to trial GM crops as the turmoil has receded.¹⁰ Consumer activists were reduced to pursuing mandatory practices such as food labelling. (Green NGOs have found another campaign to pursue; to regulate all chemicals employed in EU production and consumption called REACH.)

⁷ The Royal Society (1998). Also, Professor Nancy Millis (chapter 14 in Robertson and Kellow 2001) assesses health risk effects of GM foods as extremely low.

⁸ Other objections to GM crops relate to the use of antibiotic marker genes (regarded as reducing effectiveness of medicines) and the search for terminator genes, which would require fresh seed to be purchased for each season.

⁹ *The Financial Times*, 9 February 2006, 'EU shrugs off WTO censure over curbs on modified food'.

¹⁰ Total land planted with GM crops across the globe in 2010 increased to 148 million hectares (10 per cent of total cropland). The three largest producers were the United States, Brazil and Argentina; maize, soya beans, cotton and canola dominate; developing countries are adopting GM crops readily; drought-tolerant maize and biotech rice are pending. (*The Financial Times*, 23 February 2011, 'Rapid growth in GM cropland'.)

Quarantine and Food Labelling (SPS–TBT)

The sanitary–phytosanitary agreement (SPS) (quarantine standards) was incorporated into the WTO to cover the application of food safety and animal and plant health regulations into the broader ‘standards code’ contained in the WTO Technical Barriers to Trade (TBT) agreement. These agreements, administered by WTO committees, are designed to prevent industrial standards (including labelling standards) and technical regulations being used as impediments to trade.

Measures to protect the environment, consumer interests and animal welfare are not mentioned in the SPS agreement¹¹ but may be addressed under GATT article XX (general exceptions). NGOs complain that GM products are not covered by the SPS. The SPS agreement, however, is intended to prevent misuse of the quarantine regulations, and judgements are based on scientific evidence. It does not apply to properties of plants or animals.

On the other hand, article XX provides for ‘general exceptions’ in special circumstances but they may not be used to discriminate between countries. NGOs argue that two provisions in article XX are relevant to environmental matters as a public concern:

- XX(b) allows exceptions ‘necessary to protect human, animal or plant life or health’;
- XX(g) allows exceptions ‘relating to the conservation of exhaustible natural resources’.

In both cases, any measures introduced using these clauses would cause discrimination and encourage complaints. The EU favours global environmental agreements that take priority over WTO rules. Any member government may challenge specific measures introduced under article XX, but where disputed, they must be resolved according to the Dispute Settlement Undertaking.

There are still some gaps in the SPS agreement that offer opportunities for environmental arguments to be made, in terms of risk assessments or the design of standards for food safety and quarantine regulations, which are defined by standards organizations (such as FAO/WHO Codex Alimentarius, IPPC). The TBT agreement incorporates quality and labelling requirements, but it does not specifically provide a solution to controversies over GM foods.

The Committee on Trade and the Environment, established by WTO Ministerial Decision in Marrakesh (1994), has considered special measures to identify GM foods and crops for special treatment. However, specific labelling and bans on GM

¹¹ Key provisions of the SPS agreement: measures must be applied where necessary to achieve their purpose, based on scientific principles; measures must be non-discriminatory among countries where similar conditions apply, be transparent and not a disguised restriction on trade; measures must be based on international standards, unless justified by scientific judgement; risk analysis should be used to establish appropriate protection.

foods are not regarded as trade issues according to TBT and SPS provisions. The GM issue is skulking in the background.

The modern approach to risk assessment exposes weaknesses in the SPS agreement's insistence on scientific principles. Scientific evidence is not enough for some self-appointed NGO critics, unless it supports their political prejudices. As far as GM foods are concerned, respect for scientists among NGOs seems to be selective! Belief outweighs science when public outrage and moral indignation can be mobilized.

'Civil Society' as the EU Conscience

The latest NGO intervention in EU affairs is REACH – Registration, Evaluation, Authorisation and Restriction of Chemicals. This was adopted into EU legislation in November 2010. It has still to be approved by EU governments, but the REACH text has been under discussion with EU governments since 2003, so rejection is unlikely. It is intended to replace current legislation and will require reassessment of over 30,000 chemicals that were introduced into EU markets before 1981. It follows the same approach and has the same weaknesses as the GM programme; namely, it casts doubts in the minds of consumers about familiar chemicals, without presenting any evidence of damage or harm. Such scare campaigns tie up scarce resources (particularly scarce skilled labour).

Industries inside and outside the EU have disputed the need for this comprehensive testing and retesting of all chemicals, because it switches the onus of proof from regulators proving a chemical is dangerous to manufacturers proving they are safe.¹² The compromise was that safety of chemicals would be judged regardless of whether they are used in mass consumer products or in restricted laboratories. This was accepted to avoid even stricter measures proposed by green groups.

In 2006, EU officials managed to get this policy accepted as a 'Global Plan of Action' at a UN conference on international chemicals management in Dubai. So the UNEP can be expected to pursue a global acceptance of REACH. EU 'greens' are leading the world into expensive programmes of caution, and denying that market mechanisms are able to judge the costs and benefits of new technologies. The adoption of 'the precautionary principle' removes responsibilities from entrepreneurs, whose interests are at stake, into the realm of bureaucrats, who have nothing at stake. No attention seems to be given to the costs of delaying the arrival of new chemicals on the EU market, for the sake of precaution. It is, of course, possible to regard this as protectionist.

¹² This EU decision shows no recognition of the disasters caused when wrong decisions are made. For example, the ban on the use of DDT sprays in developing countries where mosquito-borne malaria was rife. This arose from pseudo-science in Rachel Carson's *Silent Spring* (1962), which was refuted within months (Kellow 2007: 153).

The protectionism inherent in the REACH programme will impact on international trade, especially if it is adopted only in the EU. Undoubtedly, the REACH process will delay new chemicals (or new uses of approved chemicals) from being used in EU industries until they are cleared. This is another intervention by EU officials at the behest of 'green' NGOs, without recognition of the costs imposed on EU consumers and producers. Delays in approving new chemical products and in recruiting qualified staff for official testing laboratories will impose unnecessary costs and delays on industries subject to market disciplines, which themselves ensure product safety. (According to reports, some green groups (such as Greenpeace, WWF, Friends of the Earth) believe the REACH agreement does not go far enough!)

The European Commission is one of the most prolific sources of new legislation and new requirements to control trade. The Commission insists that its trade partners should adhere to its regulations and repeatedly calls for other WTO members to adopt its rules. For example, in the lead up to a meeting on 'Trans-Atlantic market harmonisation', *The Financial Times* (19 February 2007) reported EU officials declaring:

The single market gives the EU the potential to shape global norms and to ensure that fair rules are applied to worldwide trade and investment. The Single Market of the future should be the launch pad of an ambitious global agenda.

The EU Commission has frequently ignored or avoided WTO rules. Various findings by Dispute Settlement Panels, and upheld by the Appellate Body, have declared EU trade measures illegal according to WTO rules (for example banana imports from Latin America,¹³ the US 'beef-hormones' case). The EU has resisted these rulings. Further recent examples are the imposition of 'the precautionary principle' and the REACH legislation, which are without doubt inconsistent with accepted WTO practice.

The EU is not alone in evading or ignoring WTO rules, of course. The United States has long avoided its antidumping commitments to GATT article VI; 'antidumping has evolved from an instrument of law aimed at preserving competition to a bureaucratic apparatus devoted to restricting it'.¹⁴ In August 2010, the US Commerce Department proposed tightening antidumping rules, possibly to incorporate effects of 'misaligned currencies', targeting imports from China. So far no decision has been taken.

When the environment became a controversial international issue in the 1990s, the GATT, and later the WTO, came under attack from NGOs (and some governments) because they had no specific provisions to deal with environment protection. The first major disputes arose when US fishing fleets demanded embargoes on

¹³ One of the longest running trade disputes ended 3 February 2010, when the European Parliament ratified an EU-Latin American banana accord, which will be completed in 2020.

¹⁴ Ikenson (2010).

imports of foreign-caught shrimp and tuna, on grounds of endangering turtles and dolphins, respectively (see also Chapters 13 and 21). The Earth Island Institute, a US environment NGO, had sued the US government under US environment law and succeeded.¹⁵ That US court decision was reversed after reviews by WTO dispute settlement panels and the Appellate Body, and resulted in intense criticism from environmental NGOs.

Dispute Settlement Understanding

The DSU incorporated into the WTO during the Uruguay Round negotiations was a significant step towards resolving disputes. The Secretariat's role in the GATT was to serve the Council of the Contracting Parties and the WTO Secretariat has the same limited independence. The member governments in Council initiate negotiations and approve decisions. If the Council could not reach a decision in the GATT, there was no means of redress. Yet serious disputes between members need to be resolved or the capacity to manage the trading system is lost.

In these circumstances, the Uruguay Round negotiators realized that rules and procedures were required to resolve disputes, using expert panels. And, in case of continuing disagreement between the disputing parties, an Appellate Body was needed to review disputed findings or conclusions from panel hearings. This provided a means to resolve disputes with a quasi-legal process, which opened opportunities for NGOs to participate.¹⁶

In the post-Uruguay Round discussions on the role of NGOs, there were different opinions. Some saw NGOs as bringing valuable insights and expertise, while most members saw the WTO as an intergovernmental treaty and a forum for negotiation, implying that the responsibility for consulting with 'civil society' should be at the national level. Under pressure, concessions were made for some NGOs to attend periodic WTO Ministerial Council meetings as observers. Gradually the Secretariat has increased its consultations with NGOs, at the official and the casual level. These were not all sweetness and light because NGOs themselves have conflicting interests.

The Dispute Settlement Body administers the dispute rules. A member claiming that benefits from a WTO agreement are nullified or impaired by failure of another member to meet their obligations under the agreement can request a dispute panel. A panel of trade experts is assembled to hear the case, and it can call witnesses to give evidence and/or to give technical advice. This enables NGOs to present

¹⁵ These two cases aroused intense international interest among WTO members, NGOs and international lawyers, when the WTO Appellate Body made its decision on interpretation of GATT article XX and the Settlement of Disputes.

¹⁶ Some NGO advocates present themselves as 'intellectual competitors' with governments in the search for optimal policies (Esty 1998 and 2002; for a reasoned response, see Henderson 2002).

amicus briefs to the panels, but these should not include legal opinion. Legal matters are the concern of the Appellate Body, and, where appropriate, *amicus briefs* are forwarded to the Appellate Body in the event of an appeal. However, the Appellate Body contains only legal experts, though technical experts can be summoned to give advice.

When early dispute settlement panels and the Appellate Body viewed environment issues sympathetically (for instance US cases on accidental damage to turtles and dolphins), some 'green' groups anticipated using trade regulations to restrict environmental damage, while some industries saw opportunities to reduce foreign competition in their domestic markets. However, NGOs argued that 'compliance processes' rather than 'confrontational litigation' should settle disputes. In other words, mediation, conciliation and arbitration techniques should be used to resolve disputes – a talking shop without end! (The Appellate Body is comprised of lawyers who, eventually, exercise their judgement.)

The operation of the Uruguay Round dispute settlement mechanism has provided a means to interpret WTO agreements in the light of changing circumstances. The line between interpretation and clarifying rights and obligations in these agreements is a fine one, and changes with the circumstances. Lawyers point out that dispute panels focus on trade and scientific evidence, but Appeals focus on legal procedures and ethical and social perceptions as they affect trade. Cottier (2001) blames 'the lack of a proper methodology referring to the social sciences, [which] should be developed to allow legal assessment of risk management; in particular, to include inquiries into the social and political acceptance of existing risk'. The entry of lawyers into dispute settlement has exposed economics to social scepticism, because lawyers introduce the precautionary principle into their judgements. (For the lawyers' view see McCall Smith (2003).)

Most trade and economic literature promotes strengthening the Dispute Settlement System (DSS) to increase security and predictability, and to reduce risk and uncertainty (Cottier 2001; Pauwelyn 2001). Some believe opening panel meetings and the Appellate Body to the public and allowing the WTO Secretariat to seek outside experts to assist the settlement process would enhance support for the process. On the other hand, GATT/WTO supporters declare that the DSS is to serve the rule of law in the WTO, and to ensure security and predictability in global trade; that is, to reduce risk.

Some disputes between major players have been difficult to resolve. The Latin America dispute over banana exports to the EU and the US–EU dispute over 'hormone-treated' beef, each lasted for more than a decade. The opening of WTO procedures to NGO participation would increase uncertainties over rules and outcomes. (Other disputes, such as the shrimp/turtle case and tuna/dolphin case, were returned to appeal panels in the 1990s before they were resolved under the DSS.)

Fortunately, dispute panels and appeal processes take time to reach their conclusions, so businesses are forewarned. But uncertainties about the global trading system are increasing with preferential trade agreements multiplying,

while faith in the multilateral system and prospects for successful multilateral negotiations are receding.

The Brittle Trading System

Opening WTO processes to influences from ‘civil society’ (NGOs) increases risks for businesses, consumers and social structures. Weak coalition governments in OECD economies seem to be hostage to propaganda from ‘green’ NGOs. Even sources of information become unreliable when authorship of their reports is disguised.

For example, late in 2009, WTO and UNEP issued a joint report, *Trade and Climate Change*. It was described as ‘A report explaining the connections between trade and climate change’, and it was released without notice. The WTO Secretariat should have been embarrassed because, apparently, member countries were not made aware of its release. Even so, WTO member governments seem to have ignored the report. The report’s cover declared it was a ‘WTO–UNEP Report’, yet the inside cover declared that the views expressed did not necessarily represent the views of the WTO Secretariat or UNEP (or member governments, presumably). So how and why was this report released? And why have member governments not commented on this renegade document?¹⁷

Newspapers reported the release of this document in the following terms:

- ‘WTO declares backing for border taxes’;
- ‘WTO supports climate protection goals’;
- ‘WTO admits trade limits necessary to stop climate change’;
- ‘UN, WTO call for trade shift to halt climate change’.

The media interpretation of this report was misleading, and it enhanced public perceptions that priority should be given to ‘global warming’ claims over trade matters, without an international mandate.

An academic review of this renegade report criticized the mode of its release (Charnovitz 2010). Charnovitz acknowledged that WTO rules do not require that governments’ trade liberalization should accord with social or environmental objectives. However, ‘risk’ is associated with international trade if countries change laws/rules as part of new environment protection procedures.

¹⁷ The report was released just before the December 2009 Copenhagen meeting of the UN Framework Convention on Climate Change.

International Law has Changed

At the end of the Second World War, sovereignty was the dominating force for economic repair and reconstruction. Economic recovery depended on collaboration and good will, and financial generosity from the United States as far as Europe was concerned. Over the past 30 years or so, governments have faced new challenges in international relations. Many former dependencies have become independent, while sovereignty is now under siege from new political agents, at home and offshore. NGOs represent largely non-economic interests, such as environment groups with diverse concerns, 'civil society' promotes 'global governance' pursued through UN agencies, while development agencies seek to overcome poverty and disease.¹⁸ There are complex questions over harmonization of international and domestic laws, especially in terms of extraterritorial applications of laws in international waters and in the atmosphere, where many environmental issues arise.

Besieged from all angles, governments have grown weaker and sought alliances that involve compromises. To meet new demands and to change preferences, new international organizations have evolved and non-state actors are claiming rights and obligations under international law. These developments increase risks and uncertainties facing traders. Weakening government sovereignty makes international cooperation more difficult. GATT/WTO was a leading example of effective cooperation, but evidence of its present weakness is apparent in the subsidiary role of trade matters in the G20 leaders' meetings on the continuing global financial crisis.

In many ways, GATT/WTO commitments of national governments are being usurped and the role of the WTO weakened by initiatives taken within the WTO Secretariat.¹⁹ In particular, the GATT experiment to collaborate in trade liberalization led to negotiations that recognized fully the benefits of self-interest. The elementary model that reducing tariffs benefitted liberalizers was too simple. But governments did understand that tariffs could be used internally to divert rents from exporters to importers using 'optimum tariffs'.²⁰ This ensured that market power was employed to raise national living standards. The extent that tariffs were lowered by bilateral negotiations within the GATT, multilateralized by the most-favoured-nation commitment and economic benefits redistributed to raise living standards, was a genuine demonstration of 'the invisible hand' at work.

These issues are central to John Jackson's review of international economic cooperation and the role of law (Jackson 2006). It is evident that although

¹⁸ See Robertson (2000).

¹⁹ In December 2006, the WTO Council decided that new Preferential Trade Agreements (PTAs) should be notified to the WTO Secretariat for confidential review. These reviews are voluntary and held in confidence. This process was announced in Bangalore (17 January 2007), when the Director General, Pascal Lamy, praised PTAs as instruments of trade liberalization. This is a matter of opinion.

²⁰ Johnson (1953–4).

governments retain a role in the international order, they no longer have a monopoly over international events. When NGOs became disillusioned with governments, it implied rejection of democracy and markets. Technological advances in transport and communications, which stimulated changes in rules and institutions and allowed new processes to develop, brought globalization.

Jackson (2006) believes the GATT/WTO has the capacity to adapt to changes by using the powers of the Dispute Settlement Understanding. This process has not confined itself to application of GATT/WTO law, because its judicial decisions (DSB Appellate Body) involve an evolution of trade law by the acceptance of *amicus briefs* to resolve disputes between trade and environment interests. This raises the question of how far this mixture of interests could be developed without undermining the effectiveness of the WTO. How can economic costs be assessed against damage to rare species or forest clearing? Lawyers believe in 'justice', but comparing scenic beauty or rare species with gold in the bank is another matter!

Advances in many technologies have driven rising living standards and prosperity during the past 40 years. However, the success of market economics has created an anti-globalization backlash, based on identifying 'outsiders' among those disillusioned or neglected by governments and the globalization process. Globalization brought new political challenges, as well as economic changes. It brought into the international sphere issues that, traditionally, had been covered by national laws. That required rewriting international law into domestic law, and adapting domestic law to deal with international application. These adaptations require extreme cooperation between governments, which bring more challenges.

How can a new, strengthened international law be negotiated among contrary philosophies? International economic law has been weakened by 20 years of active opposition from the 'anti-globalization' NGOs, and the intervention of international lawyers.

Jackson's proposal to resolve the dilemma between WTO authority, national sovereignty and NGO independence is to intensify interaction among nations to safeguard globalization and to use compromises to achieve cooperation. This requires governments to surrender some independence and some authority to international agencies to achieve mutually beneficial cooperation (Low 2007). This would seem to be the only route to reducing risks and uncertainties, but it will need to be navigated with great care if national authority is not to be seriously eroded, leading to breakdown of international cooperation.

Risk and Uncertainty

Commercial risk is assessable for insurance, and an everyday event for businesses whether trading at home or overseas. Premiums are increased when uncertainties apply to participating institutions (government or private), or where political risks are threatening. In the past 20 years, however, general uncertainties have appeared

that insurance agencies are unable to assess in advance, and substantial losses may occur as political circumstances change.

For example, the EU decision to ban GM crops affected decisions on North American farms that had planned to sow GM wheat or corn. Similarly, US ranchers using hormone treatments could not sell their beef in EU markets. Moreover, when many other countries followed the EU example, without any testing, this also affected farm exports. These import restrictions have been before WTO dispute panels for many years. Even if EU import bans are removed, however, the 'US first' advantage will have been lost. Some EU members are reviewing their positions, though they will have to overcome 'green' NGOs' trenchant opposition. Forward-looking EU farmers are doubtless already trialling GM crop varieties, realizing that an opportunity might have been missed while the embargo was in place. Nevertheless, the first entrepreneurs were denied 'rents' by intervention from 'green' NGOs that are not part of the market.²¹ This is a new and uncertain force in markets that cannot be anticipated by innovators, traders or insurers.

The power of NGOs is intimidating governments. The press (and media generally) can report any kind of nonsense and rarely be required to retract mistakes or untruths, while governments seldom confront their tormenters.²² This reluctance to confront the NGOs is evident in governments' attitudes to 'climate change', probably the most significant issue they face. Many questions are raised about the projected apocalypse. None are honoured with a response, only contempt. In many countries, governments have become multiparty coalitions, causing impotence and compromise which NGOs exploit using propaganda and fear of electoral losses. This is particularly evident in EU countries, where NGOs are financed from national and Community budgets, but not subject to the discipline of tax returns or general board meetings (Kellow 2007).

International institutions are alert to the growing weaknesses of national governments and they recognise the opportunity this provides to strengthen 'global governance'. UN agencies cooperate assiduously with NGOs as 'advocacy' groups and support their 'operational' functions in order to promote UN influence over national governments. The term 'global civil society' indicates their political ambition to bypass national governments and to promote 'global governance' (Robertson 2000). The UN charter provides for UNESCO to consult with NGOs, if they operate in two or more countries. National and international bureaucracies have expanded rapidly as government budgets have grown with administration of expensive social welfare programmes. Similarly, UN agencies and other international organizations (privately funded or depending on government

²¹ There are many examples of false or incomplete experiments that damaged businesses without any recompense or acknowledgement from 'green' protesters. Farmers cultivating GM crops were victims (Robertson and Kellow 2001; chapter 15, 16 for examples).

²² The UN-IPCC is a case in point. Several prominent members of IPCC have been exposed for manipulating climate data or repeating obvious errors. Yet the integrity of IPCC reporting is not questioned (Henderson 2009; Kellow 2007: chapter 3).

contributions) are promoted by burgeoning NGOs, which have prospered as a result of globalization and integration.

'Risk' increases as reformers and their critics confuse benefits with comprehensive objectives and institutional expansion. Proliferation of rules in international agreements cause clashes over alternative interpretations of international law, and clarity is lost. This competition tends to undermine the authority and effectiveness of law, and plays into the hands of anti-globalization groups. If the courts and tribunals established under agreements come into conflict, the authority and the effectiveness of the law and the tribunals will suffer. The WTO system is already under pressures from NGOs, especially from 'green' NGOs. In the interest of stability in international rulemaking and governance, international tribunals and inquiries into trade, investment, environment, and so on must adopt methods to agree jurisdiction over issues in conflict.

Conclusion

The world economy is always in transition. However, the present conflicts between weakening OECD governments in ageing international agencies, and truculent NGOs with individual programmes (supported by some invidious political forces) that make no allowances for economic consequences, are confusing and worrying. These confrontations are complicated by the rise of China and the other 'new' dynamic economies that have their individual ambitions. In these circumstances, there are many economic and political uncertainties that raise trade risks and the costs of insuring contracts.

Risk assessments on international trade transactions now have to consider many non-commercial issues that might impinge on contracts. The circumstances surrounding transactions are becoming subject to increasing numbers of intergovernmental and environmental challenges. Insurance costs must be expected to take account of these uncertainties.

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