

**One World, One System?
The Diversity Deficits in Standard-Setting,
Development and Sovereignty at the WTO**

A Report Card on Trade and the Social Deficit

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Foreword

The development agenda of the World Trade Organization launched at Doha in November 2001, has sparked a great deal of interest and debate throughout the world. Trade policy and WTO impacts are not well understood by many outside the bureaucracy of the WTO and the specialized world of trade politics. This report attempts to make a contribution in this regard by shedding important light on the way the WTO impacts domestic politics and social need across the globe.

Examining leading trade disputes provides critical information on the WTO and trade politics. Central also, is its legal culture, which is often misunderstood and not adequately assessed. This report hopes to reduce this knowledge gap.

Marc Froese prepared the primary working draft on the European Communities banana dispute. Mark Fuller coordinated the research and writing of the EC's beef dispute. Nirmala Singh prepared the written research on Canada's magazine dispute. The final draft was prepared by myself, but the project remains one of collaboration and cooperation.

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The Report Card

<p>Student: World Trade Organization Grading Period: January 1995 to November 2001</p> <p><u>Subject:</u></p>	
<p>Standard Setting: <i>European Community – Measures Concerning Meat and Meat Products</i></p> <p>The WTO struck down the EU’s ban on hormone treated beef. It ruled that the precautionary principle, which could have established a new international standard, was not relevant in this case. While the WTO has procedures to establish standards, the process is so cumbersome, it is beyond the reach of even the European Union for all intents and purposes.</p> <p>Economic Development: <i>European Community – Regime for the Importation, Sale and Distribution of Bananas</i></p> <p>The decision severely curtailed the EC’s ability to use trade instead of aid to enhance the well-being of some of the world’s poorest countries. GATT had approved the banana regime, but the WTO set aside the waiver much like it did when it dismantled the Canada/US Auto pact, another special-needs arrangement. As it stands now, the EU has capitulated to US demands on the issue of trade vs. aid.</p> <p>Cultural Sovereignty: <i>Canada – Certain Measures Concerning Periodicals</i></p> <p>The WTO failed to recognize the need to protect cultural diversity. It refused to accept Canada’s policy on cultural protection, relying instead on narrow, trade-based principles. In one of the few cases dealing with culture that has come to the WTO, its approach failed to be innovative or far-seeing. This narrow approach has kept cultural diversity off the WTO agenda</p>	<p><u>Grade:</u></p> <p>D+</p> <p>D+</p> <p>F</p>
<p>Comments: Fails to learn from its mistakes. Does not play well with others. Often a bully on the playing field. The WTO lacks attention to detail, and does not take multiple perspectives into consideration when settling disputes. Frequently fails to do homework and needs better study habits.</p>	

Introduction

Contemporary Trade Dynamics

The World Trade Organization (WTO) has reached a turning point in its short institutional life. Increasingly, it is challenged by the tension between universal trade standards and the diverse needs of different countries and trading zones. At the upcoming meeting of the G8 in Kananaskis, Alberta, global leaders will be hard-pressed to balance the desire for common trade rules for the world's most economically advanced nations with the conflicting concerns of the poorest countries of the South. So far, it has not done so. US protectionist measures in steel and agriculture threaten to derail the whole process. For many countries, the WTO's inability to strike a balance between economic and non-economic dimensions of trade is equally worrisome. Non-economic impacts to trade have become more, not less, important. So far, the legal culture and institutional framework of the WTO have failed to address the growing gap between trade norms and social need.

The result is a series of social deficits affecting the world's most powerful trading nations as well as those less affluent countries. These deficits are not a new phenomenon; they are the consequence of the non-economic impacts of international trade on domestic politics and society. Further, they reflect the gap between social need and market forces when social responsibility is exchanged for market-based goods and services. Thus, social deficits arise from either a failure of government or a failure of markets to address the harmful externalities that are produced as a by-product of the global trading system.

This report card examines three leading disputes in international trade:

- The EC beef hormone case is one of the signature examples of standard-setting within WTO jurisprudence with respect to the precautionary principle. The WTO had to decide whether or not it would be a guiding principle in international trade law. The WTO has chosen a dangerous path in rejecting it. It only accepted that the precautionary principle can be temporarily applied to raise food safety standards above international norms in very limited circumstances. In effect, nations cannot permanently establish higher safety standards to protect their citizens, even when such standards are applied universally to all food producers.

Given growing concern with genetically modified foods, this decision is particularly worrisome. Had the dispute resolution panel not taken this particular approach, it is possible the EC could have permanently applied a higher standard in food safety and that this standard would have applied equally to all nations with whom it trades.

- The bananas dispute was brought to the WTO by the United States on behalf of two US trans-national fruit producer, Chiquita and Dole. The European Community represents a major market for bananas and banana products which is largely serviced by African, Caribbean and Pacific

least-developed countries. In this case, the dispute represents a significant triumph for corporate interests, who used the dispute settlement mechanism to attack a development agreement. Creating a level playing field is the driving force behind the WTO, but this case had the opposite effect of tilting the proverbial level playing field in favour of large commercial interests.

The settlement expands the orbit of the WTO's rules and regulations to specialized trade agreements—which often directly impact developing countries. One of the less noticed effects of the panel, is that it expands the orbit of the WTO to specialized trade agreements which, in this case, directly diminished a group of developing countries. The lesson of this trade panel is that existing legal norms ill-serve the interests of developing countries, whose needs do not fit neatly into the institutional framework of the WTO.

- The split run magazine case brought by the US against Canada is a groundbreaking dispute that demonstrates the harmful effects of international competition upon domestic cultural industries. The decision gives foreign publishers even greater access to the Canadian market than they presently have. This means American publishers can enhance their already dominant market position among English language periodicals in Canada. By so clearly treating magazines as tradable commodities rather than forms of cultural expression, the WTO also set the stage for further trade challenges to other forms of cultural protection.

One of the results of this will be increased pressure by the US at future trade negotiations aimed at expanding regulation in the cultural sector. The cultural diversity deficit of the WTO needs to be addressed in a compelling and realistic manner. The dispute at hand illustrates the way in which the WTO subjects cultural industries to all disciplines of the Agreement, creating no room for cultural diversity within the framework of liberalized trade and commercial values. Once again, the WTO is impaired by its legal culture when it comes to recognizing the significant role that cultural industries play in defining national identity. Instead, it sees cultural goods and services like any other tradable commodity. For the WTO, protecting the periodical publishing industry is no more allowable in the era of advanced information technology, open markets, and global trade than impeding the free flow of bananas.

Together, these three cases form an important part of WTO jurisprudence. They define a fundamental challenge confronting the World Trade Organization. Will the WTO persevere with its one world-one system of universal rule-setting or will it embrace the need for increased diversity and pluralism in its rule-making? This report card on the WTO, the second of two reports examining social deficits issued by the Robarts Centre for Canadian Studies, suggests that the diverse needs of developed and developing countries can only be met through enhanced flexibility in designing, implementing and interpreting global trade rules. Such a change would dramatically reshape the purpose of the World Trade Organization.

From the inception of the GATT in 1947 through to the creation of the WTO in 1995, the foremost purposes of the institution have been reducing barriers to trade through the creation of a universal set of international trade rules, and the adjudication of trade conflicts between member nations when they arise. The WTO is therefore a necessary institution in order to regulate the field of international trade. However, difficulties are created when the impacts of WTO trade rules and decision-making in trade disputes are not confined to the realm of business and economics; all too often they spill over into the political and social realms with unintentional and often significant side effects. These effects are known as social deficits and they occur in large measure because of the stringent conformity the WTO places on establishing and enforcing basic trade principles and standards as universal rules.

The Doha Development Agenda, launched at Doha, Qatar in November 2001, may prove to be a watershed moment in the WTO's short history of trade regulation. Is it to continue imposing its one world—one standard system of governance in which universal standards apply to all members, or opt for a diversity-based approach to rules-setting in which differing standards are applied according to the particular needs of individual nations and geographic regions? The benefits of universal standards-as-rules are their equality of treatment for all nations. In contrast, a diversity-based approach responds to the unique characteristics of individual member states and geographic regions. Social deficits arise when this principle of universal treatment exacerbates inequality. Our view is that these deficits will occur less frequently if the WTO were to adopt increased diversity in its rules-setting principles and adjudication policies and practices.

To date, member states have given the WTO the benefit of the doubt and tolerated their one world-one system approach; countries have permitted international intrusion into areas of domestic sovereignty, such as in food safety, international development programmes, and cultural protection. Increasingly, WTO members are expressing second thoughts on the benefit-cost proposition produced by WTO intrusion.

In trade, there will always be winners and losers when only narrow commercial interests are taken into account. Increasingly, however, there is more at risk than purely commercial advantages; the legitimacy and efficacy of the WTO as an institutional body is threatened by its inability to redress the social externalities of trade. Unless the institution shows an increased willingness to recast its trade principles, policies and practices in favour of pluralism, diversity and social need, then the systemic social deficits that are produced by universal WTO trade principles will continue to accrue. Three recent trade disputes illustrate these resultant social deficits, each of which poses a liability to the integrity and legitimacy of the WTO as an international institution that can effectively address the needs of its member states.

**The Liability of Standard-setting:
EC – Measures Concerning Meat and Meat Products (Hormones) (August, 1997)**

Possibly the most dramatic example of the failure of a universal rules-based system is the beef hormone case. A long-running trade dispute involving Canada,

the United States and the European Community (Now called the European Union) was recently settled with the EC refusing to abide by the outcome of the decision. At issue was whether the EC could permanently establish higher safety standards for various chemicals in food. In today's world, where minimal governmental regulation is preferred, it is somewhat a rarity in WTO jurisprudence to observe a member nation pushing for higher standards. On this occasion, the EC was insisting on a higher standard in food safety. The WTO ruled against the EC. The ruling was that the precautionary principle – a means of allowing governments to take action to protect human welfare in the absence of certainty regarding potential health risks – could not be employed to permanently establish higher food safety standards than international norms unless it could scientifically prove its concerns. The decision created a policy gap: international norms in food safety were not only minimum limits but became maximum standards as well. The WTO in its enforcement capacity turned a basic standard into a universal rule, preventing nations from exceeding the standard even when it applied its higher requirements universally to all nations.

The European Community defied the WTO's decision and continues to incur millions of dollars worth of punitive duties as a consequence. Had the EC complied with the WTO's decision, European citizens would have been exposed to potentially cancer-causing growth hormones found in North American meat and meat products. By refusing to conform to the WTO's decision, the EC has protected its citizens, but in so doing has raised questions whether the WTO's basic standards should be enforced as *inviolable* rules in the area of food safety, or conversely, if a *diversity* of standards are possible provide they meet or surpass basic international norms while supporting the general principle of equality of application.

The Liability Of Economic Development:

EC – Regime for the Importation, Sale and Distribution of Bananas (May 1997)

The bananas dispute was one of the signature cases emphasising the diverse development needs of southern countries. At issue was whether economically advanced nations could specifically target less affluent countries for preferential trade benefits. The EC had historically provided special consideration to some of the world's poorest countries in Africa and the Caribbean in its banana import system.

The European Communities established a complex importing system to provide economic assistance to these impoverished nations. The GATT recognized the economic benefits to these countries; hence in 1989, the EC was granted a special waiver to permit its continued operation in contravention of restrictive GATT rules, allowing it to use quotas to guarantee ACP countries a share of the European banana market. Following the establishment of the WTO in 1995, the provisions of this waiver were challenged by the United States and four Latin American nations. The decision severely curtailed the EC's ability to use economic principles and strategies to enhance the well-being of some of the world's poorest countries.

The bananas case is important because the EC attempted to use market mechanisms to meet development needs. The Lome Convention is in many respects considered an unconventional agreement by free-traders because it uses quotas to guarantee a market share for the world's poorest countries. But a non-standard approach can be an innovative one. However, the WTO failed to recognize the limits of theoretical free trade models. From a practical point of view it believed that the abstract principles of global free trade were more important than an economic assistance program. The bananas case is a powerful illustration of the ways multi-national corporations can use a WTO decision to gain market share at the expense of poorer countries. As a result of this dispute, the EU has pledged to move to a tariff-only system for its banana imports by 2006.

The Liability of Cultural Sovereignty

Canada – Certain Measures Concerning Periodicals (March 1997)

The Canadian periodicals dispute exemplifies the WTO's position on the relationship between trade and culture. Culture has never been covered by WTO trade codes, though it has not been totally excluded as well. Many countries protect their cultural industries while others have adopted a more laissez-faire approach. As US cultural industries have increasingly dominated book and magazine publishing, television, films, music, and the Internet, culture has become a hot-button item for the WTO. On one side, Washington has been aggressive in pressuring countries to regard their industries as simply a commercial opportunity. With such a commanding position, US industries dominate globally much like the way McDonald's and Walmart dominate the food and retail sectors. The countermovement against US cultural imperialism emerged on streets of Seattle and the Quebec summit. But as a trade issue, Europe, Latin America, and Canada have taken a lead in demanding that culture not be included in WTO rules and negotiations and that there be a cultural exemption clause.

The dispute involves a challenge by the United States against Canadian measures to protect its magazine industry in order to promote Canadian culture. It is estimated that US magazines account for approximately 80% of shelf space in the Canadian retail market. In an attempt to level the playing field for Canadian magazine publishers, the Canadian Government effectively imposed a ban on split-run magazines and prohibited companies from claiming tax deductions for advertising in non-Canadian publications.

In 1993, the establishment of the split-run edition, Sports Illustrated Canada, disregarded these measures aimed at protecting its magazine industry. Sports Illustrated was able to avoid the Canadian ban because it was produced in Canada even though its editorial content was transmitted from the US. In 1995, Canada responded by adopting an excise tax of 80% on advertising revenue for magazines originating abroad. To avoid the tax, a split-run magazine would have to produce a publication that featured 80% Canadian content. The US objected to the measures as being trade restrictive and protectionist and filed a complaint with the WTO.

The WTO ruled in favour of the United States, concluding that the Canadian Government unfairly restricted the sale of US magazines in Canada. The WTO

treated cultural goods and services like any other tradable commodity. The WTO encroached on Canada's cultural sovereignty to further its own goal of trade liberalization. By defining what is acceptable and what is not, the WTO has significantly narrowed the scope for cultural diversity and the opportunity for countries to implement national policies and goals aimed at protecting their national cultures in the face of globalizing forces.

A Turning Point For the WTO

The organization operates within a legal culture backed by panel judges, legal rules and standards, disputes and judgments. Nevertheless the WTO has suffered from a lack of transparency, accountability, and democratic participation. It is plagued with secrecy, ignores issues of accountability within its decision-making processes, and does not have mechanisms in place to allow citizen participation within the decision-making process.

As the G8 leaders discuss how to further develop the economies of industrialized nations and invigorate the less-developed ones of Africa and elsewhere, the institution needs to re-examine the viability of its one world-one system approach to developing trade rules. The current mindset of one size fits all can no longer be supported. Its universal approach is particularly limiting when it comes to improving international food safety standards, promoting economic development in lieu of direct aid for impoverished nations, and recognising cultural diversity in the tapestry of nations. The three cases described in this report represent important litmus tests on the adequacy of the WTO's legal culture and economic philosophy.

Of central concern is whether the WTO can respond to the challenges that result from its narrow view of universality in applying international trade laws. The WTO's principle of universality need not necessarily be anti-pluralistic in the sense that it could have the ability to encompass different standards, higher standards, and flexible standards.

It is not that the WTO is setting and enforcing universal rules, but that the WTO is setting and enforcing basic standards as inviolable rules, ones that are too low and narrowly focused on economic interests. It is making this mistake because it does not have the knowledge, expertise, or organizational infrastructure to promote diversity within its decision-making framework. The result is discrimination against diverse domestic policy initiatives, including setting food-safety standards, creating economic development programs and preserving national culture, which the WTO mistakenly interprets as non-tariff barriers to trade. In the Doha round, these kinds of non-tariff barriers are targeted to be dismantled. Significantly, what the WTO defines as non-tariff barriers are the very instruments that helped northern countries develop. The international trade system has a short memory indeed. It has lost sight of the continuing importance of these established trade strategies now that industrialized countries require open markets for further development.

In its current form, the WTO is not the proper forum to deal with non-trade issues. The WTO can become a proper forum for such issues if it expands its vision of trade and commercial interests to take into account the social deficits of

food safety, culture, and development, and develop codes that level the playing field. Part of this involves acting in coordination and cooperation with other international institutions such as the United Nations or the International Labour Organization.

So far, the WTO has not coordinated its policies or practices with other International institutions, but rather has preferred to consider trade issues in an isolated policy framework. This isolation allows the WTO to shirk its responsibility for the non-trade impacts of its decisions. As a result, social deficits will grow in frequency and the legitimacy of the institution will continue to be questioned.

Measuring Mediocrity? Safety in standards setting at the WTO

*EC - Measures Concerning Meat and Meat Products (Hormones)
Complaints by the United States and Canada*

*WTO Panel Reports 18 August 1997
WT/DC26/R/US
WT/DC48/R/CAN*

WIN

*United States
Canada*

LOSS

European Communities

DISPUTE SUMMARY

Overview

In 1996, both Canada and the United States requested that dispute panels be convened concerning EC restrictions and bans on the use of growth hormones in beef cattle. Since 1980, following a public outcry over the discovery of hormonal irregularities in some European adolescents, the EC had banned the use of certain hormones as growth agents in cattle and severely curtailed their application for therapeutic veterinary purposes.

The EC claimed that their regulations were legitimate in terms of establishing a reasonable safety level for the protection of public health. Further, that these rights were guaranteed under the Application of Sanitary and Phytosanitary Measures agreement (the “SPS Agreement”). Meanwhile, Canada and the US countered that such a ban could not be justified under the SPS Agreement and that the EC regulations amounted to a ban on North American beef more than a health and safety measure.

Agreement on the Application of Sanitary and Phytosanitary Measures

Article 5: Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.
2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.
7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members.

The results of both the dispute panel reports in 1997, and the subsequent appellate body report in 1998, concluded that the EC’s measures did indeed contravene the SPS Agreement. Ultimately, the EC was given 15 months to bring their measures concerning beef hormones into compliance with the SPS Agreement. When they subsequently failed to do so, Canada and the US were given permission to apply CAD \$11.3 million and USD \$116.8 million in annual retaliatory duties, respectively, on various European products.

Canada and US arguments

Canada and the US argued that a ban on the importation of animals, meat and meat products that had been subjected to the use of growth hormones contravened articles 2, 3 and 5 of the SPS Agreement because:

- An appropriate risk assessment had not been conducted;
- International standards and guidelines, to be considered in the absence of scientific justification for a ban, had not been considered by the EC in terms of the measures they adopted;
- The ban was not “provisional” as mandated by the SPS Agreement, it was permanent;
- The regulations exceeded the minimum level necessary to protect human health and welfare;
- The ban amounted more to a measure to control oversupply in the European beef market than a bonafide health and safety provision due to its excessive restrictions that unnecessarily impacted trade; and
- That other substances used in the production of beef cattle posed a higher health and safety risk to consumers and yet were subject to less stringent regulations; therefore
- The ban on the use of hormones for enhancing growth rates of cattle constituted a discriminatory practice against North American cattle producers and exporters in favour of domestic European producers.

It was further argued that animals, meat and meat products produced using growth hormones were “like” those that were not produced in this same manner. Consequently, the discrimination between “like” products produced whether in Europe or in North America constituted a violation of the GATT agreement.

EC argument

The EC argued that they had not in fact transgressed Article III.4 of the GATT which mandates equal treatment of “like” products regardless of their country of origin; the EC claimed that growth hormone-treated products were substantially different to those not so treated. Second, that GATT Article XI – which prohibits quantitative restrictions other than duties, taxes or other charges – was not violated because the sanitary measures constituted internal regulations as defined in GATT Article III and therefore, Article XI was not applicable. Lastly, that in the event the WTO found the measures did not constitute an internal measure under Article III, that they were protected by Article XX which protects a nation’s right to establish measures “necessary to protect human, animal or plant life or health.”¹

Even if the principles of the SPS Agreement did apply, the EC argued the ban on growth hormones was consistent with their international trade obligations. Their view was that:

¹ General Agreement on Tariffs and Trade, Article 20

- An appropriate risk assessment had been completed;
- The regulations were based on scientific evidence;
- It was within their rights to determine an appropriate level of public safety;
- They had the right to choose the measures by which public safety levels were implemented;
- Their actions were consistent with the precautionary principle – that "when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically."¹

In terms of the allegations of unfair treatment toward imported meat and meat products, the EC countered that all meat treated with such products was subject to equivalent treatment – the ban on hormone use for growth purposes – regardless of the country of origin. Finally, the EC suggested that the plaintiff had a burden of proof which it failed to discharge: first, that they needed to offer scientific evidence disproving EC studies suggesting that hormone residues were unsafe for human consumption and secondly, that they had not offered an alternative method that would uphold the safety level established by the EC but which would be less intrusive to international trade.

Third party arguments

In this WTO dispute, third party arguments were particularly significant in framing the boundaries of the case. The Australian and New Zealand perspectives reflected their concerns as exporters of meat and meat products. It was their view that:

- The scientific investigation conducted by the EC was insufficient to justify an increase in the level of public safety;
- The EC had failed to demonstrate that current international standards were insufficient to achieve the EC's desired safety margin; and
- The EC had failed to explain why it differentiated between carcinogenic risk tolerances of similar hormones used in humans for medicinal purposes and those used in cattle for growth promotion.

New Zealand further suggested that international food safety standards were sufficiently high to protect human health; that increased standards may result in beef cattle with high hormone levels that are naturally occurring being incorrectly identified as having been treated with growth hormones.

A key concern for Australia was the cost of compliance with the EC's directives. In order to continue exporting meat and meat products to the European marketplace, they had to monitor each head of cattle for growth hormone use.

¹ Appell, David. 2001.

This resulted in the challenges and difficulties of managing two cattle herds – those treated and those not treated with growth hormones – at an additional cost of AUS \$10 million per annum for the Australian cattle industry. The Australians argued that their compliance with this one world, two systems philosophy was one of necessity, not of choice – that they believed the EC regulations were illegitimate, costly and unnecessary.

In contrast, Norway argued in support of the EC regulations from the perspective of individual state sovereignty and the precautionary principle. Their primary concern was the right of WTO member states “to decide, when a risk to its population was present, the limits to the risk to which it would expose its citizens, and its freedom to choose the measure to achieve this protection as long as the measure itself was consistent with WTO obligations.”¹ It believed that a higher standard than could be justified scientifically was within the purview of the nation-state. It was Norway’s position that a WTO member need only provide evidence that a risk was present in order to invoke a particular measure to address it on the basis of the precautionary principle.

WTO Panel Decision

The WTO dispute panel established three conclusions based upon the initial two cases involving the EC, the United States and Canada. First, that the EC had failed to conduct an adequate risk assessment as required under Article 5.1 of the SPS Agreement. Second, the EC had failed to establish legitimate and justifiable distinctions upon which differing levels of sanitary protections could be applied. Accordingly, the result was a discriminatory effect upon international trade, which constituted a violation of Article 5.5 of the SPS Agreement. Last, that the EC failed to provide an adequate explanation of why the chosen level of sanitary protection diverged from existing international standards, a transgression of Article 3.1 of the SPS Agreement. Consequently, the panel concluded that the WTO’s dispute settlement body should request the EC bring its practices into compliance with their obligations under the SPS Agreement.

Appeals

All three primary parties – the EC, the United States and Canada – appealed certain aspects of the original panel decisions. Australia, New Zealand and Norway participated as third parties in the appeal as they had in the original panels. Among the issues raised in the appeal were the relevance of the precautionary principle in interpreting the SPS Agreement. The Appellate Body concluded “that the precautionary principle would not override the explicit wording of Articles 5.1 and 5.2 and that the precautionary principle has been incorporated in, inter alia, Article 5.7 of the SPS Agreement.”²

The result of the appeal was that the EC was again instructed to bring its measures into compliance with the SPS Agreement. Following the failed appeal and a further refusal to fully comply, a WTO arbitrator approved retaliatory duties of USD \$116.8 million in damages to the US and CAD \$11.3 million per year to Canada. Despite the panel ruling, the dispute remains unresolved.

¹ WT/DS26/R/USA. P. 122.

² WT/DS26/AB/R; WT/DS48/AB/R. p. 98.

Diversity Deficit

Winners

Canada and The United States:
Succeeded in enforcing a level playing field for trade based upon common international norms and standards.

The Principle of Universality:

In the application of trade laws, universal principles were upheld, reinforcing the notion of one set of trade rules for everyone.

Losers

The European Community:

Despite invoking the precautionary principle and equally applying it to all nations, the EC was unable to justify a higher-than-normal standard in food safety.

The Principle of Diversity:

Diversity suffered a setback when use of the precautionary principle to protect unique needs and challenges was disallowed.

Explanation

This case illustrates the conflict that results when international standards collide with concerns regarding state sovereignty. Three key issues are involved: who determines appropriate levels for food safety; how does the precautionary principle affect these levels; and what is the impact upon decision making by national governments. The results are clear. Unless a scientifically-justifiable case can be made for raising food safety levels, a nation may not permanently impose a higher standard than those agreed upon by international authorities in the field. The principle in the beef hormone case becomes one of universality versus diversity: do we forego the possibility of higher standards to achieve a level playing field, or do we sacrifice a common framework for the flexibility of national individuality? The result in this case becomes a social deficit: the inability of nations to improve domestic food safety policies beyond international norms.

Safety According to WHO's Standard?

Who determines food safety? As the SPS Agreement indicates, and supported by the panel decisions in this case, the appropriate international organizations involved are the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Together, these two institutions – both of which are governed by the United Nations – administer the Codex Alimentarius in which food standards are specified. For the past forty years, this joint commission has worked to both develop and promote appropriate food standards while striving for fairness in food trade. Social deficits evolve from the conflicting interests of the parent organizations.

The goals of WHO and the FAO are potentially conflicting. WHO's definition of health is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."¹ In contrast, the purpose of the FAO is "to raise levels of nutrition and standards of living, to improve agricultural productivity, and to better the condition of rural populations."² Conflict can arise, as in this beef hormone case, when efforts to increase agricultural productivity have unexpected effects on the quality of human health.

It was the EC's perspective that the growth hormones used to increase beef production hurt the health of Europeans. Thus, from their view, the ban on the use of such hormones – by both European and non-European producers operating in the European market, was justifiable based upon the scientific evidence available to them. Their research, however, was not sufficiently complete to merit a revision to the Codex's standards. This raises the following question: when developments in the agricultural sciences outpace those in the human sciences and food safety legislative disciplines, what recourse is available to nation-states? According to the beef hormone case, options for national governments are limited. This is a significant defeat for the EC, Norway and other like-minded countries that believe in self-determination of national standards. Consequently, many national food safety standards will be directly or indirectly influenced by this decision.

**The WTO:
Becoming Cautious
With the Precautionary
Principle**

The EC beef hormone case is the signature example for studying the role of the precautionary principle within WTO jurisprudence. Its value as a guiding principle in international trade law was tested in this case; its worth being severely diminished by the outcome. This principle was a strategic defence against the possibility of international intrusion into domestic standard setting but the WTO has significantly curtailed its application. Its purpose was to protect human well-being in cases where scientific evidence was insufficiently advanced to safeguard our health. In the beef hormone case, the WTO has chosen a dangerous path: the precautionary principle can only temporarily be applied to raise food safety standards above international norms. In effect, nations cannot permanently establish higher safety standards to protect their citizens, even when such standards are applied universally to all food producers. Given recent developments with genetically modified foods, this decision is particularly distressing. The inability of nations to permanently apply the precautionary principle to justify higher safety standards restricts their available options to adhering to lower standards of a questionable nature or else non-compliance with a WTO dispute settlement panel, neither of which are particularly appealing.

¹ Preamble to the Constitution of the World Health Organization

² Food and Agriculture Organization

**Non-compliance:
Refusing to
Play by the Rules
of the Game**

The European Communities' bold refusal to abide by the decisions of the panel, appellate body and arbitrator brings the effectiveness of the WTO as an international medium for the resolution of trade disputes into question. Non-compliance with dispute panels was a possibility the WTO foresaw, but little did they know a case whose focus was the precautionary principle would result in an influential WTO member nation becoming so resilient in their defiance. The apparent willingness of the EC to accept in perpetuity the retaliatory duties placed upon them reflects the steadfastness of their position.

Non-compliance, however, hurts the WTO more than any of the national governments involved in the dispute. This is because WTO members are appointed and not elected; their legitimacy rests in the degree to which nations adhere to the collective decision-making of the institution. In contrast, national governments are elected. Were EC national governments to comply with the WTO ruling, in defiance of the wishes of the citizenry, they would face the possibility of electoral defeat. The WTO faces no such constraints. Accordingly, this lack of accountability enables them to strive for a level playing field for international trade; a one-rule-fits-all philosophy. This principle of universality in the application of trade laws fails to account for diversity in perspectives on social welfare and the valid need for asymmetrical health policies and safety standards. Further, it fails to acknowledge the fundamental objectives for nation-states: that before a government can enhance the economic well-being of its citizenry, it must have previously assured their personal safety and physical well-being. The outcome in the EC beef hormone case not only constrains the choices of nations with lower food safety regulations, but also restricts those that strive to exceed international standards. The result is a social deficit that leaves a bitter aftertaste.

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Banana Republic? International Development at the WTO

*EC - Regime for the Importation, Sale and Distribution of Bananas
Complaints by Ecuador, Guatemala, Honduras, Mexico and the United States against the
European Community*

*WTO Panel Report: 22 May, 1997 WT/DS27
Appellate Report: 9 September, 1997 WT/DS27/AB*

Win

*Ecuador, Guatemala,
Honduras, Mexico and the
United States*

Loss

European Community

Dispute Summary

Overview

The Lome Convention of 1989 granted by a GATT waiver that bananas imported from designated African, Caribbean and Pacific developing countries (ACP) were given preferential treatment in the EC's banana import licensing system. On Feb. 5, 1996 Ecuador, Guatemala, Honduras, Mexico and the United States requested consultations with the EC on its banana regime. They disputed the legality of the regime under Article 1 of the GATT (as well as several articles of the General Agreement on Trade in Services (GATS) the Agreement on Trade Related Investment Measures (TRIMS) and the Agreement on Agriculture (AG)).

This case is significant for three reasons. First, it calls attention to the dispute settlement mechanism's failure to provide constructive advice on the use of trade as a tool for development a time when the WTO is entering another trade round. This settlement partially dismantled a regional trade agreement designed to address the special needs of developing countries.

Second, it underlines the role of corporate interests at the WTO. The banana dispute was brought to the WTO because of Chiquita and Dole's pressure on the U.S. government. The European Union represents a major market for bananas and banana products which is largely serviced by African, Caribbean and Pacific least-developed countries. Thus, the case represents a significant triumph for corporate interests, who seem to be able to use the dispute settlement mechanism to attack a development agreement. Creating a level playing field is the driving force behind the WTO, but this case had the opposite effect, tilting the field in favour of large commercial interests.

Finally, the settlement expands the orbit of the WTO's rules and regulations to specialized trade agreements—which often directly impact developing countries. Existing legal norms ill-serve the interests of developing countries, whose needs do not fit neatly into the institutional framework.

Article 1 of the GATT, known as the Most-Favoured-Nation clause (MFN), obliges each member state to bestow upon all trading partners the same trade benefits given to the most favoured of its partners. All states trading in a particular good or service must treat all trading partners alike. Non-preferential treatment is the goal of the MFN clause.

GATT Article I
General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Consultations did not result in a mutually satisfactory solution. In May 1996, the Dispute Settlement Body (DSB) established a panel to hear the dispute. The WTO panel ruled against the EC, deciding that the banana regime, and indirectly the Lome Waiver, was in contravention of the MFN clause of the General Agreement. The panel concluded that "the system is flexible enough to allow . . . appropriate policy responses in the wide variety of circumstances across countries, including countries that are currently heavily dependent upon the production and commercialization of bananas."¹ The WTO concluded that the ACP countries did not require special treatment from the EC.

On appeal, the Appellate Body clarified the issues, stating that the EC could live up to its Lome Convention commitments without violating the MFN clause of GATT.

¹ WT/DS27/R/ECU

**Grounds for
Dispute:
Ecuador et al**

The complaining parties presented their arguments with respect to tariff issues, allocation issues, and import licensing. Ecuador et al. challenged the three-tiered structure of European banana import tariff rates on the basis that differential rates based on country of origin were a clear violation of Article I: 1 of the GATT. The EC's complex system of tariffs was designed to ensure a market share for APC countries, with less competition and fixed prices. The parties also asserted that the EC allocated shares of its banana market "in a manner inconsistent with GATT Article XIII: 2"¹ Article XIII is an extension of the Most Favoured Nation clause which states that when quotas are imposed by an importing or exporting country, the share of the quota given to each supplier must be equivalent to the market share they would most likely win on the open market. Finally, the parties argued that unlike the licensing system for ACP bananas, the one for Latin American banana imports was unnecessarily complex and that the "system, both in its totality and in its individual elements, created unfavourable conditions of competition compared to the simple arrangements for traditional ACP bananas."² They also argued that certain specific aspects of the licensing system were discriminatory under the TRIMS Agreement and the Agreement on Agriculture.

**Response by
The European
Community**

The EC argued that its organization of the banana market consisted of two separate regimes. The first was the ACP regime, set up as part of the EC's responsibilities under the Lome Convention; the other was a bond rate of duty for imports in excess of tariff quotas. "This was, in the view of the EC, a normal tariff quota as exists for many agricultural products in many Members."³ Because of the presence of two different regimes, the non-ACP members could not plead discrimination because they are all subject to the same tariff in excess of quota. The fact that the quota was filled by the ACP countries was should make no difference, because tariff rates for all non-ACP countries are the same. The Lome Waiver granted by the GATT council in 1994 allowed the prima facie discrimination which existed between ACP and non-ACP producers for the purpose of development.⁴

It also insisted that the Lome Convention "was one of the most important instruments of [its] policy of development cooperation and as such was intended to 'promote and expedite the economic, cultural, and social development of the ACP states."⁵

¹ WT/DS27/R/ECU p. 28

² WT/DS27/R/ECU p. 29

³ WT/DS27/R/ECU p. 30

⁴ WT/DS27/R/ECU p. 32

⁵ WT/DS27/R/ECU p. 32

Article 1 of the Lome IV Convention of 1995

The Community and its Member States, of the one part, and the ACP States, of the other part, hereby conclude this Convention in order to promote and expedite the economic, cultural and social development of the ACP States and to consolidate and diversify their relations in a spirit of solidarity and mutual interest.

The Contracting Parties hereby express their resolve to intensify their effort to create, with a view to a more just and balanced international economic order, a model for relations between developed and developing states and to work together to affirm in the international context the principles underlying their cooperation.

The EC's instrumental role in the agricultural aspect of Lome, and indeed its obligation under the convention was to contribute to remedying the instability of revenue flow in the marketing of ACP agricultural produce. In light of the importance of Lome for ACP economic development, and the waiver granted by GATT, the EC argued that any preferential treatment that did occur should be allowed to continue.

Finally, in respect to Lome, the EC argued that the panel was not empowered to give authoritative interpretation to any agreement except those covered by the Uruguay round of multilateral trade negotiations.¹ The last argument raises important questions of jurisdiction and reach. Are the WTO's, governance powers retroactive? If not, the WTO has no jurisdiction over the Lome Agreement. If they are retroactive, which takes precedence in a conflict, the WTO Agreement or the earlier negotiated regional agreement?

WTO Panel Decision

The panel ruled in favour of Ecuador, Honduras, Guatemala, Mexico and the United States, finding that aspects of the EC's import regime for bananas were inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Article 1.2 of the Licensing Agreement and Articles II and XVII of GATS. The panel rejected the EC's argument that to the extent that the regime was preferential, it was covered under the Lome Convention.

Appeals and Arbitration

In June, 1997 both parties appealed the panel report on several points of law. The appellate body upheld most of the conclusions of the panel report. However, it did clarify several points having to do with the Lome Convention. The appellate body concluded that the EC is required under the relevant provisions of Lome to provide duty-free access for traditional ACP Bananas, but is not

¹ WT/DS27/R/ECU p. 33

required to “allocate tariff quota shares to traditional ACP in excess of their pre-1991 best-ever export volumes.”¹ Furthermore, the EC is required to provide preferential tariff treatment for traditional ACP bananas, but is not required to “maintain the EC import licensing procedures that are applied to third-country and non-traditional ACP bananas.”²

On October 16, 1997 the EC informed the DSB that it would fully respect its international obligations as outlined in the panel and appellate reports, but argued that amending its banana import regime would be time-consuming and difficult; it would need until January 1, 1999 to implement the appropriate changes. DSB implementation periods average approximately fifteen months, but the complaining parties argued that a ‘reasonable period of time’ of 15 months and one week was excessive. The Arbitrator ruled in favour of the EC, deciding that the complexity of the case required a longer implementation period.

In November 1998, ten months after the last report of this dispute settlement was released, the US again protested the EC’s banana import practices, threatening tit-for-tat trade retaliation. The European Union trade commissioner, Sir Leon Brittan, claimed that U.S. demands vis-à-vis preferential treatment of ACP banana imports did not make sense because it did not affect a single American job. The sanctions, he added, were the result of Chiquita and Dole’s strong lobby in Washington.

On April 11, 2001, the U.S. and European Union called a truce in the banana war. The EU backed down in the face of punishing U.S. tariffs on European luxury goods. It pledged to phase in a tariff-only import system by 2006. As well, the European Union commissioner pledged to propose to the EU council of ministers an import adjustment in order to expand access to Latin American bananas, while still securing a share of the market for ACP imports. Chiquita praised the agreement, but Ecuador and Dole (whose banana production is now concentrated in the West Indies) called it an arrangement to secure Chiquita a fixed market share in the EU. Ecuador is considering a protest to the WTO.

¹ WT/DS27/AB p. 113

² WT/DS27/AB p. 113

Diversity Deficit

Winners

Ecuador, Guatemala, Honduras, Mexico and the United States:

As one of the largest exporters of bananas in the world, Ecuador stands to gain from this decision. Guatemala, Honduras and Mexico also export a significant volume of bananas and banana products. U.S. exports of bananas are minimal.

However, the U.S. stands to gain in less direct ways from its stand with domestic corporate interests.

Multinational Exporters:

Chiquita and Dole are just two of the U.S. based multinational corporations that stand to benefit from this decision.

Developed Countries:

Those countries with well-developed economies and those with comparative advantage in agricultural commodities stand to benefit from this decision.

Losers

European Community:

One of its most effective development and aid packages must be partially dismantled in favour of a stricter market-based approach to economic development.

African, Caribbean and Pacific Countries:

The ACP countries are losing their current volumes of duty-free bananas exported to the European Community.

Least Developed Countries:

This decision highlights the WTO's continued efforts to find market-based answers to development issues. However, the trading system does not provide the trade security needed given the levels of risk LDCs take when entering into the WTO trading system.

Trade not Aid?

The social deficit in this case can be seen in the uneven playing field faced by developing countries, when developed countries give precedence to open markets over development needs. Oxfam asserts that "hypocrisy and double standards characterize the behaviour of industrialized countries towards poorer countries in world trade."¹ The 49 poorest countries designated by the UN as LDC, account for less than one percent of world trade. When protectionist measures are dismantled without consideration given to the needs of developing countries, a social deficit is created. The European Community's Banana Framework Agreement looked like a good way to further development in ACP countries through trade instead of aid. Why dismantle it?

The panel identified the EC's banana regime as a distortion of trade, not an aid to trade. But the consensus in Europe was that this was a mistake. The banana

¹ Oxfam 2001

framework was a market alternative to development assistance. In its newest report on global economic development, *Rigged Rules and Double Standards: Trade, Globalization and the Fight against Poverty*, Oxfam states, “the potential benefits of trade massively outweigh those associated with aid. . . The financial transfers from development assistance are dwarfed by the potential benefits that would result if developing countries increased their share of world exports. As a group, developing countries generate more than 30 times the revenue per capita through exports (\$322) as they receive in aid (\$10).”¹ The WTO panel seems to be saying that trade is preferable to aid only as long as it does not contravene the narrow reading of GATT derived principles.

Despite the fact that the Europe’s entrance into the Lome Convention was granted by GATT waiver, the WTO has seen fit to significantly modify the conditions of the agreement, opting for a narrower interpretation of the MFN clause. This destruction of a viable international trade and development program raises issues about the reach of the WTO, and about the extension of WTO discipline into regional trade agreements. The dismantling of the Canada/US Auto pact is one more example of this extended reach, which affects developed and developing countries alike. Further, the role of corporate interests at the WTO raises questions about the benefits of WTO membership.

Corporate Interest At the WTO?

Corporate interests are varied, complex and demanding. In this case, the WTO is not preventing protectionism as much as it is inhibiting development. The settlement places corporate interests above development issues and shows how powerful actors can influence the WTO Dispute Settlement Mechanism to their advantage. Chiquita (formerly United Fruit Company) and Dole (formerly Standard Fruit Company), two of the largest fruit producers in the world, have no investment in ACP banana production.² For this reason, in 1994, both companies claimed that the EC banana import regime harmed their commercial interests as producers of Central American and West Indian bananas. Chiquita went so far as to enlist the support of Senator Robert Dole to call for trade retaliation in the U.S. senate. In exchange for his support, Dole received \$155,000 in campaign contributions during his 1994 presidential race against Bill Clinton, and use of Chiquita corporate aircraft for his campaign travel. Often the line between trade policy and domestic politics are blurred, and the WTO provides no buffer between domestic politics and global governance concerns.

¹ Oxfam 2002

² The following information compiled at www.unitedfruit.org

A New Development Round?

A new round of trade negotiations was launched in November, 2001 at Doha in Qatar. In the ministerial declaration released, ministers announced: "We stress our commitment to the WTO as the unique forum for global trade rule-making and liberalization, while also recognizing that regional trade agreements can play an important role in promoting the liberalization and expansion of trade and in fostering development."¹ The declaration is a partial recognition of the importance of regional trade agreements in promoting development, but the WTO needs to allow more flexibility in multilateral agreements between developed and developing countries. A development round must address trade issues as they relate to the unique needs of developing countries.

While the developed countries have seemingly embraced the Washington Consensus, there is greater scepticism in the third world. Martin Wolf of the Financial Times writes, "It would be foolish to claim that there exists a simple way of promoting economic development throughout the world. It would be equally ludicrous to argue that all developing countries need to do is liberalize their trade."² Yet, the WTO has expanded its orbit to include the application of its rules and regulations to special trade arrangements. In this case, its expanded reach may force a return to aid programs in lieu of trade-based development for ACP countries.

While quotas are usually considered to be harmful to trade, they may sometimes be beneficial. Likewise, tariffs may also have a role to play in exceptional circumstances. Dani Rodrick asserts, "The available studies reveal no systematic relationship between a country's average level of tariff and non-tariff restrictions and its subsequent economic growth rate. If anything, the evidence for the 1990s indicates a positive relationship between tariffs and economic growth. The only systematic relationship is that countries dismantle trade restrictions as they get richer."³ Trade liberalization may be a partial answer to development questions, but strategic trade protection must also be recognized as an effective answer to the questions of economic development and poverty reduction.

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¹ Ministerial Declaration, Doha, 2001

² Financial Times, November 21, 2001

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Commodifying Culture? Making Room for Cultural Diversity at the WTO

*Canada – Certain Measures Concerning Periodicals
Complaint by the United States against Canada*

*WTO Panel Report, March 14, 1997, WT/DS31/R
WTO Appellate Report, June 30, 1997, WT/DS31/AB/R*

Win

United States

Loss

Canada

DISPUTE SUMMARY

Overview

Cultural policy in Canada is a hot-button issue as the country has been faced with the realities of Quebec nationalism and US cultural domination. In response to US domination of film, music, television, and book and magazine publishing, the Canadian Government promoted Canadian culture through the use of subsidies, quotas, and various other measures. The other way the Government has responded has been to protect Canada's cultural industries and give them some breathing space to gain access to their own market. Canada and the US have had many conflicts as US entertainment industries have attempted to gain greater access to the Canadian market and prevent the Canadian Government from promoting Canadian culture in a focused and conscious fashion.

In 1965, Canada enacted *Tariff Code 9958* banning the importation of split-run periodicals, special issues containing advertisements primarily directed at the Canadian market but replicating the editorial content of a foreign issue. However, this ban was not applicable to split-run editions printed locally in Canada, and in 1995 this fact was revealed when the US based *Sports Illustrated* announced its plan to begin the local publication of its magazine in Canada as a split-run issue of the US edition.

In 1995, Canada enacted Part V.I of the *Excise Tax Act*¹ imposing a tax on all split-runs distributed in Canada. The tax, stated to be 80% of the value of all the advertisements inserted in the split-run, was levied on each issue. In addition, the Department of Canadian Heritage commenced an assistance program where it paid Canada Post Corporation (CPC) to provide Canadian Publishers with reduced "Canadian commercial" postal rates that were lower than the "commercial international" rates applied to imported magazines.

In June 1996, the US initiated the establishment of a WTO Dispute Panel concerning Canadian measures restricting the importation into Canada of split-run magazines. The US claimed that these measures were discriminatory and constituted a violation of Canada's WTO obligations

¹ R.S. 1985, c.E-15. (<http://laws.justice.gc.ca/en/E-15/48510.html>)

Tariff Code 9958 prohibits the importation into Canada of the following:

1. Issues of a periodical, one of the four immediately preceding issues of which has, under regulations that the Governor in Council may make, been found to be an issue of special edition, including a split-run or a regional edition, that contained an advertisement that was primarily directed to a market in Canada, and that did not appear in identical form in all editions of that issue of that periodical that were distributed in the country of origin.
2. Issues of a periodical. . . which has. . . been found to be an issue of more than five per cent of the advertising space in which consisted of space used for advertisements that indicated specific sources of availability in Canada, or specific terms or conditions relating to the sale of provision in Canada, of any goods or services except where the indication of such sources of availability or such terms or conditions was primarily directed at persons outside Canada.

**United States’
Argument**

The US complaint consisted of three components. First, the US argued that *Tariff Code 9958* is a violation of Article XI: 1 of GATT 1994, which prohibits quantitative restrictions on imports. *Tariff Code 9958* applied to both split-run and domestic magazines containing even a small amount of advertising targeting Canadian readers – single advertisement in the case of split-runs and 5% or more of the advertising space in the case of magazines generally. In effect, the ban eliminated these magazines from the Canadian market and ensured that only Canadian magazines could compete for domestically-oriented advertising, thereby securing a monopoly for Canadian magazines on the sale of magazines containing such advertisements.

The second argument made by the US was that Part V.I of the *Excise Tax Act* is inconsistent with Article III: 2 and Article III: 4 of GATT. The US argued that the 80% tax on split-run editions was designed to eliminate competition between split-run magazines and domestically produced magazines because it ensured that Canadian magazine producers secured all of the revenues associated with advertisements directed at Canadian readers. The tax is designed to ensure that foreign-based publishers forego the commercially attractive option of publishing a split-run edition of an existing magazine for the Canadian market.

Finally, the US argued that lower postal rates for domestically produced periodicals under the “funded” and “commercial” rate systems are inconsistent with Article III: 4 of GATT 1994, and is not a domestic subsidy within the meaning of Article III: 8 of GATT 1994. Canada’s postal rates for magazines were described by the US as discriminatory because it provided less favourable treatment to imported magazines than to like domestic magazines.

Canada's Arguments

Canada's argument focused on the government's public policy objective of ensuring that magazines with editorial content developed for the Canadian market can compete for the limited advertising revenues. The three measures in question, Canada argued, are part of this public policy objective to help the Canadian periodical industry raise advertising revenues and to ensure there was a market for Canadian publications that reflected the Canadian perspective or culture. Canada defended the measures prohibiting split-runs on the basis that Canada had not listed advertising services for coverage under the GATS agreement on services.

First, Canada countered the US claim that *Tariff Code 9958* creates a monopoly by arguing that "spill over" advertising or advertisements for products in wide-circulation US magazines reaches the Canadian public with significant consequences for the competitiveness of the Canadian industry, precluding the creation of a true monopoly.

In addition, Canada argued that *Tariff Code 9958* is part of a "package of measures with a single objective", that is, "to provide Canadians with a distinctive vehicle for the expression of their own ideas and interests."¹ Canada's long-standing policy objective has been to balance the need to establish and maintain a place for Canadian periodicals in the Canadian market while at the same time ensuring that Canadians have unrestricted access to foreign periodicals.

Second, Canada argued that the excise tax measure is designed to prevent the diversion of advertising to low-cost publications reproducing recycled editorial content at the expense of publications created for Canadians. The main source of revenue for magazines comes from the sale of advertising space and from the circulation of the magazine. Canada argued that the object of the excise tax is to maintain an environment in which Canadian magazines can exist in Canada alongside foreign magazines, not to discourage readership of foreign magazines.

With respect to the differential postal rates, Canada argued that the principle of national treatment as set out in GATT does not apply to the commercial postal rates charged by Canada Post because of the independent nature of Canada Posts' commercial operations for the distribution of publications.

Moreover, Canada argued that Canadian magazines and US magazines are not like products and could thus be treated differently. Canada argued that while US magazines can, at times, provide news for Canadians, they are not a substitute for Canadian magazines, which provide news about Canada. Canadian and US magazines were not like products and therefore not substitutable. The US product was not being discriminated against by the split-run tariff.

¹ WT/DS31/R

WTO Panel Decision

The WTO Panel rejected Canada's argument that Canadian and US magazines were not like products. The Panel disregarded arguments relating to content and focused on the product's physical characteristics. The Panel ruled in favour of the US, concluding that Tariff Code 9958 and the Part VI of the *Excise Tax Act* was inconsistent with GATT rules. The Panel, however, found that the funded postal rate scheme was consistent with GATT.

Appeals

On June 30, 1997, upon appeal by both Canada and the United States, the AB affirmed the US victory, and also ruled that Canada's postal subsidies for Canadian magazines violated GATT. Canada notified the WTO that it would comply with its ruling and still pursue its cultural policy objectives. Canada subsequently implemented the *Foreign Publishers Advertising Services Act*¹ (Bill C-55). The US threatened to impose punitive tariffs on Canadian exports of steel, plastics, textiles, pulp, paper and wood products, forcing Canada to amend its legislation.

¹ S.C. 1999, c.23. (<http://laws.justice.gc.ca/en/1999/23/3574.html>)

Diversity Deficit

Winners

United States:

Interests to promote its entertainment industry furthered by this decision.

US Based Publishers:

They gain access to the Canadian market and are able to establish split-run magazines in Canada.

Other Foreign Media Companies:

The dispute all cultural industries. Decision limits the ability of countries to implement national policies aimed at protecting national identity or culture. Commodification of all types of cultural goods and services.

Losers

Canada:

The Canadian magazine industry lost guaranteed access to its domestic market. Canada's sovereignty is weakened since the WTO placed commercial norms and practices above the interests of national identity and culture. From a democratic point of view, the Government is as accountable to the WTO as it is to its own public when establishing Canadian cultural policy.

Other Countries:

Other countries fear the infiltration of American culture across their borders. This is a real fear as the WTO has commodified culture. Any policies aimed a protecting national culture are deemed to be illegitimate barriers to trade.

Trading Away Culture

The diversity deficit in this case can be described as the loss of legitimacy of national policies aimed at protecting cultural industries when evaluated against principles of trade. In a borderless world, many countries feel vulnerable in the face of the homogenizing force of US culture. The fear is that they will lose their cultural particularity and distinctiveness. This comes at a time when globalization has brought about a growth of multiculturalism and identity politics. People everywhere want to communicate with a distinctive cultural voice. Article XX of the GATT permits countries to protect cultural industries and space. However, with the establishment of the WTO in 1995, the WTO has increasingly expanded its orbit to include non-economic areas despite the fact that it claims to be an organization only concerned with commercial interests.

One side of the debate argues that cultural goods and services are no different than any other good or service and should be fully covered by trade agreements. Like all internationally traded goods and services, cultural goods and services result from the application of capital, technology, and labour and depend upon success in the commercial marketplace for their prosperity.

On the other side of the debate is the argument that cultural goods and services should not be treated as ordinary goods. Cultural industries play a crucial role in

defining national identity and reinforcing national attachment and therefore deserve to be protected from the obligations of free trade agreements to allow governments flexibility in developing and protecting culture.

The WTO Panel and AB in this dispute rejected the latter argument and treated magazines, not as channels of cultural communication and propagation, but as any other tradable good. Canada's right to protect and nurture its own cultural expression was sacrificed for the promotion of free trade.

Setting the Precedent on Culture

The WTO panel and appellate body decided, from a purely commercial viewpoint, that Canada's measures to protect its magazine industry were illegitimate, classifying them as protectionist and discriminatory. The WTO impinged on Canada's national sovereignty by using a single standard to determine what is legitimate domestic policy and what is not. Culture, according to the WTO, is to be traded like any other good.

By so clearly treating magazines as tradable commodities rather than forms of cultural expression, the WTO also set the stage for further trade challenges to other forms of cultural protection. One of the results of this will be increased pressure by the US at future trade negotiations aimed at expanding regulation in the cultural sector.

It is important to note, however, that the WTO gave assurance that cultural protectionism remains legal under GATT. The Panel stated that, "the ability of any Member to take measures to protect its cultural identity was not at issue in the present case."¹ The events following this dispute suggest otherwise.

Canada's Response to the WTO Ruling

Canada sought to continue protection of its magazine industry by proposing legislation that would ensure that Canadian advertisers would advertise in Canadian publications. In 1998, the Federal Government introduced Bill C-55, defending the measure as being exempt from the WTO since it applied to an advertising service.

The US argued that the legislation was protectionist and discriminatory and did not respect the WTO decision, which required, in the US view, the entry of split-run magazines into the Canadian market. The US was prepared to impose retaliatory sanctions against steel, textiles and other goods if Bill C-55 was passed by the House of Commons.

In May 1999, Canada and the US reached an agreement whereby Bill C-55 was amended to allow foreign publishers limited access to the Canadian market, provided they establish a majority of Canadian content and new periodicals

¹ *Panel Report*, Supra note 2 para 5.45.

businesses in Canada. Under the terms of the agreement, US magazines exported to Canada will be able to carry 12% Canadian advertising without adding Canadian content, something that the original Bill would have prohibited entirely. Within three years, that number will increase to 18%. If US magazines want more than 18% Canadian ads for those editions, the new edition will have to contain substantial content, and the publisher will have to establish a Canadian office with Canadian staff. Canada also agreed to remove discriminatory tax laws prohibiting advertisers from receiving the standard business deduction if they advertised in foreign-owned publications within one year and will permit 51% foreign ownership of a magazine publishing business within 90 days and will permit 100% ownership after one year.

The final deal gives far less protection to Canadian magazine publishers than that promised in the original Bill. Any foreign magazine will now be able to establish a split-run magazine in Canada. To soften the blow, subsidies were promised for Canadian magazines unable to compete under the new arrangement.

Reconciling Trade and Culture

The extent to which cultural goods should be subjected to trade obligations remains unclear and unresolved. Yet WTO jurisprudence is proceeding to unilaterally redefine culture in purely commercial terms. There is a need to find a balance between cultural policy objectives and international trade agreements. But can trade and culture be reconciled? One option is to carve culture out of free trade agreements. Exempting culture from trade agreements is not a new phenomenon. The *North American Free Trade Agreement* (NAFTA) has a partial exemption for cultural industry matters carried forward from the *Canada-US Free Trade Agreement* (CUFTA).¹ The WTO Agreement does not contain a similar exception for cultural industries.

A second option is to create an international cultural diversity instrument to define the rules of the game for trade and investment in cultural goods and services. The proposal for a new international instrument originated in the 1999 report of the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT). The objective of such an instrument would be to preserve and promote domestic cultural policies within international obligations.

Canada's search for allies in support of expanding trade rules to include cultural diversity led to the formation of the International Network on Cultural Policy (INCP). As of March 2001, it has 46 Members.² The goal of the INCP is to create an instrument under the control of an organization outside the WTO. The main purpose of such an instrument would be to preserve cultural diversity

¹ Article 2005(1) of CUFTA exempts cultural industries from the provisions of the Agreement except for tariff elimination, a divestiture of an indirect acquisition, Article 2006 (retransmission rights), and Article 2007 (print in Canada requirement). Article 2005(2) allows a party to take measures of equivalent commercial effect in response to actions that would have been inconsistent with the agreement but for Article 2005(1).

² International Network on Cultural Diversity (INCD). Member Countries.

through dealing with rights and obligations of countries regarding specific issues such as subsidies, content quotas, ownership restrictions, use of public enterprises, protection of intellectual property and competition policy issues.

Despite these ongoing efforts, the Doha Ministerial Declaration, while referring to other key social objectives (sustainable development, protection of the environment, public health, etc.), failed to include the issue of cultural diversity for future trade negotiations¹. Notwithstanding this failure, the United Nations Educational, Scientific and Cultural Organization (UNESCO) made a promising declaratory statement committing itself to "...taking forward notably consideration of the opportunity of an international legal instrument on cultural diversity."²

The cultural diversity deficit of the WTO needs to be addressed in a compelling and realistic manner. The dispute at hand illustrates the way in which the WTO subjects cultural industries to all disciplines of the Agreement, creating less room for cultural diversity within the framework of liberalized trade and commercial values. The WTO is impaired by its legal culture when it comes to recognizing the significant role that cultural industries play in defining national identity. Instead, it sees cultural goods and services like any other tradable commodity. It subjects a world of cultural diversity to its single universal commercial model of world trade. To the WTO, protecting the periodical publishing industry is no more allowable in the era of advanced information technology, open markets, and global trade than impeding the free flow of bananas.

However, if the WTO were to expand its philosophy beyond free trade and commercial interests, it would be more open to recognizing national policies and goals aimed at protecting local culture and national identity as important and legitimate goals, not impediments to trade. This would require the WTO to set a much higher standard than was set in this dispute, placing culture above and beyond the rules of the trading game. Expanding the WTO's one world-one system approach to all issues to a more multicultural understanding of free trade would allow it to recognize that concerns about local culture and national identity are legitimate and can fit within the broader goals of free trade -- to increase people's quality of life.

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¹ Neil, Garry. 2001

² United Nations Educational, Scientific and Cultural Organization (UNESCO). *Universal Declaration on Cultural Diversity*. Article 12.1.

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Conclusion

WTO trade decisions affect all aspects of social, political, and economic life, subjecting national policies and programmes to the disciplining principles and values set out in its various agreements. Accordingly, the result has been a growing tension between the need to establish universal rules and the pressures of flexibility in accommodating different countries' political, economic and social agendas. Such tensions, as we have seen, are exemplified in each of these disputes.

The beef hormone case illustrates the conflict between universalism and diversity promotion as seen in the WTO's one world-one system approach to jurisprudence. Had the dispute resolution panel not taken this particular approach, it is possible the EC could have permanently applied a higher standard in food safety and that this standard would have applied equally to all nations with whom it dealt.

However, the panel decision does not distinguish between the value of the principles in the GATT and the more technical orientation of the SPS Agreement. It rejected the principle of 'equal treatment' – diverse standards applied equally to all - in favour of 'treatment as equals' – one standard applied universally. The result is the maintenance of the WTO's one world-one system rule-making philosophy that fails to capture the need for diversity in standard setting required by sovereign nations to protect the health and welfare of their citizenry.

Similarly, tensions between universal trade standards and the needs of developing countries are intensified by the WTO's reach into multilateral agreements. The bananas case is the first case to challenge the legality of a multilateral agreement approved under GATT. The European Community argued that its import regime was allowed by GATT waiver, but the panel chose to set aside the waiver, opting to define trade for the purposes of economic development more narrowly.

As a result, developed countries who wish to sign multilateral trade agreements with developing countries as an alternative to aid-based programmes will find that trade for the purpose of development is increasingly constrained by the WTO. The appellate body modified the panel's position, allowing some unique standing for waiver-favoured bananas. Nevertheless, the case represents a significant incursion into the realm of domestic social policy. The WTO dealt a serious blow to an important trade-based development programme, and redefined the parameters within which trade can be used as an alternative to aid. Despite the best efforts of the EU to strike a compromise, it has capitulated to the WTO and US demands.

The rejection of Canada's measures to protect its magazine industry in the periodicals case further illustrates the one-track mindset of the WTO. The decision gives foreign publishers even greater access to the Canadian market. In the Canadian case, this means American publishers can enhance their already dominant market position among English language periodicals.

Efforts by the Government of Canada to protect its domestic magazine industry have failed. The WTO failed to acknowledge the importance of cultural diversity, not only for developed countries like Canada, but also for developing nations who fear the infiltration of American culture across their borders. By treating cultural products such as magazines like any other tradable commodity, the WTO has once again placed trade priorities above non-trade domestic interests. Subordinating culture in this way gives WTO members the precedent-setting authority to infringe on other countries' cultural sovereignty.

These three disputes illustrate the need for diversity within the WTO rules and dispute settlement process. The need to integrate the interests and goals of diverse countries more effectively into the world trading system was the main focus of the Doha development agenda. The agenda of negotiations include a wide range of trade related issues such as: enhanced market access, balanced rules, and effectively financed technical assistance and capacity building programs.

The Doha agenda is important in bringing to the fore important and legitimate concerns of developing countries. Future negotiations will have to address the substantive issues facing developing countries, rather than merely agreeing to review them. Its future success lies in its ability to resolve these challenges in a way that is sensitive to the diverse needs of the developing world. Such sensitivity is crucial in light of the current lack of diversity as exemplified in the above three cases. The WTO seems to have no room for flexibility and rejects national initiatives that go beyond the narrow market-model it promotes.

As the leaders of the world's most affluent countries meet in Kananaskis, their discussions will help define the developed world's approach to global economic development. It is a widely held belief that economic growth for both the developed and developing worlds is only achievable through trade liberalization; the imbalanced outcomes of WTO dispute settlements suggest that diverse strategies are required to address the non-economic impacts of global free trade: social issues such as health standards, economic development, and cultural sovereignty.

If the WTO continues to reject rules-based diversity – freedom to set higher international standards, to provide special consideration for economic development within the poorest countries, and to allow global cultural diversity to grow and flourish – the result will be a growing social deficit, which will further jeopardize the legitimacy of the World Trade Organization. If the institution wishes to increase the economic and social wellbeing of its member nations, in particular those in Africa, the G8 leaders meeting in Kananaskis need to consider how to implement principles of diversity at the WTO.

Notes