

The World Trade Organization: On the Road to Doha

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Even the most dedicated free-trade insider will be challenged in finding his or her way through the web of entanglements that make up the World Trade Organization (WTO).

That bewilderment seems to grow day by day, as the agenda gets more and more complicated for the next WTO ministerial gathering in Doha, Qatar, in November. The objective of the Doha ministerial meeting is to see if a consensus can be reached on a new round of trade negotiations, to take the WTO into the 21st century.

This is an ambitious objective, since the table at Doha will include a smorgasbord of unfinished business -- old agenda items, so-called "trade and...." items -- plus all of the proposals, suggestions and initiatives for a new round of trade negotiations that have to be sifted through.

Overlaying the Doha agenda is the ongoing work being done at the WTO's headquarters in Geneva, namely the plethora of committees, councils and working groups. All of this makes figuring out what makes the WTO tick a daunting task.

Trade fatigue

If Canadian business lacks the energy to follow all of these developments day by day, it is understandable. Trade fatigue has set in. But business will be the direct beneficiary of improvements in the rules of international trade. One of the key objectives at Doha will be to move forward on services negotiations, for starters, taking the WTO into new and uncharted areas of telecommunications and electronic commerce, finance, insurance, engineering and the like.

Therefore, business clearly has a direct and obvious interest in the health of the WTO body politic. Even though Canadian companies tend to show less energy in following WTO matters than their counterparts elsewhere, there is need to know what is going on, simply because the WTO will set the rules of the international road for decades to come.

Ironically, while there is trade fatigue in business circles, the general public -- so called "civil society" -- is increasingly concerned about the alienating effects of globalization. There is continuing pressure from interest groups that demonstrated at Seattle, for

example, and NGOs to moderate the WTO's business agenda and to add or substitute a peoples' agenda to the work program.

One of the main challenges for national governments and the WTO itself at the next Ministerial is to find some meaningful way of addressing some of these concerns. The WTO has tried its best to de-mystify itself. Interestingly, some of the recent cases decided by WTO panels indicate that the voices of these groups resonated among the panel members.

A bipolar world

It may seem odd to speak of a bipolar world in an era of global economic dominance by the United States. In terms of WTO politics, however, influence in the organization has really become a contest between the U.S. and the European Union. Historically, the U.S. has been the more deft player, not saddled with the need to achieve consensus to deal on behalf of 15 sovereign states, as in the case of the Union.

However, that has changed. The U.S. Executive is increasingly constrained by the powerful, countervailing role played by the Congress in matters of trade policy. Congressional committees, and they are many, are often more influential in driving the U.S. trade agenda than the Executive. This makes it difficult for other governments to deal comfortably or with certainty with the U.S. Executive.

American influence in the WTO, as strong as it is, is also affected by the absence, so far, of a negotiating authority for the president (formerly called "fast track" but now called "trade promotion authority" or "TPA"). It is essential that the president have this authority in any new WTO negotiating round and failure to obtain it from the Congress has weakened the U.S. politically.

Some Washington insiders have said that there is a lack of focus in the present U.S. trade policy. This is seen by many as due to the Bush administration's failure to pull together a coherent team. However, it is more likely due to the shift in power in the Congress to the Democrats, and the fact that the Democrats and the Republican have decidedly different optics when it comes to trade agreements.

One key area of discord in Washington is over what is, in reality, a secondary issue. The Democrats want U.S. to include environmental and labour standards as part of a trade deal, with rights to retaliate against countries that do not meet these standards. The Republicans continue to strongly oppose this linkage.

The absence of a strong U.S. voice on trade issues in the months before Doha is of concern, one that could severely limit the possibility of success.

Jockeying

So far in the jockeying for leadership, the European Union has seized the initiative. The Union has tabled ambitious and creative ideas for a comprehensive set of trade negotiations that cover services and agriculture, but that also includes investment, competition policy and social development issues. Uneasy over linkage, the U.S. wants a more focused agenda. Reconciling these approaches will be difficult.

Added to the mix, and making consensus at Doha even more difficult, are the legitimate needs and increasingly vociferous concerns of developing countries, who are skeptical about a new round because they feel they were excluded from receiving any lasting benefits of the last round. What also concerns these countries is that WTO commitments prevent a range of national policies that favour economic development from being implemented because they may not conform to trade rules.

This view has been articulated over and over again by Brazil in the aircraft subsidies dispute with Canada. The industrialized countries will have to convince the developing countries that they can and will gain in the next round and not be mere bystanders as the rich countries gather the prizes.

The legislature

Assessing the WTO and its progress as the ministerial meeting approaches requires an understanding of the organization as an institution. In this regard, there is an important difference between the WTO as a norm-creating institution, on the one hand, and its activities as a dispute resolution body, on the other. The two functions are quite different, like the distinction between Parliament and the Courts. Parliament debates and passes laws, the Courts interpret those laws. The ministerial session at Doha is like the opening of Parliament, the hoped-for consensus document like the Speech From The Throne. These activities are political.

And like Parliamentary committees, the various negotiating groups table a myriad of proposals, like those for legislation in white papers, policy proposals and draft bills. There is a great deal of fluidity and an element of uncertainty in this process. But on the road to Doha, it is important to keep in mind that the parliamentary arm of the WTO, as it were, is not all that there is.

The courts

As an adjudicative body, the WTO deals with laws, not politics, the central law being the WTO Agreement itself. That Agreement includes the GATT, and a range of other agreements on discrete subjects, such as TRIPs, the GATS and the Agriculture Agreement. These are supplemented by a growing and valuable body of jurisprudence in the decisions of WTO panels and of the Appellate Body, the final court of appeal in the WTO system.

In this domain, it's the law that prevails, not compromise, deal making or the uncertainties of international politics. Here, we enter the realm of the courts. This system is not perfect, as will be seen. Some of the proposals at Doha will aim at making the system more efficient and effective, without destroying the gains that have been made to date.

Central institution

In both senses, norm-creation and dispute resolution, the WTO is the world's premier multilateral body, probably more important than the U.N. itself. At the core is the WTO Agreement itself, a remarkable mix of obligations and entitlements, enforced through a system of adjudication that actually works and is arguably unique in the history of international relations.

It works because countries are required to adhere to dispute settlement decisions by removing measures that are found to offend WTO obligations. Failure to comply with these legal rulings allows the complaining country to either obtain monetary compensation or to withdraw reciprocal trade benefits for the offender, often called "retaliation." The system of retaliation works, more or less effectively, as the ultimate enforcement tool. Because it impacts directly on economic self-interest as the vehicle of sanction, it forces member governments to come into line.

It is not a perfect system. There are concerns, with justification, that the rich and powerful states get an easier ride in not following panel rulings. There is a process of post-adjudicative settlement, where the parties attempt to find a means of complying with panel rulings. In some high-profile cases, post-adjudicative settlement talks can drag on for months, even years.

In the main, however, the WTO dispute-settlement system functions probably better than any other multilateral attempt at rule-enforcement. Ninety percent of the panel and Appellate Body decisions are complied with in accordance with the time-lines set down in the Agreement.

In a world of continuous change, where economic chaos, disruption and turmoil seem the only certainties, the WTO and its adjudicative system stand as a beacon of stability. The rule of law, not without flaws and imperfections, but the rule of law nonetheless prevails.

Paradigm shifts

The trite expression "paradigm shift" has some meaning in the WTO context. Under the old quasi-diplomatic process in the General Agreement on Tariffs and Trade (GATT), disputes were largely over border laws and regulations or over subsidy programs of one kind or another. Almost all of the 100 or so GATT cases between 1947 and 1995 concerned national legislation of this kind.

Under the WTO Agreement as well, early dispute panels were largely concerned with disputes over national laws and like measures that discriminated against imports. An example is the Canada-France Scallops Case, which concerned the labeling of Canadian scallops in the French market. Canada won in a decision that held that Canadian exports had not been given treatment equal to that accorded to French scallops.

These kinds of cases were typical of the pre-Uruguay Round era and were the norm in the early years of the WTO. This has changed, as WTO panels are now more frequently asked to delve into matters that reach deep into internal policies and regulations of the States concerned.

For Canada, this extended reach became evident in the Periodicals Case, where the U.S. challenged a long-standing Canadian measure protecting homegrown magazines, and won. That case engendered criticism in Canada because it struck down a pillar of Canadian cultural policy, previously seen as outside the scope of international trade rules. It illustrated the broad reach of the WTO and the potential for trade disputes to be initiated over matters that were heretofore considered sacrosanct.

This factor is of some significance in the continual debate with those critics who portray the WTO as a monolithic and unresponsive body that has little respect for the sovereignty of states. These criticisms are overdrawn, but the ability of dispute panels to adjudicate on internal, national matters and impact on state sovereignty is not to be dismissed.

The court of last resort

As well, WTO disputes now regularly reach far beyond national laws and measures and concern the decisions of national agencies. This, too, has profound implications. It

means, in effect, that the WTO panels and Appellate Body -- not the courts in the country concerned -- have become the final court of appeal in administrative agency decisions.

This evolution of WTO adjudication, from examining national laws and regulations, to assessing and reviewing decision-making by national tribunals and agencies, is an important development. It has extended the reach of the WTO beyond its traditional sphere. WTO panels and the Appellate body have now become, in effect, the courts of last resort. Again, this has not been without some disquiet.

Anti-dumping

One of the greatest threats to Canada-U.S. trade under the NAFTA, and some would say to global trade at large, is the growing use of anti-dumping measures to deal with problems of competitiveness. Over the years, these remedies have become imbedded in the system, in the U.S. in particular. Canada and like-minded countries at Doha need to see if some work can be initiated to moderate the protectionist elements of the anti-dumping measures.

Softwood lumber

In the annals of Canada-U.S. trade relations, there is no dispute larger than the Softwood Lumber case. It is a subsidy case that could have a serious impact on a business that is worth \$10.0 billion annually to Canadians.

The case has had a series of incarnations since the first action was brought by the U.S. lumber industry in 1986. While its history is too long and complex to be dealt with here, it is important to point out that the U.S. producers claim that Canadian stumpage rates are unfair subsidies. To settle the most recent action, Canada and the U.S. entered into an export-restraint agreement. That agreement expired on March 31, 2001, and was followed almost immediately by a new petition by U.S. lumber producers. Once again, the focus is on Canadian stumpage rates.

Canadian softwood producers have vowed to not succumb to this latest U.S. subsidy investigation and to fight the case all the way. In this regard, the changes at the WTO have altered the landscape to the benefit of the Canadian industry. Unlike the previous scenario where, recourse could only be had before U.S. courts (and some limited recourse to NAFTA panels), Canada now can seek recourse before a WTO panel and can have the panel decide whether the U.S. fully complies with the WTO Agreement.

Environmental measures

Criticism has been leveled at the WTO by environmental interest groups and NGOs, claiming that the organization follows a business agenda and is unwilling or incapable of dealing with important non-trade interests, particularly the environment, conservation and human health. They point to past GATT decisions, such as the famous Tuna-Dolphins case and the Reformulated Gasoline case, where panels struck down U.S. environmental measures that ostensibly interfered with free trade.

Recent WTO decisions contradict these criticisms, however, and suggest a shift in GATT and WTO jurisprudence. These cases parallel work underway in WTO committees on environmental issues, much of which will be on the table at Doha, although developments in jurisprudence normally lag political and legislative change.

The WTO panel ruling in the 2001 Asbestos Case is the best illustration of this change in thinking. Canada challenged a French ban on the importation of asbestos on the basis that there was no clear scientific opinion to support this interference with Canada's access rights. The French said that the permitted exceptions under the GATT allow countries to depart from trade obligations in cases where it is "necessary" to protect human health.

Previous GATT and WTO decisions, including the famous Tuna-Dolphins and Reformulated Gasoline cases, said that for trade restrictive measure to be "necessary" and justified as exceptions to normal GATT obligations, there had to be no other possible alternative to achieve the desired result. In other words, if the government concerned could use other means to protect human health, they had to use them rather than restrict imports.

The Asbestos Case changed this. The WTO Appellate Body affirmed the sovereign right of states to take measures they deem necessary to protect human health, even though such measures interfered with normal trade obligations. Even if scientific opinion was not unanimous, the Appellate Body said that WTO members were allowed to restrict imports to protect the health of their citizens. The Asbestos Case will have a major influence on future environmental and health issues in the WTO.

Another WTO panel recently found that a U.S. conservation measure respecting endangered sea turtles was justified under these same GATT exceptions. In this case, the U.S. law prohibited imports of shrimp from countries that did not have adequate conservation policies for the protection of sea turtles. The Appellate Body said that the U.S. measure was justified, even though it interfered with trade in shrimp.

These decisions are important milestones. While jurisprudence develops incrementally and not in sudden shifts, these findings reflect a better appreciation of the public's

concerns and the pressure on governments to pass measures to protect health and conserve natural resources, notwithstanding the trade-restrictive effect. And they demonstrate the ability of the WTO to adapt to these concerns.

Transparency and protest

The last Ministerial at Seattle was a disaster, not necessarily for the WTO in any lasting sense but for the public perception of what the WTO is all about. Given the location of this next meeting, it can be expected that public protest will be more limited. But the legacy of Seattle remains.

What can be done about this? How can the WTO, a multilateral body made up of states, deal with outcries for direct involvement of the public in its decision-making. These demands for direct involvement of private parties are impossible. But the WTO has made real attempts -- bold efforts by an international body -- to make its processes more open, transparent and understandable to the global public. This is not an easy task. The first point above was that the WTO is an inherently complex organization. Given the issues under examination, trying to make its work seem less arcane is a worthwhile notion but difficult to achieve in practice.

For Canadian business, the challenge is more complex, but in a different way because there are direct costs involved in having officials trade WTO developments. Regardless, the business community needs to become more engaged and to spend more effort in providing useful and focused input into the WTO processes. This is particularly so, since the door in Ottawa is open. Focused business input, both before and after Doha, is needed.

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