

The Discouraging Effect of Risks in the WTO¹

Valentin Zahrnt

GARNET Working Paper: No 10//06

October 2006

ABSTRACT

When governments conclude WTO agreements, they are uncertain about the legal significance of certain obligations because these are incomplete or ambiguously formulated. In addition, governments cannot fully anticipate the economic, non-economic, and political effects of WTO agreements even when their legal meaning is well understood. The present article argues that both types of uncertainty have increased since the Uruguay Round. Furthermore, countermeasures which governments can adopt to mitigate adverse, unexpected effects from WTO agreements have become less available. Since governments are risk-averse, uncertainty thus increasingly exerts a discouraging effect on the progress of WTO negotiations. The argument is based on a series of interviews conducted with members of national delegations to the WTO and with WTO employees, as well as on a survey of the national delegations.

Key words: WTO, uncertainty, risk, sovereignty, international negotiation

Address for Correspondence

Valentin Zahrnt,

Hollmuthstr. 2a,

69151 Neckargemünd,

Germany

Email: vzahrnt@hotmail.com

¹ I am grateful to Rudolf Adlung, Jörn Altmann, Mireille Cossy, Simone Ruiz and Dominik Zahrnt for comments on earlier drafts of this article. The research has been conducted during a stay at the University of Geneva. It has been supported by the Fritz Thyssen Foundation.

1. INTRODUCTION

When governments conclude WTO agreements, they are uncertain about the legal meaning of certain obligations because these are incompletely or ambiguously defined. Governments thus do not know how other governments and, more importantly, dispute settlement bodies will interpret the treaty. In addition, governments cannot fully anticipate the economic, non-economic, and domestic political effects of WTO agreements even when their legal meaning is well understood. What results a given regulation will have under current circumstances is often uncertain, and this uncertainty is exacerbated when one considers how circumstances might change in the future.

Therefore, unexpected, adverse effects may materialize after the conclusion of an agreement that decrease the benefits or increase the costs that governments derive from the agreement. For instance, governments may be obliged to cut more subsidies or to remove more market access barriers than they had anticipated. Likewise, foreign companies may gain a more significant share in domestic markets than expected.

In such cases, governments can take countermeasures to soften the adverse repercussions. They may resort to unilaterally available exceptions, such as safeguard measures. They may bilaterally or multilaterally negotiate changes to their obligations, for example through waivers. Alternatively, they may refuse to comply with their obligations or they might even leave the WTO. In some circumstances, however, certain countermeasures may be unavailable, while others may be excessively costly. Governments may thus benefit less from an agreement than expected, or may even find themselves worse off than without the agreement. In other words, WTO agreements are risky.

Common sense and scientific evidence converge in the observation that governments, and human beings more generally, are risk-averse. This means that governments would prefer an international agreement with a guaranteed gain to an agreement with several possible results if both offer the same average gain. More generally, the value of an agreement for governments decreases as the standard variation of expected outcomes increases. The important point is that a discouraging effect of risk can exist although WTO agreements do not decrease governments' utility below the status quo without an agreement. Even if all expected outcomes involve net gains, uncertainty about the level of gains reduces the value of an agreement. Assuming that negotiations are efficient, governments expand their cooperation until the marginal benefits of further cooperation equal its marginal costs. By reducing the value of possible agreements, the risk involved in WTO agreements thus exerts a discouraging effect on the progress of multilateral trade liberalization. That is, the greater the risks involved, the earlier the marginal gains from additional cooperation become zero.

Governments and their negotiators do not make a fully fledged assessment of the risks inherent in possible WTO agreements when they decide on their negotiating position.

However, it seems that most of the governments and negotiators implicitly factor in most of the above mentioned determinants concerning uncertainty and countermeasures against unexpected, adverse effects.

In response to their perception of risks, governments may abstain from any agreement on a certain issue which they deem overly risky. They may reduce the ambition of rules that impose obligations on the entire membership. They may allow for additional flexibility in selecting their obligations on an individual basis (and thus complicate bargaining problems as in the service negotiations). Finally, they may be more hesitant to assume specific market access commitments.

Uncertainty may affect decision-making not only through a reasoned calculation of risks and adequate responses in correspondence with the rational choice approach adopted in this analysis. Uncertainty is also likely to interfere with successful WTO negotiations through psychological channels. Accordingly, member states may feel overwhelmed by the complexity of issues and the resulting uncertainty, so that they prefer not to undertake any significant commitments that would necessitate calculations regarding this uncertainty.² In addition, it seems that the unknown is often perceived as a threat. This especially affects civil society organizations and the general public, who, lacking reliable information about the effects of WTO agreements, appear more disposed to believe in sinister scenarios of a neo-liberal world trade regime that destroys the welfare state and stalls non-economic policies, than in a golden age of wealth and peaceful cooperation brought about by multilateral liberalization. In turn, this mistrust influences the WTO negotiating position which politicians endorse.

The relationship between risk, institutional design, and developing international cooperation has been analyzed repeatedly.³ What is missing, however, is a systematic examination of the causes behind this chilling effect that takes the specific substantive content of WTO cooperation and the institutional and political setting of the WTO into account. The present article attempts to develop such a framework adapted to the nature of the WTO. It also strives to trace the changes in the determinants of risk over time in order to assess how the problem is evolving. In order to assure that this framing and tracing of the discouraging effect of risk has a solid empirical base, a survey of the national delegations at the WTO has been conducted. In addition, 27 interviews on problems in WTO negotiations, lasting on average close to 1,5 hours, have been conducted with members of the national delegations and with WTO employees.

² Lepgold and Lamborn (2001, 10) observe that “in some situations people may be so uncertain about future states of the world that would result from their choice that they cannot decide what they want.”

³ See Abbott and Snidal (2000), Ethier (2002), Goldstein and Martin (2000), Hillgenberg (1999), Koremenos (2001), Lipson (1991), Rosendorff and Milner (2001), Shelton (2000) and Smith (2000).

The article finds that WTO agreements have become more likely to lead to significant adverse outcomes that have not been expected by the governments, that countermeasures have become less available or more costly, and that it is thus likely that governments have become more inclined to forgo additional scope in WTO agreements out of risk aversion. These analytical considerations correspond to the survey results.

The article begins with an analysis of the sources of uncertainty in the WTO and their development since the Uruguay Round (Section 2). This is followed by a discussion of the countermeasures with which governments can soften adverse, unexpected effects and of the changes in their availability since the Uruguay Round (Section 3). Subsequently, the results from the survey of national delegations at the WTO are presented in order to address the empirical relevance of risk in shaping member states' negotiating positions (Section 4). In the concluding section, policy implications are briefly discussed.

2. UNCERTAINTY ABOUT LEGAL MEANING AND CAUSAL EFFECTS

In the following, the causes of governments' (increasing) uncertainty about what they can expect from WTO agreements will be discussed. The argument starts with uncertainty about the legal meaning of agreements and then turns to its causal effects. Afterwards, several developments are presented that raise governments' sensitivity to both types of uncertainty.

2.1 Uncertainty about Legal Meaning

Legal uncertainty arises if contracts are legally incomplete, i.e. if they do not prescribe obligations or rights for every situation within their scope. In addition, contracts may be ambiguously formulated, i.e. they may contain vague or conflicting prescriptions.

To an extent, these imperfections are unavoidable. Actors cannot foresee every future contingency. Language is inherently ambiguous and cross-cultural communication breeds misunderstandings. The bargaining process marked by distributive haggling further contributes to gaps and conflicts between rules. However, imperfections can also be intentional.⁴ If actors accept imperfections, they save transaction costs of bargaining and accelerate the entry into force of their contract. Not least of all, unresolved conflicts may be buried under vague formulations. Governments may prefer a later third-party dispute resolution over negotiated concessions. This can shift the political costs of potential concessions into the future, and it can deflect political responsibility from governments to international institutions. In addition, governments tend to be overly optimistic regarding their chances of victory should they go to court.⁵

⁴ See Ayres and Gertner (1992) and Trachtman (1999).

⁵ See Peters (2003) and Simmons (2002).

In a broad sense, legal uncertainty also comprises those problems of adequate interpretation of treaty provisions that are not inherent in the legal text but are due to the limited analytical capacities of the member states. The plentitude of general and specific rules, exemptions, and transition periods tends to overwhelm especially small developing countries. Thus, the clarification of rules through greater precision – and thus usually greater length and complexity – may not reduce uncertainty for many countries.

Legal uncertainty is pervasive and appears to have increased with the new and more complex nature of the WTO's regulatory domain. In the case of the General Agreement on Trade in Services (GATS), for example, considerable uncertainty already surrounds the scope of obligations. This pertains to the scope of the general obligations, the definition of 'like' services and thus the scope of specific commitments which states can selectively undertake, as well as the international classifications lists employed for further detailing specific commitments.⁶ Other cases in point are the unclear provisions on the tariffication of non-tariff barriers and the calculation of permissible levels of subsidization in the Agreement on Agriculture.⁷ The same applies to the interface between economic and non-economic values.⁸ To what extent such legal uncertainties contained in the original contract matter depends particularly on the design and practice of litigation, as well as on the independence of the judiciary.⁹

2.1.1 Design and practice of litigation

With regard to litigation, governments' selection of cases which they want to bring to court functions as a filter since private actors lack direct access to the WTO dispute settlement system. This reduces the relevance of legal uncertainty to the extent that states are reluctant to legislate through the judiciary. If they insist on legal clarification of a strongly contested issue, they have to fear that they will become the target of another lawsuit brought by the defendant in response. They may abstain from pushing the panels and Appellate Body into a law-making role that damages their legitimacy. Furthermore, they may anticipate that a losing party would not implement a ruling, so that a lawsuit would bring little to the complainant but harm the legitimacy of the institution. Despite these reasons, governments resort far more frequently to the dispute settlement system under the WTO than under the old GATT.¹⁰

⁶ See VanDuzer (2005).

⁷ See O'Connor (2003). The result that has not been expected by developing countries during the Uruguay Round is that OECD farmers' receipts from governmental support have remained largely unchanged at 30% of their income, with two-thirds of support directly raising product prices and thus strongly distorting trade. This contributed to the surprising effect that growth of trade in agricultural products has slowed down after the Uruguay Round and that the share of developing countries in agricultural trade has stagnated. See OECD (2005).

⁸ See Biermann (2001), Goh (2004), Scott (2004) and Winham (2003).

⁹ Remember that uncertainty about the legal meaning of an agreement refers to the time of negotiations. The practice of resolving disputes judicially rather than diplomatically and the independence of the dispute settlement system indeed enhance legal clarity – but only after the conclusion of the agreement.

¹⁰ See Leitner and Lester (2004).

Importantly, they not only use it in order to decide on whether rules whose meaning is in principle uncontested have been respected in concrete cases but they also employ judicial dispute resolution as a surrogate for negotiations.¹¹ In addition, they apply it as a strategic device to influence negotiations. This means that they bring complaints on contested issues that are being collectively negotiated by the membership in order to exert pressure on the other side.¹²

2.1.2 *Judicial independence*

Judicial independence “assesses the extent to which adjudication is rendered impartially with respect to concrete state interests in a specific case.”¹³ As the judiciary becomes more independent, rulings become less accommodating and more affirmative of WTO obligations for legal reasons – even when they contradict strongly held preferences of member states. Accordingly, legal uncertainty becomes more problematic with increasing judicial independence.¹⁴

Judicial independence is determined by two countervailing forces. On the one hand, courts have to consider the political situation in order to avoid member states resorting to countermeasures that would harm the individual interest of judges, damage the legitimacy of the dispute settlement system, or weaken the WTO. On the other hand, judges are inclined to adhere to the agreement and maintain legal consistency. They may believe that this is appropriate role behavior, that it is in their professional self-interest, or that it serves the legitimacy and long-term effectiveness of the WTO.

The potency of member states’ instruments for controlling the judiciary has declined. First, the selection of judges has become more formalized and based on professional qualifications. In addition, the members of the Appellate Body are not selected on a case-by-case basis but have 4-year tenures. As a consequence, member states have fewer opportunities to select judges they deem responsive to their interests or to sanction those who have ruled against them. Second, the losing party can no longer block the adoption of a ruling since rulings need no longer be accepted by member states’ consensus but enter into force unless they are unanimously rejected. Third, member states find it more difficult to take countermeasures

¹¹ See Bronckers (1999), Barfield (2001) and McRae (2004).

¹² See Petersmann (2005).

¹³ Keohane, Moravcsik, and Slaughter (2000, 460). On considerations that guide panelists and members of the Appellate Body and on factors that shape their independence, see Broude (2004), Cass (2005), Ehlermann (2003), Greenwald (2003), Smith (2003), Steinberg (2004) and Weiler (2001). See also Alter (2000), Burley and Mattli (1993), Garrett, Kelemen, and Schulz (1998) and Pollack (2003) for comparable analyses of the European Court of Justice.

¹⁴ Judicial independence also has a risk-mitigating effect in that a government needs to be less concerned that other governments interpret their obligations in self-serving ways. The risk-increasing effect, however, is likely to dominate because being confronted with an unexpected obligation may trigger protest by import-competing industries and it may detract from the pursuit of non-economic objectives. Not receiving all of the anticipated market access abroad, by contrast, reduces only the benefits accruing to the export-oriented sector which is politically less sensitive.

against adverse rulings that have entered into power. A multilaterally negotiated relief – whether through a waiver from the obligation in question or an authoritative interpretation by the membership that supersedes the rulings – has become less available, while unilateral defiance of rulings or even leaving the WTO have become more costly.¹⁵

At the same time, the opposite force that disposes judges to adhere to the agreement and maintain legal consistency has gained in strength. One reason for this is that courts are perceived as legitimate by member states if they resolve disputes consistently along principles stemming from agreements; the more clearly courts deviate from the agreement and from legal precedent, the greater the legitimacy costs they incur. Hence, courts have become less likely to succumb to power as they have produced ample precedent which has been unified and elevated by the jurisprudence of the Appellate Body. A second reason why judges have become more committed to legal consistency is that the formal legalization of the WTO has shaped the professional ethos and the standards for recognition within the legal community. Judges who are socialized to legal culture feel less like conflict managers, who assist actors in diplomatic dispute settlement, than like ‘champions of law’. In particular, the introduction of the Appellate Body has increased the incentive for panels to get it legally right, rather than paying attention to the political situation, in order to avoid reversals by the Appellate Body.

In the light of the combination of these two developments – the weakening of member states’ control over the judiciary, and the strengthening of the judiciary’s commitment to legalized dispute resolution – it is unsurprising that the judiciary has been accused of abusing its independence and to engage in judicial activism. Such activism would have been facilitated by the increasing complexity of factual and legal reasoning which complicates monitoring if courts pursue their own agenda. When courts can hide their intentions under opaque layers of factual and legal reasoning, activism is harder to discover and pin down. If courts did indeed attempt to exploit legal ambiguities and gaps for expanding the scope of WTO regulation and empowering themselves in their role as final arbiters of member states’ obligations, states should worry all the more about legal uncertainty. The truth seems to be somewhere in the innocuous middle: The Appellate Body has strategically consolidated its position, but it has been careful not to depart from the opinion of the majority of member states and it has shown considerable deference to national beliefs about the appropriateness and necessity of trade-restrictive policies and the value trade-offs implied in these policies.

In sum, the relevance of legal uncertainty has increased as the GATT/WTO has expanded from the reduction of tariffs and similar border-related trade barriers to new and more complex regulatory issues that reach into the domestic sphere and are closely linked to non-economic values. Governments have not reacted with self-imposed restraint but have used the dispute settlement system frequently, including as a substitute for and complement to

¹⁵ See Section 3.

multilateral negotiations. At the same time, the judiciary has acquired additional independence. Therefore, governments have reasons to be (increasingly) concerned about legal uncertainty.

2.2 *Uncertainty about Causal Effects*

Agreements are not only legally ambiguous or incomplete, but the causal effects of rules whose legal meaning is well understood are also uncertain.¹⁶ This uncertainty concerns effects on economic wealth, on economic inequality, on non-economic values, and on governments' political support at home. The latter is influenced by the former three factors, but also depends on (changes in) the relative power of different domestic constituents.

2.2.1 *Effects on economic wealth*

Calculating the economic gains from increased trade has always been difficult. During the Uruguay Round, negotiators relied largely on crude rule-of-thumb heuristics for assessing negotiating outcomes.¹⁷ The scientific forecasts of likely effects have proven unreliable with hindsight.¹⁸

One problem is that the export gains depend on the relative competitiveness of domestic industries. Since competitiveness is not static, the future competitiveness of domestic and foreign producers needs to be anticipated. Since the business environment has become more dynamic, especially through the rise of the Chinese economy, the prediction of economic effects has become more complex.

A further factor that complicates estimations is the increasing restriction of market access through non-tariff barriers to trade. A straightforward reason for this is that a given level of non-tariff barriers becomes relatively more disturbing as tariffs are removed. In addition, discriminatory domestic regulation may be chosen as an alternative to tariffs and import quotas whose use has been more strictly disciplined. The problem is that governments are often unaware of current non-tariff barriers abroad and their trade-restrictive effects. They tend to know the most important obstacles in their major export markets, but they are far from having a comprehensive overview comparable to a list of applied tariff rates.¹⁹ It is even more difficult to gauge the future development of non-tariff barriers since they are

¹⁶ See Haas (1992).

¹⁷ See Finger, Reincke, and Castro (1999).

¹⁸ Francois (2000) and Whalley (2000) report on the fundamental differences between the global multi-commodity multi-region equilibrium models employed to assess the expected gains from the Uruguay Round. The prognostics differed drastically on the global overall gains, on which country would win how much, and on which sectors would bring what size of gains. They produced some unlikely forecasts, such as 20% GDP gains for certain countries, and were generally overly optimistic with hindsight. Moreover, they often did not include time frames.

¹⁹ See WTO (2005) on the difficulty of understanding foreign technical regulation and its complex effects on market access. See also WTO (2006b) on the difficulty of assessing the protection granted through subsidies.

subject to more complex considerations than tariffs that serve primarily trade-related ends, and as they more easily escape WTO control.

Finally, the changing scope and nature of WTO agreements impedes estimations of effects. First, the effects of deep WTO regulation in new issue areas on market shares, employment, and company profits are more complex than the economic effects of shallow integration in traditional industries. For example, estimating how patent protection affects the bio-tech industry, how geographical indications influence prices and market shares, or how GATS improves e-commerce is harder than assessing the impact of tariff reductions prescribed by the WTO on steel producers.²⁰ Second, the implementation of deep WTO regulation, concerning for example regulatory transparency, trade facilitation, or the protection of intellectual property, is costly. Appreciating these costs, as well as the opportunity costs of governments' expenditures, is a demanding task. Moreover, implementation costs concern also those developing countries that otherwise need to care only about a very limited number of sectors in which they are significant traders. Third, a deep regulatory agenda leads to substantial rent shifting which is difficult to quantify. This has been the case with TRIPs that has shifted rents arising from intellectual property rights. The tightening of global intellectual property right protection obliges especially developing countries to pay royalties to intellectual right holders in industrialized countries or to import products containing intellectual property at higher prices.²¹ This issue would, to a minor degree, resurface with an agreement on competition policy that would reduce rents stemming from monopolistic power that companies exert on their own or in arrangements with other companies.

Not only has prediction become more difficult, but the variability of outcomes has increased to such an extent that WTO-led economic integration ceases to be a mutual gain phenomenon by nature.²² Most economists agree that traditional multilateral liberalization through reciprocal tariff reductions improved the welfare of all states. By contrast, WTO agreements that prescribe 'deep integration' may decrease national welfare. This concerns primarily developing countries. They incur substantial implementation costs because deep WTO regulation is modeled on the already existing, demanding regulation of industrialized countries that does not correspond to developing countries' priorities. At the same time, their opportunity costs in terms of investments in areas such as health, education, and infrastructure are high. Where the challenge is to get simple regulatory systems to work, the installation of complex, preordained systems may even be counterproductive.²³ Moreover, developing countries generally lose, at least in the short-run, as a result of intellectual

²⁰ Not only the magnitude of effects but even their direction is uncertain. For instance, McCalman (2005) challenges the conventional wisdom that stronger intellectual property rights always promote knowledge diffusion.

²¹ See Maskus (2000), McCalman (2001) and Pugatch (2004). It appears, however, that the costs have initially been overestimated. See Lybbert (2002).

²² See Clive and Kirkpatrick (2004), Das (2003) and Mattoo and Subramanian (2004).

²³ For example, Finger (2002) mentions that fitting the WTO-required valuation accounting into developing countries' present customs systems would likely increase the opportunities for informal negotiations with customs officials rather than an objective valuation.

property standards set by the TRIPs Agreement. Another cause of possible losses is the erosion of the value that countries draw from special and differential treatment. The US and the EU especially grant preferential market access to developing countries based on various criteria, ranging from poverty to good governance, including the fight against drug production and trafficking. Preference erosion is becoming critical as the WTO turns to a more profound multilateral liberalization of agricultural markets, where the most important special and differential rights are granted.

2.2.2 *Effects on economic inequality*

Excessive economic inequality can cause problems, such as poverty, social inequality, and political instability. Many industrialized societies, feeling exposed to a neo-liberal globalization that dismantles the welfare state, pressure their governments for protection. In many developing countries, democratization makes governments more responsive to appeals to fight poverty through a reduction of inequality. Hence, the link between WTO rules and inequality is of increasing concern to governments.²⁴

There are numerous channels through which trade liberalization affects inequality. A first channel works through changes in consumer prices. In this regard, liberalization tends to increase inequality because existing tariff structures are traditionally biased in favor of goods consumed by the poor, taxing luxury goods more heavily. Second, changing factor prices may decrease or increase inequality. Countries that are relatively rich in labor compared to capital, i.e. developing countries, tend to import goods and services whose production is relatively capital-intensive. Thus labor will be less abundant compared to capital, so its marginal productivity will increase. Since marginal productivity tends to influence factor rewards, wages stand to rise.²⁵ By the same token, changes in factor rewards induced by trade liberalization tend to increase inequality in industrialized countries. In reality, this effect is far from straightforward, especially because a country that is relatively rich in one factor of production in a global context may have a scarcity therein compared to its neighboring countries. If geographical distance matters for trading patterns, the country may thus import goods whose production is intensive in the factor in which the country is relatively rich from the global perspective. Besides the relationship between capital and labor income, the wages for different qualities of labor are also affected. Generally, the premium for skilled labor in comparison to unskilled labor tends to rise, for instance, because production in developing countries becomes more technology-intensive, and thus skill-intensive, with liberalization.

Third, the costs of adapting to price shocks influence inequality. On the one hand, the costs of

²⁴ In the survey, national delegates rated the importance of a possible increase in poverty or inequality due to domestic market opening on their negotiating position in the WTO with 3,2 (on a scale from 1 to 5, with 3 standing for medium and 4 for high importance). The importance of a possible aggravation of long-term unemployment, which is related to poverty and inequality considerations, was rated with 3,4.

²⁵ This is Stolper-Samuelson theorem well-known to economists.

adjusting to liberalization may increase inequality as poor people may find it more difficult to adapt to shocks, especially because they have few financial reserves and often poor access to loans. On the other hand, liberalization may smooth prices in the long run as domestic price volatility is likely to be larger than the volatility on world markets which absorb numerous, only partly correlated shocks. Fourth, trade liberalization may reduce social government expenditures and thus worsen inequality. One reason for this is that governments lose tariff revenues. Another is that governments find it harder to tax mobile factors as their economies become more integrated into the global market place. Fifth, competitive pressures by foreign providers may lead to a chilling or even race-to-the-bottom effect on domestic regulation that benefits the poor, such as labor laws that protect employees with poor qualifications or requirements on service providers to cater for low-income areas.

Given the number and nature of these effects, it is unsurprising that the empirical results are heterogeneous.²⁶ This makes it all the more difficult for governments to assess the effect of WTO rules on inequality in advance.

2.2.3 Effects on non-economic values

Multilateral trade liberalization touches on non-economic values, such as human health and consumer protection, animal health and the environment, and the provision of public services and culture. The effects on non-economic values vary significantly from one issue-area to another. One important example is the liberalization of education and health services. Services such as these, which are considered 'basic', are politically more sensitive than professional services, where interests are primarily commercial.

On the gains side, opening one's own market (for education and health services) may alleviate shortages of capital, personnel, or knowledge in the domestic systems. On the loss side, foreign providers may escape quality control measures, for instance concerning professional qualifications or professional track records. If domestic elites have access to high quality foreign services, they may cut down public investments into lower quality public service provision. Foreign suppliers may attract the most qualified personnel, partly in order to serve foreign customers, leading to an internal brain drain away from services affordable for low-income locals.²⁷

In addition to these uncertainties about how liberalization will work out under current circumstances, the future regulatory needs with regard to non-economic values are particularly uncertain. Non-economic gains and losses, which are thus extremely difficult to predict, have become more important as the WTO has moved from trade in goods into new

²⁶ See Garrett (1998), Harrison (2006), Kapstein (2000), Milanovic and Squire (2005), Reimer (2002) and Winters (2000).

²⁷ See VanDuzer (2005). See also Clive and Kirkpatrick (2004) on the multitude of effects of WTO agreements on non-economic values.

issue areas and from disciplines on border measures to more intrusive regulation of domestic policies.²⁸

2.3 *Relevance of uncertainty*

It has been argued that uncertainty about the legal meaning and the causal effects of WTO agreements has increased. Both types of uncertainty become less tolerable for governments as the importance of the WTO increases.

First, WTO agreements have gained importance in comparison with national determinants of wealth. This is not to deny the predominant influence of national policies that are independent of WTO law. The point is solely that WTO agreements have become relatively more important as global economic interdependence has increased and as the scope and depth of WTO agreements has expanded. In particular, the margin between WTO-bound liberalization and actually practiced trade-relevant policies is drastically shrinking in the Doha Round (especially with regard to tariffs). This especially concerns developing countries which have been negotiating mostly about bound rates above their applied tariff rates and service commitments that fell well short of their autonomous policy choices in the past.

Second, WTO agreements have become more important for governments' political support at home. Import-competing and export-oriented interest groups, as well as civil society organizations with non-economic objectives, have become significantly more active with regards to trade policy since the Uruguay Round.²⁹ If WTO agreements oblige governments to implement policies which domestic stakeholders reject or to abstain from policies which domestic stakeholders request, governments may be politically worse off with than without an agreement, even if national welfare has been increased.³⁰

The point is that governments are more ready to tinker at the margins than to assume risky obligations that wield decisive influence over their country's welfare and their own political well-being.

²⁸ The survey contained the question "To what extent is your government reluctant to accept WTO rules that touch upon such non-economic values because of restraints on policy autonomy – in particular, governments may fear that WTO agreements may rule out the most efficient policy instruments that are feasible in the domestic political context for the attainment of non-economic values or that they may exert pressure on the levels of protection for non-economic values." Delegates rated the importance of the restriction of non-economic policy space with 3,1 (on a scale from 1 to 5, with 3 standing for medium and 4 for high importance), putting it almost at equal footing with restraints on economic policy space.

²⁹ See Zahrnt (Draft). One interviewee reported that governments were "scared to death by the idea of having Bové [a famous French NGO activist] on their back."

³⁰ The case where foreign market access gains do not materialize as expected is politically less problematic. Export-oriented industries exert pressure on their government that they should claim market access abroad and make own concessions in exchange. If they are satisfied with the agreement as it is concluded, they do not cause troubles if the results are disappointing.

3. COUNTERMEASURES AGAINST UNEXPECTED, ADVERSE EFFECTS

How much uncertainty matters to risk-averse governments depends decisively on the countermeasures which they can adopt to soften adverse, unexpected effects. They may resort to unilaterally available exceptions, such as safeguard measures. They may bilaterally or multilaterally negotiate changes to their obligations, for example through waivers. Alternatively, they may refuse compliance with their obligations or exit from the WTO. The changing availability of these countermeasures shall now be addressed in turn.

3.1 *Unilaterally available Exceptions*

There are two exceptions to which governments can resort without depending on the consent of other parties that are particularly relevant in the context of the uncertain effects of WTO agreements. The first exception, contained in the Agreement on Safeguards, can be invoked in the case of import surges. It authorizes a member state to introduce safeguard measures that restrict imports in a non-discriminatory manner, provided that a “product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”³¹ The measure shall be limited “to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.”³² Furthermore, it shall be regularly reviewed and last not longer than eight years.³³ Member states that employ safeguard measures shall negotiate over compensatory concessions with negatively affected parties, but within the first three years the latter cannot withdraw equivalent concessions if these negotiations fail.³⁴ In GATS, Art X mandates negotiations on safeguard measures.

The second exception gives governments leeway in pursuing non-economic objectives. Art XX of GATT enumerates a list of such values that may justify derogations from GATT obligations. They include the protection of public morals; the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources. In addition to certain disciplines which are specific to the value which states pursue, all such measures are subject to the requirement that they “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” Measures justified under this exception do not intend compensatory concessions or the withdrawal of equivalent concessions by negatively affected third parties. Similar provisions can be found in Art XIV of GATS.

The major limitation on the reach of these exceptions is that they protect only against certain

³¹ Agreement on Safeguards Art II:1

³² Agreement on Safeguards Art V:1

³³ Agreement on Safeguards Art VII

³⁴ Agreement on Safeguards Art VIII

types of risk. They do not provide any rights to governments that have overestimated their export gains. Neither do they protect governments that have underestimated the implementation costs, the rent shifting to intellectual property holders, or the consequences of the erosion of their preferences. Nor do unanticipated repercussions related to inequality and poverty entitle states to exceptions. Moreover, they cannot reassure governments of the availability of a safety valve if the interpretation of the exception itself is an element of the legal uncertainty. Yet, this is recurrently the case where the linkage between trade and non-economic values is concerned.³⁵ Finally, the exceptions provide only partial protection for governments that have miscalculated the political repercussions of WTO agreements because they do not consider the political problems of governments in the wake of WTO agreements as a cause for an entitlement to relief. The availability of safeguards is conditional on significant increases in imports and on damage to domestic industries. As long as domestic political problems result from unexpected import surges, governments can alleviate the situation. But governments may have erred about the will and the ability of the import-competing sector to resist even moderate increases in imports. In this case, safeguard measures are unavailable. In the case of trade-restrictive measures with non-economic objectives, criteria such as the necessity and non-discriminatory nature of the disputed measures do not at all consider to what extent the said government is under political pressure to implement the measures in question.

A comparison with the availability of exceptions under the old GATT system is difficult. In the case of safeguard measures, the granting of a three-year period of protection from the withdrawal of equivalent concessions has enhanced flexibility. By contrast, the conditions governing the use of safeguard measures have been formalized and tightened. Furthermore, voluntary export restraints that gave governments room for accommodation outside the GATT disciplines have been banned.³⁶ Regarding the exceptions for non-economic purposes, the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) that specify the relationship between trade and non-economic values have restrained member states' flexibility in choosing non-economic policies.³⁷ But the Appellate Body appears to have provided as much policy space for the pursuit of non-economic objectives as the treaty text and member states' diplomatic pressure allow. In any case, important aspects still await clarification. At the least, the Uruguay Round has not significantly expanded the availability of exceptions.³⁸

³⁵ See Goh (2004), Pauwelyn (2004), Sands (2000) and Scott (2004).

³⁶ Agreement on Safeguards Art XI:1(b)

³⁷ See Kalderimis (2004).

³⁸ Antidumping measures and countervailing duties against illicit subsidies have not been discussed as they do not primarily soften concerns arising from legal and causal uncertainty, but insure against unfair trade practices by other member states. See, however, Ethier (2002) for an 'insurance triangle' model where discriminatory exceptions benefit third actors who do not employ the exceptions themselves but gain from the discriminatory trade restrictions imposed on other exporting countries that are more competitive. In this way, discriminatory trade restrictions may mitigate uncertainty about market access gains broad.

3.2 *Bilaterally or Multilaterally Negotiated Measures*

If governments cannot react to unexpected, adverse effects of WTO agreements by unilaterally resorting to exceptions, they can attempt to negotiate a solution to their grievance. The procedurally least burdensome avenue is to compensate negatively affected third parties by granting concessions in other areas.³⁹ This may be a convenient way for a government to escape unwanted obligations if it is inclined towards liberalization anyway. In this case, it loses only a bargaining chip that it could have used to gain additional market access abroad in subsequent multilateral obligations. However, granting compensatory concessions may also be painful, especially if there are several injured parties that claim different compensatory measures – which the Most-Favored Nation principle automatically extends to the entire membership. This has become more problematic with a greater and more active membership that guards its interests and claims compensation.

Alternatively, governments can seek to obtain a waiver, an authoritative interpretation, or an amendment. These legal instruments change obligations upon decision by the entire membership but fall short of general renegotiations. A waiver from unwanted obligations requires a three-fourth majority of the member states at a Ministerial Conference.⁴⁰ The same majority threshold applies for authoritative interpretations which can be adopted by a Ministerial Conference or the General Council and which supersede judicial interpretations.⁴¹ Amendments to the treaty that affect central treaty provisions require unanimity.⁴² All other amendments can be passed by a two-third majority but take effect only for those member states that have accepted them.

The availability of such countermeasures against unexpected, adverse effects is thus inherently limited to those cases where a large majority of member states are affected or where a minority of member states is able to command the support of a sufficient majority. This limitation is exacerbated by the fact that, despite the statutory possibility for majority voting, member states practice consensual decision-making. Besides, member states are reluctant to resolve a single issue. They prefer to save up other states' problems for broader negotiations where they can get something in exchange for letting other states off the hook. A telling example of the insistence on consensus decision-making and the delaying of a solution until the beginning of comprehensive multilateral negotiations is the waiver from TRIPs obligations for public health reasons granted in 2003. Hence, limited responses to unexpected, adverse effects that need to be negotiated among the entire membership do not provide effective shelter.⁴³

³⁹ GATT Art XXIII and GATS Art. XXI

⁴⁰ WTO Art IX:3

⁴¹ WTO Art IX:2

⁴² WTO Art X

⁴³ See Cottier and Takenoshita (2003) and Ehlermann and Ehring (2005). Developing countries' delegates repeatedly complained about the inflexibility of industrialized countries in addressing the health problems posed by TRIPs. This instance where developing countries attained redress only after tenuous negotiations – despite

A multilateral trade round is not a suitable instrument to deal with unexpected, adverse effects either. Intervals between trade rounds can be long. Trade rounds last over many years, and nothing is agreed before all is agreed. And, again, the price which states have to pay in order to attain changes in the treaty may be high.

3.3 *Noncompliance*

Noncompliance with WTO obligations and court rulings is, on the one hand, particularly important for the risk implied in WTO agreements; as unconditional escape routes, it is more relevant to states' calculation of risk than the frequency of its use suggests. On the other hand, delegates dislike thinking in such categories.⁴⁴

The costs of noncompliance for governments hinge on the sanctions they incur, their loss of reputation in international society, and the harm which they inflict upon their systemic interest in the effective functioning of the WTO.⁴⁵ It is beyond the scope of this paper to assess the respective binding power of these mechanisms. It shall only be argued that all these mechanisms have become more powerful over time.

As concerns sanctions, the judiciary can authorize member states whose benefits from a WTO agreement have been unduly impaired or nullified by another member to retaliate by a suspension of concessions. The paradigm that suspended market access concessions or other obligations should be equivalent to the impaired or nullified benefits has not been changed with the transition to the WTO.⁴⁶ The underlying idea remains to re-establish reciprocity, not to punish the violator and to deter future defections. Nevertheless, several developments suggest that sanctions hurt more than in the past. First, implementation of sanctions lags behind the benefits that governments derive from their WTO-illegal policies. Since governments discount the future, any acceleration of the legal process increases the discounted present cost of sanctions. Indeed, the process leading from the deposition of a complaint to a ruling has been streamlined during the Uruguay Round. The panels and the Appellate Body are required to follow strict schedules and defendants have fewer possibilities to delay judicial proceedings. Second, the vague concrete meaning of equivalence leaves ample discretion to judges in determining the value of equivalent concessions authorized for suspension.⁴⁷ The values established in recent cases, most notably in the Foreign Sales Corporation case, indicate a less lenient attitude towards violations. Debates about reforming the enforcement system indicate that even stricter sanctions could be introduced in the

the urgency of their needs, the public pressure which the normative content of their cause facilitated, the large coalition they were able to form, and the interest of industrialized countries in launching a new trade round and thus overcoming obstacles – has deeply shaped their perception of risk.

⁴⁴ For example, one delegate objected to the idea that he might factor in the possibility of non-compliance as last resort with the remark: "You don't think like this, at least not if you are an honest country."

⁴⁵ Besides such considerations related to the international level, governments are also sensitive to the domestic political costs of rule violations. See Koh (1997) and Lohmann (2003).

⁴⁶ Dispute Settlement Understanding Art 22:4

⁴⁷ See Jürgensen (2005).

future.⁴⁸ Third, member states have elaborated sophisticated punishment strategies, such as targeting vulnerable and politically influential industries, selecting industries in politically critical constituencies, and rotating between industries. This enables them to intensify the political costs for defecting governments at a given level of authorized sanctions. Fourth, sanctions now include the possibility of cross-retaliation.⁴⁹ This means that countries can suspend foreign intellectual property rights, which is attractive to them, instead of restricting market access, which also harms the punishing state economically.⁵⁰

Violations of international law tarnish a state's reputation within the WTO but also within international society more generally.⁵¹ For weak and developing countries, being recognized as a legitimate state entails advantages in terms of financial rewards, security, autonomy, and participation in global governance. However, strong and industrialized countries also depend on a good reputation in order to cooperate successfully and build alliances. As global interdependence and, in its wake, the scope and intensity of international cooperation grow, the benefits of having a good reputation increase.⁵²

Moreover, states are enticed to abstain from violations in order to preserve the effective and stable functioning of the WTO.⁵³ This systemic interest could be harmed through likely and limited consequences of own violations. In this sense, legal breach could hamper current negotiations or provoke other states to also defect. Less likely, but more problematically, the WTO could be destabilized by own rule violation and its undermining effect on other states' compliance, the retaliatory actions original and subsequent violations may trigger, and the shifts in domestic political balances all this might engender. The unraveling of international institutions is a critical-mass phenomenon. An institution may persevere with few apparent signs of distress and then suddenly break down, once a certain amount of stress has been exceeded. Whether an international institution collapses depends on the number and significance of damaging acts and on the identity of the damaging actors.⁵⁴ It is impossible to predict the blows an international institution can take before breaking down, in which direction harmful interaction dynamics between actors unfold, and the extent to which an international institution will have recuperated before the next stressful situation occurs. Therefore, actors always have to guard against damaging the WTO.

⁴⁸ See O'Connor (2004).

⁴⁹ Dispute Settlement Understanding Art 22:3

⁵⁰ See Charnovitz (2002) and Ethier (2004).

⁵¹ Abbott and Snidal (2000, 427) state that "when a commitment is cast as hard law, the reputational effects of a violation can be generalized to all agreements subject to international law, that is, to most international agreements." See also Guzman (2002).

⁵² Chayes and Chayes (1995, 27) even believe that "sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life." See also Chimni (2004) for an account of developing countries' growing dependence on international institutions.

⁵³ See Bull (1977), Chayes and Chayes (1995) and Reich (1996).

⁵⁴ See Chayes and Chayes (1995).

3.4 *Exit*

The WTO grants every member the right to leave the institution on six-month notice.⁵⁵ Taking this ultimate countermeasure against unexpected, adverse effects has, however, become close to unaffordable. Advancing global economic integration and investments specific to WTO membership – on the part of private agents as well as governments – magnify the economic costs of exit. Especially if small states were to leave the WTO, they would be at the mercy of their large trading partners and could not expect to have equally favorable and reliable market access rights. In addition, exiting the WTO would harm a state's international reputation which has been argued to be increasingly important. The U.S. and the EU may be large enough to shoulder the economic costs of exit and to weather the political fallout.⁵⁶ However, the systemic interest they have in maintaining the WTO for preserving order in international relations speaks not only against rule violations, as noted above, but even more strongly against leaving and thus debilitating the WTO.⁵⁷

4. EMPIRICAL FINDINGS

The following results are based on an empirical project conducted during the first half of 2006. The 100 missions at the WTO in Geneva were asked to fill out up to three questionnaires on negotiations over non-agricultural market access, agriculture, and services, respectively. 26 states provided in total 41 responses.⁵⁸

The questions relating to risk ask:

1. When states conclude a WTO agreement (i.e. a package that concludes a WTO trade round), they are partly uncertain about both its efficiency and the distribution of benefits and costs between states. In addition, states are generally risk averse – i.e. they prefer an agreement with a guaranteed gain to an agreement with several possible results if both offer the same average gain. To what extent do the following sources of uncertainty thus limit progress at WTO negotiations?

⁵⁵ WTO Art XV

⁵⁶ During the ratification process of the Uruguay Round results, there has indeed been serious debate in the US Congress about a clear exit route from the WTO. Eventually, a 'three strikes and we are out' clause that threatened US withdrawal should the US find that three dispute settlement system decisions had arbitrarily ruled against US interests was dismissed. See Sarooshi (2004).

⁵⁷ Cronin (2001, 122) summarizes the paradox of hegemony: "Hegemons have the material resources to promote their interests through unilateral action, yet they cannot remain hegemons if they do so at the expense of the system they are trying to lead. ... They can most easily violate organization rules and procedures with impunity, yet their violations have the greatest negative impact on the stability of the hegemonic order that they work so hard to maintain."

⁵⁸ The industrialized countries are Australia, the European Communities, New Zealand, and Switzerland. The developing countries are Antigua and Barbuda, Brazil, China, Colombia, Croatia, Ghana, Hong Kong, Israel, Jordan, Malaysia, Mexico, Oman, Panama, Paraguay, Qatar, Romania, Senegal, South Korea, Taiwan, Trinidad and Tobago, Turkey, and Zambia. As this is work in progress, additional responses are still being submitted. The total number of responses will probably be between 50 and 60.

It may be unclear what precise meaning will eventually be given to inherently ambiguous agreements, in particular through judicial contestation.

Even if the legal meaning is unambiguous, it may be unclear what results a given WTO regulation will produce under existing circumstances, as well as how circumstances may change and affect results.

2. How has the importance of uncertainty as an impediment to progress at WTO negotiations changed? (Please take as your time-frame the period since the conclusion of the Uruguay Round or since you are a delegate at the WTO, whichever is more recent.)

Answers could be marked on a scale ranging from 1 to 5, with 1 standing for very low (or strongly decreased), 3 for medium (or unchanged) and 5 for very high (or strongly increased).

The responses are contained in Table 1. They provide an overview of the frequency of responses for each number of the scale, as well as the average. Results are given according to country status (industrialized and developing countries), as well as according to sectors (services, agriculture, and non-agricultural market access).⁵⁹

The results show that both legal uncertainty and uncertainty about causal effects are substantial and of approximately equal importance. Developing countries, which have fewer resources for legal and economic analysis at their disposal, are far more concerned about both causes of risk than industrialized countries. In the case of legal uncertainty, the importance of uncertainty according to sectors is larger in services and in agriculture than in non-agricultural market access. In the case of uncertainty about causal effects, it is largest in services, moderate in agriculture, and smallest in non-agricultural market access. All these results appear plausible.⁶⁰

Furthermore, the discouraging effect has gained in strength in the eyes of industrialized and developing countries. This implies that the capacity building in developing countries has not kept up with the increasing complexity of WTO agreements. Again, the familiar sector-based order results: increases are marginally larger in services than in agriculture, while uncertainty has not changed with regard to non-agricultural market access. Note that the responses on

⁵⁹ Respondents could also choose not to select a specific sector but to base their answers on their experience in several sectors or the entire WTO. The different sectors are similarly represented in the industrialized and developing country samples. Hence, there is no distortion in the comparison between industrialized and developing countries originating from this source.

⁶⁰ On the situation of developing countries, Hoekman (2002, 15) observes: "When it comes to 'new' issues on which developing countries have little experience, it may be difficult to determine whether a 'grand bargain' will have a net positive social payoff. This is a major reason why developing country negotiators have often been risk averse in GATT/WTO negotiations and sought to avoid issue linkage." See also the pervasiveness of complaints by developing country officials about their lack of capacity to understand increasingly complex WTO regulation, in the collection of case studies published by the WTO (2006a). Concerning the service sector, VanDuzer (2005, 192) finds that "the reason most frequently cited for avoiding commitments in health and education services in the current negotiations, however, is uncertainty regarding the nature and effect of GATS commitments." See also Jara and Dominguez (2006).

changes in uncertainty are likely to substantially underestimate the real effects since the experience of most delegates is limited to a few years and rare are those who have already weathered the Uruguay Round.

	1	2	3	4	5	Average
Uncertainty about legal meaning						
Industrialized countries	0	4	2	1	0	2,57
Developing countries	1	4	9	13	4	3,48
Non-agricultural market access	1	0	4	0	0	2,60
Agriculture	0	2	0	4	1	3,57
Services	0	1	2	5	0	3,50
Uncertainty about causal effects						
Industrialized countries	0	3	4	0	0	2,57
Developing countries	0	3	14	12	2	3,42
Non-agricultural market access	0	2	2	1	0	2,80
Agriculture	0	2	2	3	0	3,14
Services	0	0	4	4	0	3,50
Changes in uncertainty over time						
Industrialized countries	0	0	6	1	0	3,14
Developing countries	0	1	17	10	2	3,43
Non-agricultural market access	0	0	4	0	0	3,00
Agriculture	0	1	3	3	0	3,29
Services	0	0	4	3	1	3,63

Table 1: Survey responses on uncertainty in WTO negotiations

5. CONCLUSION

States are risk averse. WTO agreements are (increasingly) risky. Therefore, risk (increasingly) exerts a chilling effect on WTO negotiations. These are the findings in a nutshell. In more detail, the argument runs:

- Legal uncertainty has increased as the GATT/WTO has expanded from the reduction of tariffs and similar border-related trade barriers to new and more complex regulatory issues that reach into the domestic sphere and are closely linked to non-economic values. Governments have not reacted with self-imposed restraint but have used the dispute settlement system frequently, including as a substitute for and complement of multilateral negotiations. At the same time, the judiciary has acquired additional independence.
- Uncertainty about causal effects has also increased. First, economic welfare effects have become less predictable: WTO regulation has expanded to new issue areas, such as e-commerce and bio-technology, whose economic dynamics are hard to grapple with; the business environment has become more dynamic in general; market access has become more dependent on unpredictable non-tariff barriers to trade; the increasing implementation costs and rent shifting of WTO agreements are difficult to assess in advance. Second, the intricate relationship between trade and inequality, and thus also poverty, has become a central criteria for the evaluation of WTO agreements. Third, the non-economic effects of WTO agreements, which are equally difficult to forecast, have also become more important in governments' perceptions.
- Governments have become more sensitive to both sources of uncertainty. WTO agreements gain importance in comparison with national determinants of wealth as global economic integration advances, as the WTO expands the scope and depth of its regulation, and as the margin between WTO-bound liberalization and actually practiced trade-relevant policies shrinks. A further reason is that WTO agreements have become more decisive for governments' domestic political support.
- Overall, countermeasures which governments can adopt to soften adverse, unexpected effects have become less available. Unilaterally available exceptions, such as safeguard measures against import surges and flexibility in pursuing non-economic objectives, have experienced several changes that, taken together, appear to have diminished national maneuvering space somewhat. The bilateral negotiation of compensatory concessions has become more complicated with a greater and more active membership that guards its interests and claims compensation. The multilaterally negotiated measures, in the form of waivers, authoritative interpretations, and amendments, have become more difficult to attain as the membership has expanded while the consensus decision-making practice has been reinforced. Noncompliance with WTO obligations

and court rulings has become less attractive. Sanctions are authorized more expeditiously and, while the principle of equivalence has been maintained, the value of concessions that are authorized for withdrawal has augmented. States' interest in their reputation, as well as in the effective functioning of the WTO system, has grown and speaks against non-compliance. Finally, exiting the WTO has become close to unaffordable for economic and political reasons.

The empirical findings from the survey confirm the chilling effect of risk. It is most pronounced for developing countries and in the service sector.

What follows from all this for the WTO and its member states? First, they should strive to reduce the degree of uncertainty. In this context, strengthening the capacities of developing countries to understand the effects of WTO agreements is crucial. Technical and financial assistance to upgrade developing countries' analytical capacities is thus not only a normative imperative in order to enhance the WTO's legitimacy, but it is also a key to more successful negotiations. This assistance should entail not only missions in Geneva, but also the bureaucracies in capitals and domestic constituents that resist liberalization out of misplaced fears and the feeling of losing control to external forces they do not understand.

Second, the design of institutional provisions that govern the availability of countermeasures should be undertaken with the implications for risk strongly in mind. There are good reasons in favor of limiting governments' flexibility in handling their WTO obligations. These include: improving the predictability of market access for private agents, avoiding the expansive use of exceptions that erode the original contract, preventing recurrent non-compliance that weakens the agreement's legitimacy, and curbing discretion that can be used to exert pressure on relatively weak states. Against this background of competing objectives, the risk perspective speaks against any tightening of existing exceptions and sanctions, and for the introduction of special/emergency safeguard measures in agriculture and services which are being negotiated in the Doha Round. Interestingly, greater precision of the exceptions, especially at the interface with non-trade values, would reduce uncertainty without undermining the binding nature of member states' obligations (and it would also alleviate the dispute settlement system from having to repeatedly 'legislate' on this issue).

Third, states should consider the repercussions for risk when deciding about waivers, authoritative interpretations, and amendments. If states which are under distress find no consideration, this acts as a signal beyond the specific case. States should thus take great care to redress legitimate grievances in order to create trust which smoothes concerns about risks.

Literature

Abbott, Kenneth W., and Duncan Snidal. 2000. Hard and Soft Law in International Governance. *International Organization* 54 (3):421-456.

Alter, Karen J. 2000. The European Union's Legal System and Domestic Policy: Spillover or Backlash? *International Organization* 54 (3):489-518.

Ayres, Ian, and Robert Gertner. 1992. Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules. *Yale Law Journal* 101 (4):729-773.

Barfield, Claude E. 2001. Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization. *Chicago Journal of International Law* 2 (2):403-415.

Biermann, Frank. 2001. The Rising Tide of Green Unilateralism in World Trade Law: Options for Reconciling the Emerging North-South Conflict. *Journal of World Trade* 35 (3):421-448.

Bronckers, Marco C.E.J. 1999. Better Rules for a New Millennium: A Warning against Undemocratic Developments in the WTO. *Journal of International Economic Law* 2 (4):547-566.

Broude, Tomer. 2004. *International Governance in the WTO: Judicial Boundaries and Political Capitulation*. London: Cameron May.

Bull, Hedley. 1977. *The Anarchical Society: A Study of Order in World Politics*. London: Macmillan Press.

Burley, Anne-Marie, and Walter Mattli. 1993. Europe before the Court: A Political Theory of Legal Integration. *International Organization* 47 (1):41-76.

Cass, Deborah Z. 2005. *The Constitutionalization of the WTO*. Oxford: Oxford University Press.

Charnovitz, Steve. 2002. The WTO's Problematic 'Last Resort' Against Noncompliance. *Aussenwirtschaft* 57 (4):409-439.

Chayes, Abram, and Antonia Handler Chayes. 1995. *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge, MA: Harvard University Press.

Chimni, B. S. 2004. International Institutions Today: An Imperial Global State in the Making. *European Journal of International Law* 15 (1):1-37.

Clive, George, and Colin Kirkpatrick. 2004. Trade and Development: Assessing the Impact of Trade Liberalisation on Sustainable Development. *Journal of World Trade* 38 (3):441-469.

Cottier, Thomas, and Satoko Takenoshita. 2003. The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response. *Aussenwirtschaft* 58 (2):171-214.

Cronin, Bruce. 2001. The Paradox of Hegemony: America's Ambiguous Relationship with the United Nations. *European Journal of International Relations* 7 (1):103-130.

Das, Bhagirath Lal. 2003. *The WTO and the Multilateral Trading System: Past, Present and Future*. London: Zed Books.

Ehlermann, Claus-Dieter. 2003. Reflections on the Appellate Body of the WTO. *Journal of International Economics* 6 (3):695-708.

Ehlermann, Claus-Dieter, and Lothar Ehring. 2005. Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade? *Journal of International Economic Law* 8 (1):51-75.

Ethier, Wilfred J. 2002. Unilateralism in a Multilateral World. *The Economic Journal* 112:266-292.

———. 2004. Intellectual Property Rights and Dispute Settlement in the World Trade Organization. *Journal of International Economic Law* 7 (2):449-458.

Finger, J. Michael. 2002. *The Doha Agenda and Development: A View from the Uruguay Round*. Manila: Asian Development Bank.

Finger, Michael J., Ulrich Reincke, and Adriana Castro. 1999. Market Access Bargaining in the Uruguay Round: Rigid or Relaxed Reciprocity? World Bank Policy Research Working Paper 2258.

Francois, Joseph. 2000. Assessing the Results of General Equilibrium Studies of Multilateral Trade Negotiations. UNCTAD Policy Issues in International Trade and Commodities Study Series No. 3.

Garrett, Geoffrey. 1998. Global Markets and National Politics: Collision Course or Virtuous Circle? *International Organization* 52 (4):787-824.

Garrett, Geoffrey, R. Daniel Kelemen, and Heiner Schulz. 1998. The European Court of Justice, National Governments, and Legal Integration in the European Union. *International Organization* 52 (1):149-176.

Goh, Gavin. 2004. The World Trade Organization, Kyoto and Energy Tax Adjustment at the Border. *Journal of World Trade* 38 (3):395-423.

Goldstein, Judith, and Lisa L. Martin. 2000. Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note. *International Organization* 54 (3):603-632.

Greenwald, John. 2003. WTO Dispute Settlement: An Exercise in Trade Law Legislation? *Journal of International Economic Law* 6 (1):113-124.

Guzman, Andrew T. 2002. A Compliance Based Theory of International Law. *California Law Review* 90 (6):1823-1887.

Haas, Peter M. 1992. Introduction: Epistemic Communities and International Policy Coordination. *International Organization* 46 (1):1-35.

Harrison, Ann. 2006. Globalization and Poverty. NBER Working Paper 12347.

Hillgenberg, Hartmut. 1999. A Fresh Look at Soft Law. *European Journal of International Law* 10 (3):499-515.

Hoekman, Bernard M. 2002. Strengthening the Global Trade Architecture for Development. World Bank Policy Research Working Paper 2757.

Jara, Alejandro, and M. del Carmen Dominguez. 2006. Liberalization of Trade in Services and Trade Negotiations. *Journal of World Trade* 40 (1):113-127.

Jürgensen, Thomas. 2005. Crime and Punishment: Retaliation under the World Trade Organization Dispute Settlement System. *Journal of World Trade* 39 (2):327-340.

Kalderimis, Daniel. 2004. Problems of WTO Harmonization and the Virtues of Shields over Swords. *Minneapolis Journal of Global Trade* 13 (2):305-352.

- Kapstein, Ethan B. 2000. Winners and Losers in the Global Economy. *International Organization* 54 (2):359-384.
- Keohane, Robert O., Andrew Moravcsik, and Anne-Marie Slaughter. 2000. Legalized Dispute Resolution: Interstate and Transnational. *International Organization* 54 (3):457-488.
- Koh, Harold. 1997. Why Do Nations Obey International Law? *Yale Law Journal* 106 (8):2599-2659.
- Koremenos, Barbara. 2001. Loosening the Ties that Bind: A Learning Model of Agreement Flexibility. *International Organization* 55 (2):289-325.
- Leitner, Kara, and Simon Lester. 2004. WTO Dispute Settlement 1995-2003: A Statistical Analysis. *Journal of International Economic Law* 7 (1):169-181.
- Lepgold, Joseph, and Alan C. Lamborn. 2001. Locating Bridges: Connecting Research Agendas on Cognition and Strategic Choice. *International Studies Review* 3 (3):3-29.
- Lipson, Charles. 1991. Why are Some International Agreements Informal? *International Organization* 45 (4):495-538.
- Lohmann, Susanne. 2003. Why do Institutions Matter? An Audience-Cost Theory of Institutional Commitment. *Governance* 16 (1):95-110.
- Lybbert, Travis J. 2002. On Assessing the Cost of TRIPs Implementation. *World Trade Review* 1 (3):309-321.
- Maskus, Keith. 2000. *Intellectual Property Rights in the Global Economy*. Washington, DC: Institute for International Economics.
- Mattoo, Aaditya, and Arvind Subramanian. 2004. The WTO and the Poorest Countries: The Stark Reality. *World Trade Review* 3 (3):385-407.
- McCalman, Phillip. 2001. Reaping What You Sow: An Empirical Analysis of International Patent Harmonization. *Journal of International Economics* 55:161-186.
- . 2005. International Diffusion and Intellectual Property Rights: An Empirical Analysis. *Journal of International Economics* 67:353-372.
- McRae, Donald. 2004. What is the Future of WTO Dispute Settlement? *Journal of International Economic Law* 7 (1):3-21.
- Milanovic, Branko, and Lyn Squire. 2005. Does Tariff Liberalization Increase Wage Inequality? Some Empirical Evidence. NBER Working Paper 11046.
- O'Connor, Bernard. 2003. A Note on the Need for More Clairity in the World Trade Organization Agreement on Agriculture. *Journal of World Trade* 37 (5):839-846.
- O'Connor, Bernard 2004. Remedies in the World Trade Organization Dispute Settlement System - The Bananas and Hormones Cases. *Journal of World Trade* 38 (2):245-266.
- OECD. 2005. Tackling Trade in Agriculture. Policy Brief.
- Pauwelyn, Joost. 2004. Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO. *European Journal of International Law* 15 (3):575-592.
- Peters, Anne. 2003. International Dispute Settlement: A Network of Cooperational Duties. *European Journal of International Law* 14 (1):1-34.
- Petersmann, Ernst-Ulrich, ed. 2005. *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance*. Oxford: Oxford University Press.
- Pollack, Mark A. 2003. *The Engines of European Integration*. Oxford: Oxford University

Press.

Pugatch, Meir Perez. 2004. *The International Political Economy of Intellectual Property Rights*. Cheltenham: Edward Elgar.

Reich, Arie. 1996. From Diplomacy to Law: The Juridicization of International Trade Relations. *Northwestern Journal of International Law and Business* 17 (2/3):775-849.

Reimer, Jeffrey J. 2002. Estimating the Poverty Impacts of Trade Liberalization. World Bank Policy Research Working Paper 2790.

Rosendorff, B. Peter, and Helen V. Milner. 2001. The Optimal Design of International Trade Institutions: Uncertainty and Escape. *International Organization* 55 (4):829-857.

Sands, Philippe. 2000. 'Unilateralism', Values, and International Law. *European Journal of International Law* 11 (2):291-302.

Sarooshi, Dan. 2004. Sovereignty, Economic Autonomy, the United States, and the International Trading System: Representations of a Relationship. *European Journal of International Law* 15 (4):651-676.

Scott, Joanne. 2004. International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO. *European Journal of International Law* 15 (2):307-354.

Shelton, Dinah, ed. 2000. *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Oxford: Oxford University Press.

Simmons, Beth A. 2002. Capacity, Commitment and Compliance: International Institutions and Territorial Disputes. *Journal of Conflict Resolution* 46 (6):829-856.

Smith, James McCall. 2000. The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. *International Organization* 54 (1):137-180.

———. 2003. WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings. *World Trade Review* 2 (1):65-100.

Steinberg, Richard H. 2004. Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints. *American Journal of International Law* 98 (2):247-275.

Trachtman, Joel P. 1999. The Domain of WTO Dispute Resolution. *Harvard International Law Journal* 40 (2):333-377.

VanDuzer, Anthony J. 2005. Navigating between the Poles: Unpacking the Debate on the Implications for Development of GATS Obligations Relating to Health and Education Services. In *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance*, edited by E.-U. Petersmann. Oxford: Oxford University Press.

Weiler, Joseph H. H. 2001. The Rule of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement. In *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the New Millennium*, edited by R. B. Porter, P. Sauvé, A. Subramanian and A. B. Zampetti. Washington, DC: Brookings Institution Press.

Whalley, John. 2000. What Can the Developing Countries Infer from the Uruguay Round Models for Future Negotiations. UNCTAD Policy Issues in International Trade and Commodities Study Series No. 4.

Winham, Gilbert R. 2003. International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO. *World Trade Review* 2 (2):133-151.

Winters, L. Alan. 2000. Trade, Income Disparity and Poverty. World Trade Organization Special Issue 5.

WTO. 2005. World Trade Report 2005.

———. 2006a. Managing the Challenges of WTO Participation: 45 Case Studies.

———. 2006b. World Trade Report 2006.

Zahrnt, Valentin. Draft. Domestic Constituents and the Formulation of WTO Negotiating Positions: Relative Influence, Dynamics, and Repercussions on the WTO. On file with the author.