PART I

Stalemate and its ideological origins

1 Trade and culture

1.1 'Trade and . . .' problems

At the heart of a great many trade disputes lies a 'trade and . . .' problem;[1] that is, a clash between the goal of trade liberalisation and some other goal. As Joel Trachtman has explained, these problems involve 'conflicts between trade values and other social values', such as 'environmental protection, labour rights or free competition'.[2] Indicative of such conflicts are clashes within the WTO (and its predecessor, GATT 1947) over EC import bans on asbestos[3] and meat treated with certain growth hormones,[4] US prohibitions on imports of shrimp harvested in a manner threatening sea turtles[5] and on the cross-border supply of

[1] I take this terminology from Joel Trachtman, 'Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity' (1998) 9(1) *European Journal of International Law* 32.

[2] Trachtman, 'Trade and . . . Problems', 33. See also, e.g., Steve Charnovitz, 'The World Trade Organization and Social Issues' (1994) 28(5) *Journal of World Trade* 17; Robert Howse, Brian Langille, and Julien Burda, 'The World Trade Organization and Labour Rights: Man Bites Dog' in Virginia Leary and Daniel Warner (eds.), *Social Issues, Globalisation and International Institutions: Labour Rights and the EU, ILO, OECD and WTO* (2006) 157; Matthew Stilwell and Jan Bohanes, 'Trade and the Environment' in Patrick Macrory, Arthur Appleton, and Michael Plummer (eds.), *The World Trade Organization: Legal, Economic and Political Analysis* (2005) (vol. II) 511; Tania Voon, 'Sizing Up the WTO: Trade-Environment Conflict and the Kyoto Protocol' (2000) 10(1) *Journal of Transnational Law & Policy* 71.

[3] Appellate Body Report, *EC – Asbestos*, [1]–[2].

[4] Appellate Body Report, *EC – Hormones*, [2]. See also WTO, DSB, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute: Request for the Establishment of a Panel by the European Communities*, WT/DS320/6 (14 January 2005); WTO, DSB, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute: Request for the Establishment of a Panel by the European Communities*, WT/DS321/6 (14 January 2005) (Panel Reports not yet circulated at time of writing).

[5] Appellate Body Report, *US – Shrimp*, [1]–[6]; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, [3]–[7]. See also GATT Panel Report, *US – Tuna (Mexico)*, [2.3]–[2.12].

gambling and betting services,[6] and import restrictions and tax requirements imposed on cigarettes by Thailand[7] and the Dominican Republic.[8]

I do not propose to debate the virtues of trade liberalisation as a general matter. However, in a nutshell, the theory is that the removal of trade barriers (such as tariffs and import quotas), which distort international trade, will allow each country to specialise in producing goods or providing services in industries in which it has the greatest 'comparative advantage', and to import goods and services in industries in which it lacks this advantage. Although initially this may cause some adjustment problems (because, for instance, a steel worker cannot transform overnight into a computer programmer), in the longer term, national and global welfare will increase.[9] Of course, the underlying theory of comparative advantage has its limits. In some areas, such as national security, countries may want to retain all or some of their industrial and technical capabilities, regardless of their comparative advantage. In addition, even in industries to which the theory of comparative advantage applies easily, governments should not have to give up their right to regulate their territories as they see fit purely in the interests of trade liberalisation.

The WTO agreements reflect the goal of trade liberalisation, or at least its value as a means to achieve broader social and economic objectives. The WTO was established on 1 January 1995, following the eighth round of trade talks launched in Uruguay in 1986[10] under GATT 1947. In the preamble to the Marrakesh Agreement, WTO Members recognise 'that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services'. The preamble goes on to express the Members' desire

[6] Appellate Body Report, *US – Gambling*, [1]–[2].
[7] GATT Panel Report, *Thailand – Cigarettes*, [6]–[11].
[8] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, [2.1]–[2.6].
[9] See generally Douglas Irwin, *Against the Tide: an Intellectual History of Free Trade* (1996); Alan Sykes, 'Comparative Advantage and the Normative Economics of International Trade Policy' (1998) 1(1) *Journal of International Economic Law* 49. For a brief discussion of the history of the WTO, focusing on key disciplines and underlying trade theory, see Kym Anderson, 'Setting the Trade Policy Agenda: What Roles for Economists?' (2005) 39(2) *Journal of World Trade* 341, 342–54.
[10] GATT, *Ministerial Declaration to Launch the Uruguay Round of Multilateral Trade Negotiations* MIN.DEC (20 September 1986).

to 'contribut[e] to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations'.

In simplified terms, the core obligations or disciplines imposed on WTO Members in connection with trade in goods (essentially unchanged since GATT 1947) are as follows.[11]

To reduce trade barriers and increase market access:

(a) A general *prohibition on quantitative restrictions* (such as quotas) and equivalent measures on imports or exports from or to other Members.[12] Pre-existing quantitative restrictions and equivalent measures on agricultural and industrial products were converted to tariffs (customs duties) during the Uruguay Round, in a process known as 'tariffication'. Various economic and policy reasons explain this preference for tariffs over quantitative restrictions as a form of protection.[13]

(b) *Tariff bindings*: the tariff that a Member applies to imported goods of other WTO Members must be no greater than the tariff that the importing Member has agreed or 'bound' for the relevant product in its 'schedule of concessions'.[14] These tariff bindings under GATT 1994 continue the process of negotiated tariff reductions that took place under GATT 1947.[15]

To eliminate discrimination:

(c) *National treatment*: Discrimination by WTO Members against products of other Members in favour of domestic products may distort trade, much like a tariff, artificially increasing the competitiveness of the

[11] For a more detailed explanation of the core WTO disciplines, see Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (3rd edn, 2005) 27–32, 49–111, 177–93; Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005) chs. 4–5.

[12] GATT 1994, art. XI:1.

[13] In particular, tariffs provide greater transparency and economic certainty (e.g., for importers calculating transaction costs). In addition, tariffs generate revenue for the government imposing them, rather than simply for the domestic producers, who can charge higher prices when imports are restricted through either tariffs or quotas. See Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (2nd edn, 2001) 148; John Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn, 1997) 140; Richard Posner, *Economic Analysis of Law* (2003) 315. See also UNCTAD and World Bank, *Liberalizing International Transactions in Services: A Handbook* (1994) 54.

[14] GATT 1994, art. II. See, e.g., Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices* (2001) 19.

[15] See Jackson, *World Trading System*, 74.

domestic industry and reducing imports.[16] Therefore, under national treatment, each WTO Member must treat imported products, after they have crossed the border,[17] no less favourably than like products produced domestically. Specifically, internal taxes and charges, and laws and regulations affecting internal sale and distribution, 'should not be applied to imported or domestic products so as to afford protection to domestic production'.[18] Thus, national treatment precludes discrimination against imported products.

(d) *MFN treatment*: Discrimination by WTO Members in favour of imports from certain Member or non-Member countries (rather than imports from all WTO Members) may also distort trade.[19] According to the MFN obligation, described as a 'cornerstone' of the WTO[20] and 'the defining principle of the GATT',[21] where a Member grants an advantage (with respect to import, export, sale, purchase, transportation, distribution or use) to a product being imported from or exported to another country, it must also accord that advantage to all Members' like products.[22] Thus, MFN treatment precludes discrimination among imports of WTO Members or in favour of imports of non-WTO Members.

A recurrent difficulty in the global trading system (as well as regional and national counterparts)[23] involves distinguishing between trade-restrictive or discriminatory governmental measures that are imposed in the pursuit of a legitimate government objective from those imposed purely to protect domestic industries from foreign competition. Arguably, no 'trade and . . .' problem arises where the competing objective is mere protectionism, since trade liberalisation trumps protectionism in the absence of other considerations. However, numerous 'other' considerations exist, many of which the WTO agreements identify. The preamble to the Marrakesh Agreement itself recognises certain values

[16] See, e.g., John Jackson, *World Trade and the Law of the GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)* (1969) 273.
[17] See Panel Report, *EC – Poultry*, [273]–[275].
[18] GATT 1994, art. III:1. See also GATT 1994, arts. III:2, III:4.
[19] On the trade effects of such measures, see Robert Hudec, 'Tiger Tiger, in the House: A Critical Appraisal of the Case Against Discriminatory Trade Measures' in Robert Hudec (ed.), *Essays on the Nature of International Trade Law* (1999) 281, 286.
[20] Appellate Body Report, *Canada – Autos*, [69]; Appellate Body Report, *EC – Tariff Preferences*, [104]; Appellate Body Report, *US – Section 211 Appropriations Act*, [297].
[21] WTO, Consultative Board, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004) [59].
[22] GATT 1994, art. I:1.
[23] E.g., regional trade under NAFTA or the EC, and interstate trade in countries such as Australia or the USA.

or concerns other than trade liberalisation, such as development and the environment, noting that Members' trade should

> allo[w] for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,
>
> *Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development ...

As Trachtman has pointed out, a variety of 'trade-off devices' may assist in resolving 'trade and ...' problems.[24] GATT Article XX provides an example of such a device in connection with the problem of trade and environment. As the key exception clause in GATT 1994, Article XX lists certain '[g]eneral exceptions' to the usual trade-liberalising disciplines of the WTO, allowing Members to adopt or enforce measures 'necessary to protect human, animal or plant life or health'[25] or 'relating to the conservation of exhaustible natural resources'[26] (among other things) provided that certain other conditions are met.[27] Other WTO agreements besides GATT 1994 also recognise the trade and health problem. Consider a strict quarantine law on imported produce, which a WTO Member might impose on genuine health grounds or to protect its farmers or fisheries from competitors worldwide.[28] The WTO's SPS Agreement (which governs Members' 'sanitary or phytosanitary' measures that affect international trade)[29] captures the difference between these objectives by

> [r]*eaffirming* that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between

[24] Trachtman, 'Trade and ... Problems', 35.
[25] GATT 1994, art. XX(b).
[26] Such measures must be 'made effective in conjunction with restrictions on domestic production or consumption': GATT 1994, art. XX(g).
[27] In particular, the *chapeau* to GATT 1994, art. XX, makes all the exceptions '[s]ubject to the requirement that such measures 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'.
[28] Cf. Appellate Body Report, *Australia – Salmon*, [1]–[2].
[29] SPS Agreement, art. 1:1, annex A.

Members where the same conditions prevail or a disguised restriction on international trade.[30]

Similarly, the Enabling Clause allows some discrimination in favour of developing countries, contrary to the usual WTO rules, recognising the importance of development.[31] The WTO rules also recognise the potential problem of trade and security, providing that GATT 1994 is not to be construed to prevent a Member 'from taking any action which it considers necessary for the protection of its essential security interests' relating to traffic in arms, for example.[32]

Other 'exceptions'[33] to WTO disciplines are not necessarily or ordinarily characterised as such. For example, to counter injury to their domestic industries, Members are entitled to impose anti-dumping duties on dumped imports,[34] and countervailing duties on certain subsidised imports,[35] subject to compliance with detailed procedural and substantive requirements set out in the WTO agreements. That these kinds of 'trade remedies' involve exceptions to WTO disciplines is clear. They might otherwise violate the MFN obligation or tariff bindings. They are also examples of 'trade and . . .' problems. Although their rationale is debatable,[36] some might describe anti-dumping and countervailing duties as reflecting the conflict between free trade and unfair trade.[37] This conflict is purportedly resolved by creating strict

[30] Ibid., preamble (see also art. 2.3). The wording of this passage is comparable to that in the *chapeau* of GATT 1994, art. XX.
[31] Enabling Clause, [1].
[32] GATT 1994, art. XXI. See also GATS, art. XIV *bis*.
[33] Although the point was disputed, the Appellate Body found that the Enabling Clause is an exception to MFN treatment in Appellate Body Report, *EC – Tariff Preferences*, [98]–[99].
[34] GATT 1994, art. VI:2; Anti-Dumping Agreement, art. 1. In the WTO, 'dumping' occurs where 'products of one country are introduced into the commerce of another country at less than the normal value of the products': GATT 1994, art. VI:1. See also Anti-Dumping Agreement, art. 2.
[35] GATT 1994, art. VI:3; SCM Agreement, art. 10. In the WTO, a 'subsidy' essentially involves conferring a benefit through either a 'financial contribution' by a government or public body or 'income or price support' that increases exports from or reduces imports to that country: GATT 1994, art. XVI:1; SCM Agreement, art. 1.1.
[36] See below, 237.
[37] GATT 1994, art. VI:1 reflects the alleged unfairness of dumping, stating that WTO Members 'recognize that dumping . . . is to be condemned if it causes or threatens material injury to an established industry in the territory of a Member or materially retards the establishment of a domestic industry'. GATT 1994, art. XVI:2 provides an example of WTO Members' recognition of the alleged unfairness of certain subsidies, stating that WTO Members 'recognize that the granting by a Member of a subsidy on the export of any product may have harmful effects for other contracting parties, both

conditions on the imposition of these duties to prevent their use as protectionist measures, just as the SPS Agreement, '[i]n an effort to eliminate protectionist and unnecessary non-tariff barriers . . . imposes strict scientific justification requirements'.[38]

According to the Appellate Body, Article XX of GATT 1994 describes 'measures that are recognized as exceptions to substantive obligations established in GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character'.[39] Petros Mavroidis has pointed out that 'one tenable reading' of this list of exceptions 'would be to exclude regulatory intervention on grounds not mentioned' therein.[40] However, although Article XX is restricted to certain domestic policies that WTO Members have identified as legitimate, this does not necessarily mean that all other domestic policies (including policies regarding cultural products) are illegitimate for the purposes of WTO law.[41] Leaving to one side the issue of whether it is appropriate for WTO Panels and the Appellate Body (which resolve disputes between WTO Members regarding trade-related measures)[42] to assess the legitimacy of particular domestic regulatory goals,[43] several factors suggest that WTO Members never intended to limit their regulatory objectives to those listed in Article XX (or explicitly specified

importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement'.

38 Catherine Button, *The Power to Protect: Trade, Health and Uncertainty in the WTO* (2004) 103.

39 Appellate Body Report, *US – Shrimp*, [121]. See also [156].

40 Petros Mavroidis, '"Like Products": Some Thoughts at the Positive and Normative Level' in Thomas Cottier and Petros Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2000) 125, 129.

41 Cf. William Davey and Joost Pauwelyn, 'MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product"' in Cottier and Mavroidis, *Regulatory Barriers*, 13, 38.

42 Disputes between WTO Members about compliance with WTO rules are settled by Panels (established on an *ad hoc* basis and generally comprising three individuals) and the Appellate Body (comprising seven individuals who serve four-year terms). Reports of Panels and the Appellate Body become effective only upon adoption by the DSB (comprising representatives of all WTO Members), but adoption is virtually automatic. The DSU is the WTO agreement that establishes the rules for resolving disputes. Although the DSB could in theory agree by consensus not to adopt a Panel or Appellate Body Report (DSU, arts. 16.4, 17.14), it has not done so to date. For more detailed commentary see generally Jeffrey Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (2002).

43 Aaditya Mattoo and Arvind Subramanian, 'Regulatory Autonomy and Multilateral Disciplines: The Dilemma and a Possible Resolution' (1998) 1 *Journal of International Economic Law* 303, 321.

elsewhere in the WTO agreements), and that the Appellate Body would be loath to impose such a requirement.

First, this reading is inconsistent with the preamble to the Marrakesh Agreement, which appears to recognise other legitimate objectives of WTO Members, as already mentioned. Indeed, the Appellate Body itself has looked to the preamble in the course of interpreting GATT Article XX(g).[44] Second, it inexplicably excludes numerous goals of domestic policy that are both common and apparently non-protectionist, such as consumer protection,[45] 'competition policy, company law and investment-related matters', 'income distribution, revenue raising' and 'the environment *per se*'[46] (i.e. other than for measures 'relating to the conservation of exhaustible natural resources . . .', which are explicitly recognised in Article XX(g)).[47] Third, and most importantly, it is contrary to 'the notion of trade liberalization as consistent with deep regulatory diversity, accommodating a full range of noneconomic public values'.[48] This notion is supported by GATT contracting parties' refusal during the Uruguay Round to craft the WTO system 'as an autonomous level of governance' with regulatory powers.[49] Moreover, it is a key factor in maintaining support for and institutional legitimacy of the WTO. Although certain WTO agreements involve some harmonisation,[50] in general the WTO refuses to characterise the multilateral trading system as harmonising or deregulating.[51] Substantial freedom to regulate domestically according to any social or political agenda is essential to achieving agreement in the WTO among countries of vastly different backgrounds, values, and levels of development.[52]

[44] See, e.g., Appellate Body Report, *US – Shrimp*, [129]. [45] Mavroidis, 'Like Products', 129.
[46] Mattoo and Subramanian, 'Regulatory Autonomy', 308, 313–14.
[47] Other legitimate policies that might fall outside Article XX include those 'designed to harmonize technical standards, to avoid the accumulation of waste, or to tax the consumption of luxury goods': Frieder Roessler, 'Diverging Domestic Policies and Multilateral Trade Integration' in Jagdish Bhagwati and Robert Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (1996) (vol. II) 21, 30.
[48] Robert Howse and Kalypso Nicolaïdis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?' (2003) 16(1) *Governance* 73, 79–80.
[49] Ibid., 84.
[50] E.g. TBT Agreement, art. 2.6; SPS Agreement, art. 3.1; TRIPS Agreement.
[51] See, e.g., Appellate Body Report, *US – Gasoline*, 30; WTO, Economic Research and Analysis Division, *Market Access: Unfinished Business – Post-Uruguay Round Inventory and Issues (Special Study No. 6)* 122; GATT, *Countdown for the Uruguay Round: Address by Peter Sutherland to the Forum de l'Expansion, Paris, 19 October 1993*, NUR 070 (20 October 1993) IV. See also Steve Charnovitz, 'Free Trade, Fair Trade, Green Trade: Defogging the Debate' (1994) 27 *Cornell International Law Journal* 459, 471; Mavroidis, 'Like Products', 129.
[52] See Howse and Nicolaïdis, 'Enhancing WTO Legitimacy', 86.

This assessment is consistent with the statement by Robert Howse and Kalypso Nicolaïdis that a 'large part of the membership of the WTO opposes the WTO having any social agenda'.[53]

Thus, an undefined list of legitimate regulatory objectives or social values may compete with the endorsement of trade liberalisation within the WTO. Promotion or preservation of culture is one of these.

1.2 Cultural implications of WTO rules

Individuals, non-governmental organisations and certain States have made clear their anxiety about increasing cultural homogenisation and a world swamped with burgers from McDonald's and films from Hollywood.[54] Few would dispute that Members should be allowed to retain their 'culture', whether or not they could be said to have a 'comparative advantage' in this area. However, as some traded goods and services have both economic and cultural value (in such forms as aesthetics, spirituality, history, symbolism, and authenticity),[55] a Member could impose trade-restrictive or discriminatory measures on imports of these items either to preserve and promote local culture or to protect its producers. The cultural value of a given product may be reflected not only in the nature of the product, or who produced it, but also in the way it is produced or consumed or the way it affects local identity.[56] Moreover, a desire to protect local culture, broadly defined, could undermine the wisdom of trade liberalisation in the first place. Even a nail, tiny and seemingly meaningless, could have cultural implications when combined with millions of other nails and millions of other goods and services bringing in foreign influences, standards, and materials. This is the essence of the trade and culture problem.

On one view, '[j]ust as quarantine laws prohibit the import of disease-bearing plants and animals, so does cultural protection seek to shield

[53] Ibid.

[54] See, e.g., Harry Redner, *Conserving Cultures: Technology, Globalization, and the Future of Local Cultures* (2004) 47–8, 103; George Yúdice, *The Expediency of Culture: Uses of Culture in the Global Era* (2003) 221; Guillermo de la Dehesa, *Winners and Losers in Globalization* (2006) 166–7. But see also Trebilcock and Howse, *Regulation of Trade* (3rd edn) 10–12, 451; David Hesmondhalgh, *The Cultural Industries* (2002) 174–8.

[55] David Throsby, *Economics and Culture* (2001) 28–9.

[56] Tomer Broude, 'Taking "Trade and Culture" Seriously: Geographical Indications and Cultural Protection in WTO Law' (2005) 26(4) *University of Pennsylvania Journal of International Economic Law* 623, 638–41.