



Political constraints in resolving international disputes on trade and sustainable development

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The spectacular failure of the millennium round of trade negotiations in 1999 illustrates the extent to which political constraints on multilateral trade liberalisation have increased in recent years. Both the difficulties of **agreeing on new rules** to extend and deepen the multilateral trade regime in a new round of trade negotiations and the political constraints on the **application and effectiveness of existing rules** have become more visible. In cases such as the EU ban of hormone treated beef or the US Foreign Sales Corporations export tax breaks the WTO dispute settlement procedure and the authorisation of retaliatory tariffs have not led to a change in the offending party's rules. Paradoxically, in these cases dispute settlement has resulted in less, rather than more, trade liberalisation. So far the political and economic damage has been limited because the cases only concerned relatively narrow issues. However, the conflict between the EU and the US over **European regulations governing the approval and sale of genetically modified organisms (GMOs)** may soon develop into a much more serious challenge to the legitimacy and credibility of the multilateral trade regime.

This paper draws on the conflict over the European GMO regulations to illustrate some of the main political constraints on the application and the effectiveness of WTO rules. Building on this analysis, I consider the option of supplementing existing WTO rules with new procedures to deal with certain highly political trade disputes. This is followed by a discussion of some of the main questions and problems that would have to be addressed by researchers and political actors to further develop such reforms.

The case of the European GMO regulations

Given that the US has been complaining about the negative trade effects of European GMO regulations for more than ten years, it seems surprising that no formal complaint has yet been filed with the WTO. This **reluctance to appeal to the WTO** is particularly striking if one takes into account that, despite protests from the US, the European GMO regulations have been further strengthened in recent years. In addition, in 1998 EU Member States imposed a *de facto* moratorium on the approval of new GM products for the European market, which is still in force.

There seem to be several reasons why the US has not yet lived up to its often repeated threats to resort to the WTO. The most important of these appears to relate to the **political and economic risks** involved in a WTO challenge. These risks primarily stem from the fact that the

issue of GMO regulation is highly politicised in the EU, where environmental NGOs and most consumers are opposed to a rapid commercialisation of GM agricultural products. This situation renders the outcome and the political and economic effects of WTO proceedings uncertain in several respects:

- **Uncertain outcome of WTO dispute settlement procedure:** Although previous WTO rulings, such as the hormone beef case, suggest that the outcome of a dispute settlement procedure is likely to support the US position on the regulation of GMOs, factors such as the political sensitivity of the case, the potential damage in terms of legitimacy which a positive ruling could inflict on the WTO, and different interpretations of WTO rules, might induce the WTO to depart from its previous approach.
- **Precedent function of negative WTO ruling:** In addition to its direct effects on trade in GM agricultural products, a ruling which did not support the US position might have repercussions on future similar trade disputes, if it were recognised as a precedent.
- **Impact on WTO credibility:** A negative ruling might also reduce the credibility of the WTO as an organisation promoting trade liberalisation.

But even if, as is frequently expected, the WTO ruled in favour of the US position, the following factors would create additional uncertainty:

- **Enforcement problems:** As was the case in the hormone beef and the Foreign Sales Corporations export tax breaks cases mentioned above, a successful WTO challenge - and even the imposition of severe trade sanctions - does not always bring about a change in the position of the offending party. Given the high degree of politicisation of biotechnology regulation policy in the EU, this may also apply to the trade dispute over the European GMO regulations.
- **EU market impact:** If the EU abandoned its regulations, this could further undermine consumer confidence in GM agricultural products in the EU. This appears to be particularly likely where an EU decision results from external interference, such as a WTO ruling. The trade and economic implications of such a development are highly uncertain.
- **EU political impact:** Given the rejection of GM agricultural products by most consumers in the EU, a WTO ruling against the EU regulations could weaken the legitimacy of the

WTO in Europe where the ruling may be perceived as undemocratic.

- **US market and domestic political impact:** Growing mistrust of GM agricultural products and protests against a positive WTO ruling in the EU could spill over to the US, reducing US consumer confidence and politicising the issue of GMO regulation.

In addition to the political and economic risks of a WTO challenge, the availability of **alternative ways of reducing trade barriers** may also act as a constraint on the multilateral trade regime. For example, the EU and the US have both tried to influence discussions in international institutions with a remit that covers the adoption of international standards relevant for the regulation of GM agricultural products, such as the **Codex Alimentarius Commission** and the **Cartagena Biosafety Protocol**. At least in the case of the Codex Alimentarius Commission, however, those efforts remain closely linked to the WTO because the WTO SPS Agreement explicitly recognises the legitimacy of Codex standards. Ongoing US efforts to **isolate the EU internationally** on the issue of GMO regulation also offer an alternative way of acting against trade barriers. The same applies to several attempts which have been undertaken to resolve conflicts over the regulation of GM agricultural products through **bilateral contacts**.

Finally, **tactical considerations** have also contributed to the reluctance to file a WTO complaint. For example, having a strong influence on the negotiations on the **Biosafety Protocol** was an important US priority in the late 1990s. Against this background, fear that a simultaneous US challenge of the European GMO regulations could undermine the US position in these negotiations probably contributed to US reluctance to appeal to the WTO. Subsequently, the US further delayed a WTO complaint, to wait for the **new and significantly more stringent European GMO regulations** to come into force in October 2002.

However, it seems that a **WTO complaint will become more likely** in the near future. Increasing economic stakes appear to be a key driving force for such a development. First, lost US export opportunities are growing as **more and more GM agricultural products are developed and grown in the US**. Perhaps more importantly, the EU position on GM agricultural products increasingly affects how **third countries approach the relevant safety questions**. Some countries, such as Zambia, appear to have been influenced by the arguments put forward by the EU to justify its regulations. What is more, these countries also fear losing EU agricultural export markets if they cannot guarantee that their products are GMO free. This

has led these countries to restrict imports of GM agricultural products. Such effects on third countries increase the likelihood of a US challenge to the European GMO regulations because they provide an additional rationale for action: Although the EU might not comply with a WTO ruling supporting the US position, such a ruling could at least prevent less powerful third countries from adopting an approach similar to the one pursued by the EU. Taken together, these developments might eventually outweigh the considerable economic risks of a WTO complaint for the biotechnology industry and the US government.

In addition to the growing economic stakes, the limited effectiveness of ways other than WTO proceedings to address the trade implications of the European GMO regulations also renders a WTO complaint increasingly likely. Despite intense efforts, negotiations in the Codex Alimentarius Commission have so far not significantly helped the US position. Bilateral talks between the US and the EU suffer from the fact that commitments by the European Commission lack credibility because they are not supported by a sufficient number of EU Member States. As illustrated by the effects of the European GMO regulations on some third countries, efforts to isolate the EU internationally have so far also only had limited success.

Finally, the costs of inaction in terms of the **credibility of the WTO** are also likely to rise significantly in the near future. Such costs are to a large extent a function of the increasing economic stakes: If the WTO were to prove incapable of resolving an economically and politically highly sensitive trade dispute, such as the conflict over the European GMO regulations, this would seriously undermine its credibility. The **WTO therefore faces a dilemma**: if a complaint is filed and the WTO supports the US position on GMO regulation, its political legitimacy is likely to suffer in Europe and possibly other parts of the world. The credibility of the WTO could be undermined further if the EU defied a ruling in favour of the US and refused to abandon its GMO regulations. In the case of a WTO ruling supporting the EU position, or of continuing inaction on the part of the WTO despite rising economic stakes, the WTO's credibility as an organisation promoting trade liberalisation would suffer.

A special WTO procedure for highly political cases?

How could the WTO be reformed to improve its capacity to react to dilemmas such as the one arising from the trade dispute over the European GMO regulations? The case of the European GMO regulations suggests that the existing multilateral trade regime has serious difficulties in legitimating decisions dealing with trade barriers if, first, the relevant legislation is **not pri-**

marily intended to serve protectionist purposes and, second, concerns **highly politicised issues**. The introduction of **separate procedures** for the highly political cases would be one way of increasing the capacity of the WTO to deal with such cases. This would require the creation of two new procedures: First, it would be necessary to introduce an instrument allowing for a distinction to be made between, on the one hand, protectionist or less politicised routine trade disputes and, on the other hand, the highly political cases which raise issues of democratic legitimacy. Second, a procedure to resolve the highly political cases would have to be devised.

An instrument for the **identification of highly political cases** could combine the processes of collecting and evaluating information with elements of democratic decision-making. Relevant information would pertain to the extent to which a given trade barrier reflects protectionist intentions and to the degree of politicisation. For example, a body could be set up to collect and assess the information. However, even if such a body would be independent in fulfilling its tasks, the collection and evaluation of information on intentions and complex political factors is likely to exhibit biases. It could therefore be helpful to supplement the procedures for collecting and assessing information with democratic elements. These could offer an additional source of legitimacy and to some extent counter balance some of the biases.

As to dispute resolution, at present the WTO may authorise member countries which are negatively affected by illegal trade barriers to impose retaliatory tariffs on the offending party's exports. However, this approach seems **difficult to justify for the highly political cases** which are not primarily motivated by protectionism and which raise issues of democratic legitimacy. In these cases it may be more appropriate to merely ensure that no trade benefits from a breach of WTO rules accrue to the offending country. This approach would have several advantages: First, it would respect the democratic process in the offending country. Second, it would reduce the incentive to disguise protectionist measures as highly political cases. Third, the economic damage for the would-be exporting country would be limited because some compensation corresponding to the *status quo ante* would be available in most cases.

Reforming the WTO along these lines would offer several advantages. Perhaps most importantly, it would allow the WTO to address dilemmas such as the trade dispute over the European GMO regulations without risking a severe loss of political legitimacy and credibility. In addition, the basic WTO rules could remain unchanged. They would merely need to be com-

plemented by procedures to identify and resolve highly political cases. However, before these or similar reforms could be put into practice it would be necessary to address several **difficult questions**. For example, the design of procedures to collect and assess information relevant for identifying highly political cases may, among other things, require the development of suitable methods of **determining protectionist intentions and the degree of politicisation** of a given issue. Policy analysis, public opinion and comparative research as well as the literature on independent agencies may provide relevant information in this context. Similarly, appropriate **democratic procedures** would have to be identified. Increasing stakeholder participation or letting Members of Parliament from countries which are parties to a given trade dispute participate in decision-making may be part of the solution. Academic and political debates on the possibilities and conditions of democracy beyond the nation-state, in particular with respect to international and supranational organisations, address relevant issues. In addition to these issues concerning implementation, more **fundamental issues** would have to be raised, too. For example, does it make sense to distinguish between routine and highly political cases which raise issues of democratic legitimacy if the offending country in a trade dispute is not a democracy? If so, what would this entail for procedures to identify highly political cases?

Obviously, some of the highly political trade disputes, such as the conflict over the European GMO regulations, could also be addressed by **alternative reform proposals**. For example, the WTO could adopt **special provisions on biotechnology** which could supplement the SPS Agreement. Another option would be to give the **precautionary principle** more prominence in the multilateral trade regime. However, reforms along these lines would also face a number of problems. Introducing special rules for biotechnology would undermine the coherence and clarity of the WTO system. This could reduce its credibility and legitimacy. The precautionary principle is highly contested among WTO member countries and it seems likely that the US and several other countries would reject such a proposal. Against this background, it may be worth considering and comparing old and new proposals to address the increasing political constraints with which the multilateral trade regime seems to be confronted. The introduction of a special procedure for dealing with highly political trade disputes may be one of the more promising options.