

The WTO: Domestic Regulation and the Challenge of Shaping Trade

Presentation Summary and Comments

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John H. Jackson: Jackson noted the impact that international law has had on economic markets through institutions such as the World Trade Organization (WTO). Likewise, he observed the reverse: economic markets have influenced the development of international law. He questioned whether some of its critics might think about the WTO differently if one believes there is a need for an institution above the nation-state. He suggested that the presumption that nations should be allowed to do as they wish absent a clear rule to the contrary may not work in such a regulatory framework.

Grant Aldonas: Aldonas began by suggesting that when one asks what role the WTO should play, it raises a more fundamental question of what is wanted from the system. This question is something that trade policymakers have been struggling with since the GATT. The focus of the GATT is on international rules that apply across the board. The question is whether such a system works well in all situations and for all negotiations. For instance, in the GATT negotiations, when policymakers found out how essential that question is, they instead began to ask, "What is the heart of the matter that we want to achieve?" Aldonas suggested that a WTO that is not all-encompassing may be the answer and that a system is needed to encourage governments to set rules to eliminate domestic restraints without creating restraints at the international level. He proposed that much more needs to be done on the domestic level to interface with the international level of trade policy-

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making. He asked whether it is time for the WTO to “declare victory,” since much of the WTO’s original agenda on tariffs and trade barriers has been achieved. He also questioned whether the original model of “reciprocal” tariff and non-tariff reductions had outlived its usefulness.

William Reinsch: Reinsch argued that the debate in fact derives from a question of whether one is talking about institutional architecture or common economic policy. He observed that by examining the difficulties the International Monetary Fund (IMF) has experienced, one sees the difficulty in pursuing common policy rather than enacting architecture within which to act. The question is how to get from here to there: we already have institutions and have mechanisms for addressing disputes and negotiating the architecture. He then argued that the current system may be flawed and may contain built-in inefficiencies. Therefore, for some new areas, it may be more productive to build something new than to use existing institutions.

Warren Maruyama: Maruyama observed that domestic sovereignty is not really addressed in the Doha Declaration or the Trade Promotion Authority bill and that recently there is a tendency to ignore the fact that trade agreements may impinge on domestic sovereignty. Historically, trade policy has only implicitly acknowledged these tradeoffs with sovereignty; today, it would be helpful to be more straightforward about them. He noted that as trade agreements enter more areas traditionally considered to be “domestic,” increased transparency in the system and better understanding of what is being done in trade agreements are key.

Maruyama suggested a number of steps that could be taken, even in tough areas. He suggested WTO Members should consider expanding the GATT article XX exceptions, which already allow countries to prohibit imports made from prison labor, to include child labor (since most countries agree that child labor is a problem). On antitrust, Maruyama suggested that countries should start by engaging in greater levels of international cooperation on things like merger reviews. In other areas, Maruyama argued that there is a need for dispute settlement panels to stick closely to the text they are interpreting, and for the WTO to be more transparent in order to increase the legitimacy of its decision-making and dispute settlement processes.

He noted that, as Aldonas had observed, some of the debate regarding provisions to be included in trade agreements is really about domestic regulation (a fact evident from the WTO rules on telecommunications and the U.S. financial services proposals).

Maruyama indicated that improvements in the rule of law—e.g., transparency, regulatory procedures, objective decision-making, and judicial review—could benefit trade, while having a positive spillover on human rights. He also argued that promoting the rule of law in the trade sector may help promote rule of law in human rights, while helping to rebuild bipartisan political support in the U.S. by showing that trade has positive spillover on rule of law and other concerns of trade skeptics. In view of GATT article X, the WTO clearly has competence to pursue rule of law negotiations that would aim for improvements, transparency, and rule of law in WTO Members.

Timothy Reif: Reif addressed three points: First, he observed that the WTO is already a world trade regulatory institution, and the question policymakers need to ask is, “Do we stick with it or start over from scratch?”

Second, Reif argued that even as we think about what we want to go into such an institution, we must recognize that we do not in fact fully get to make this choice. He suggested

it is to some extent immaterial whether the European Union (EU) antitrust proposals should go into the WTO agreements or not, since antitrust is already there. To the extent that policymakers can decide what should go into the agreements and when, one criterion they should consider is whether there is a high level of consensus. On antitrust, he noted, such consensus does not exist between the United States and the EU.

Third, Reif stated that market access is not and cannot be an absolute goal for a trading system. Rather, we should view ourselves on a spectrum: total national power to regulate commerce on one end versus full access to markets and an abdication of control by countries over markets on the other. He noted that we have never been on the far ends of the spectrum; instead, he argued that we must strike a balance between rules that police commerce and rules that shape the rules of commerce. He cited the Sanitary and Phytosanitary Measures (SPS) agreement as one example of the latter.

Reif disagreed with earlier characterizations of the sovereignty problem and suggested there is a solution at the WTO. In establishing the proper balance, the question at WTO dispute settlement should be, for example, "Has the challenged regulation been put into place to protect the market or for consumer safety?" He stated that this determination must be made, and making these determinations was what the U.S. Supreme Court started doing in the early 1800s on its own via the dormant Commerce Clause.

Grant Aldonas: Aldonas concurred with Reif on the importance of consensus before bringing an issue to the WTO. However, he noted that consensus alone will not be enough. For example, even though we have the consensus of most countries that child labor is a problem, article XX does not in fact reach child labor or slave labor as currently written. He suggested that, instead of focusing on the fact of consensus, many countries will approach the issue from a traditional negotiator's stance. So, if we in fact try to amend article XX to cover child labor, other countries will not simply accept this but will ask, "What will you give us in return?" So, the better question is: "How do we negotiate this in the WTO and is the WTO the best place to move this issue forward?"

Aldonas discussed the labor standards issue. He stated that some in the United States want to promote international labor standards, but he suggested it is not clear that the WTO will be able to get us there. He added that thinking about the experience in the United States under the Interstate Commerce Clause leads to the question of whether countries are willing to consciously cede enough sovereignty to go through such a common law exercise in the WTO. A great struggle ensued in the United States between courts and states when this happened. He questioned whether countries would willingly accept this type of loss of sovereignty through negotiations.

Reinsch: Reinsch observed that the way some of these complicated issues have been sorted out in the past is through the judicial process of deciding where lines should be drawn. If a polity is unhappy with the result, it can work through the political system to change the law. The sense is that it is very hard to draw lines if, as is currently the case at the WTO, plaintiffs win all the time. We are creating a body of law that is indefinitely expansionist. Reinsch suggested that until plaintiffs lose on a regular basis, the WTO will not get us where we want to go.

Jackson: Jackson contested Reinsch's characterization of the WTO Dispute Settlement Body (DSB) as consistently handing victories to plaintiffs. He argued that, in fact, the meaning of "win" or "loss" becomes much less clear on an issue-by-issue basis. He recalled a high-level EU official's observation that in one case the EU had forty separate issues, won

39 of them, but lost one and, therefore, counted the case as a loss due to that single issue. He noted that many cases involving disaggregated issues result with the DSB coming out on either side.

Reif: Reif suggested that the issue of wins and losses is about how you include the shaping process into the debate. He agreed with Jackson that a more complex breakdown of sub-issues suggests the DSB is more even-handed than a simple look at the ultimate outcome would suggest (though he noted that looking at Appellate Body decisions closely may also reveal more troubling developments in the jurisprudence itself). He reiterated that getting to a better system in the United States as it changed from a state-based economy to a national economy required a long fight between the Executive Branch and Congress on the one hand, and the Supreme Court on the other, over labor practices, a fight that culminated in the Supreme Court's decision in the *Jones and Laughlin* case. He queried whether this administration was interested in doing this. And even if it was, how many countries would want to engage with us on this?" He believed that WTO Members need to actively structure the shaping process.

Jackson: Jackson suggested that competition policy provides an excellent example of the issues being discussed, including Aldonas' observations about the approach of trade negotiators. He observed that EU representatives persistently ask why U.S. competition policy officials are so hostile to trade negotiations—the answer is they fear the habits of the trade negotiators will lead to selling out. He noted that, analogous to the situation in Washington, Geneva suffers from a form of the “inside the beltway” phenomenon: trade practitioners become out of touch with policymakers outside of Geneva. He noted that certain habits of diplomats can be counterproductive, becoming the problem, not the solution.

Questions and Answers: The panel was asked why the United States, as the world's only superpower, would want to be treated the same as all other nations. Aldonas replied that the United States must try to encourage worldwide peace and stability by offering economic opportunities to other countries. He observed that the markets of the future are in the South, and the United States has a vested interest in seeing demand growth in those areas. Given our vested interest in seeing markets expand, trade liberalization is good policy from even a purely mercantilist perspective. Maruyama added that the United States has always believed in rules, predictability, and the rule of law. He argued that these principles have commercial benefits because they create a more stable environment for businesses trying to enter markets abroad, and for developing countries trying to stimulate economic growth and attract foreign direct investment and technology. Transparency in those markets—through procedures such as notice and comment rulemaking—is a real advantage for American companies operating abroad and has positive spillover for human rights.

The panel was asked about the relevance of a discussion regarding domestic regulations, such as competition policy and international trade, in terms of the Doha Declaration's commitment to development. It was observed that Doha is called the “development round,” yet it is not clear that many of the 144 WTO Members know or care about competition policy. Separately, the panel was asked whether, as a practical matter, there could be a Doha Round agreement without agreement of the United States and the EU. The panel was asked whether the United States and the EU were moving together or apart, the latter making success much more difficult.

Reif replied that there will have to be some coalescence between the United States and the EU for the round to come together. He suggested that U.S./EU cooperation was still necessary, though perhaps not as sufficient, for success as it once may have been. He ob-

served that one area which has proven divisive between the United States and the EU is food safety: there is a need for a stronger domestic system of regulation in the EU in order for the public there to have more confidence and prevent further trade friction. He noted that this is another way that success in the WTO may hinge on adequate domestic regulation.

Aldonas noted that until we develop more consensus on what we want out of the round, it will be difficult to get to consensus to move the round forward.

Jackson stressed that the notion that we should declare victory at the WTO and leave is wrong: GATT was never confined to border measures (for example, article III covers to some extent internal measures). Through the Tokyo Round the issue became non-tariff barriers, so countries set up side agreements that had their own problems. These in turn were cleaned up in the Uruguay Round. Jackson argued this does not mean we should necessarily add antitrust to the agreement; but rather we should consider it as an exercise in power allocation. The European Community wants antitrust in the WTO so we must ask, should the Dispute Settlement Understanding (DSU) apply to competition policy? Jackson observed that the negotiators lacked anything near consensus, since most do not want the Appellate Body making antitrust policy. But given that antitrust is already in the agreements, he suggested that most likely the United States would realize the need to discuss the issue.

Maruyama agreed with Jackson on the need to continue negotiating in the WTO framework, arguing that walking away from trade expansion does not seem viable at all. He noted that trade expansion has always been an important way to expand growth and create U.S. jobs. He suggested that the idea that the WTO's various problems cannot be fixed or managed is defeatist. An ambitious, broad-ranging agenda would facilitate progress on tough issues like agriculture, which benefits from cross-sectoral trade-offs. Such an agenda would also stimulate broader interest from the U.S. business and farm communities, which has been lacking, and help the EU do what needs to be done on agriculture.

Aldonas argued that it is unrealistic to try and force the WTO to do the work to develop consensus on issues such as competition policy and labor. He argued that we may need other institutions to resolve these issues.

The panel was asked whether, given that the judicial path to resolution of contentious issues seems foreclosed in a system of sovereign states, yet a transatlantic compromise approach to legislation becomes more difficult as more issues are added to the WTO's mandate, would a multi-speed system be a viable solution or would the risk of balkanization be too great?

Reif responded that in his view the only concern is coherence. He pointed out that one should not include environment on the list of issues that need to be added to the WTO, as it is already deeply embedded in WTO rules (through mechanisms such as the article XX exceptions and the Agreement on the Application of Sanitary and Phytosanitary Measures). He observed that pulling apart the issues in the various agreements is not such an easy task and may result in a lack of coherence.

Aldonas replied that a host of issues do not fall in the conventional framework of the WTO. For example, he noted that as proposals are developed on steel, one might find facets of the problem that will have to be dealt with in the WTO, while other problems not belong in the WTO. He observed that on matters such as steel, one faces a set of issues where the sector demands solution, but generally only a narrow window of time exists in which to grapple with the problems before even larger problems are created.

**Speech of The Hon. Grant Aldonas,
Under Secretary of Commerce for International Trade
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Thank you for that introduction. I appreciate having the opportunity to discuss one of the most significant, and relevant, trade issues: our ability to build a stronger consensus for trade liberalization. I've had the opportunity to speak on this subject most recently in relation to a report by Oxfam titled "Rigged Rules and Double Standards: Trade, Globalization and the Fight Against Poverty."

While the Oxfam report has a number of shortcomings, which I will describe in more detail in a few moments, it points the way to a new, and I would argue, more politically sustainable basis for the conduct of trade. The political logic that has driven trade negotiations is irrevocably broken. As a result, it is incumbent upon all nations, and specifically members of the WTO, to rework the ideological underpinnings of trade.

For the past seventy years, trade negotiations have been based on the mercantilist political logic of trading market access. We supported agreements on the basis that our exporters were getting an equal or better opportunity than we were giving up to foreign exporters who wanted access to our market.

This premise has two very significant shortcomings: (1) trade is not a zero sum game, and (2) after successive rounds of multilateral trade negotiations, the United States has few remaining tariffs peaks and those represent the most politically sensitive categories for the United States and for the rest of the developed world. Both are clearly indicated in a recent report by the International Trade Commission, which concluded that the average U.S. tariffs were among the worlds lowest, but we have much higher tariffs on some import-sensitive commodities.

Given these deficiencies in our prevailing ideology, it is easy to understand why we've had difficulty building a census for international trade. However, it is on this topic that the Oxfam report is most relevant. As the forward states, "the broader object of the report is to promote discussion of the kind of institutional architecture that may best serve the interests of the poor and the deprived."¹

First and foremost, I appreciated that the report acknowledged the economic opportunities that result from trade.

- Since the mid 1970s, more than 400 million people have been lifted from poverty by trade.
- Studies have shown consistently that developing countries with outward-oriented economic policies experience higher annual GDP growth than inward-oriented countries, and increased trade openness was associated with an increase in real per capita income.
- Even a small increase in the developing world's share of world exports could have a significant impact on their economic prospects, vastly outstripping, but not replacing, all forms of bilateral and multilateral assistance.

Furthermore, I believe the report accurately critiques the current trading system, its rules, and its biases. Globalization is not a new phenomenon. Technology and trade have advanced it, to be sure, but what is often overlooked may be the most fundamental fact, that the

1. OXFAM, RIGGED RULES AND DOUBLE STANDARDS: TRADE, GLOBALIZATION AND THE FIGHT AGAINST POVERTY (2002), available at http://www.maketradeair.com/assets/english/Report_English.pdf.

political divisions that persisted in the world, at least since the onset of World War I, largely came to an end with the demise of the Soviet Union.

At the end of the Cold War, we missed a tremendous opportunity to implement a political and economic strategy that would rival the end of either of the first or second World Wars. We failed to ensure that the seeds of global integration found fertile soil and that the benefits of globalization were broadly shared. We failed to consider the contribution that trade could make in raising living standards throughout the world. And we failed to offer the developing world, and the developed world, the opportunity to rapidly improve their economic prospects.

While our past failures are significant, I do believe that reformation is forthcoming. Amartya Sen, a Nobel Laureate in economics, points out the most politically sustainable basis for the conduct of trade. He concluded in *Development as Freedom* that the basis for all economic development is human freedom.

Sen's definition of freedom is broader than we tend to think about it in Western democracies. It includes the freedom from any limitation that undermines human potential. Trade is ultimately consistent with that definition. At its root, it is about human freedom—the freedom to interact, innovate, and exchange goods and services without interference from the state.

You can build a far more compelling case for the benefits of a global trading system if you focused on those areas that are most likely to lead to rapid improvements in the prospects, not only in the developing world, but for the poor in the developed world as well.

As a practical matter, consider the profound impact of liberalizing trade in the sectors that will have the greatest benefit to humankind.

- Agriculture—Consider what liberalizing trade in agriculture would do for the seven million children who, according to UNICEF, die each year of malnutrition.
- Energy—Consider what liberalizing trade in energy might do for the billion people in urban and rural areas who, according to the World Bank, lack access to modern forms of energy, such as electricity and oil.
- Health/Sanitation—Or consider what liberalizing trade in pharmaceuticals, medical equipment, and healthcare services might do for the 2.2 million people who, according to the World Health Organization, die of dysentery due to bad water, or the forty million people worldwide who have HIV/AIDs, which is now the leading cause of death in Sub-Saharan Africa and a scourge that continues to expand worldwide.

Now, before I touch on how President George W. Bush intends to encompass this vision of trade in his agenda, I'd like to discuss one of the primary failings of the Oxfam report. The Oxfam report blames the private sector for the inequities in the world trading system. I believe, on the contrary, that these companies are our strongest allies in advancing the cause of a just world economically and a just world in terms of the rules of the game.

While it is common, as the report does, to criticize corporations for their statelessness (which I take to mean the notion that they are somehow free of all control by states), the truth is that they have a stronger stake in a rules-based system than virtually all governments. The reason is that, in an era of global trade and financial flows, what becomes important is not so much that the rules afford them some advantage (again, the mercantilist perspective), but that the same rules apply to all. Companies engaged in global commerce are a powerful force for ensuring that the playing field is level.

Furthermore, we rely on the private sector to foster a basic level of trust. Mancur Olson, in *Power and Prosperity*, recognizes the far-reaching importance of ensuring that the rules are both politically and economically appropriate. And, as Robert Putnam observes in *Bowling Alone*, it isn't the law alone, but also the broader civic orientation, the social fabric if you will, that makes a difference.

The President is dedicated to advancing these many principles. From ensuring that the benefits of trade are realized across borders to trade as an impetus for the formation of democratic principles and from recognizing the role of our corporations in promoting trade to understanding the necessity of the right rules and structure, he is dedicated to redeveloping the basis for trade. And, aided by the recent passage of Trade Promotion Authority, he has the tools to do so.

For American citizens and businesses, the President's trade agenda means more production, more jobs, and more opportunities. At the International Trade Administration, we have taken the President's agenda to heart and we are actively seeking to expand market opportunities. You can be sure that we will be promoting American jobs and American values in international trade negotiations.

I appreciate your thoughts and comments.