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Introduction

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The Rationale for the Volume

The World Trade Organization (WTO) has recently celebrated 20 years of existence. Although two decades is a relatively short period for an international organisation (IO), the WTO has established itself as the multilateral anchor of global trade politics and law. Its development has certainly been helped by the achievements of its forerunner treaty, the General Agreement on Tariffs and Trade (GATT), yet, the decision to create a new IO in the early 1990s was a landmark decision transforming trade politics for years to come. The timing was prompted by a so-called 'constitutional moment' at the end of the Cold War and the development of a broad consensus among leading industrialised countries on the need to create a more legalised system expanding commitments to new areas (such as services) in order to reflect the growing economic interdependence among nations and firms. In addition, many saw the development of new multilateral rules and a more judicialised system as an attempt to tame US incentives to go 'unilateral' in trade policy. In retrospect, the creation of the WTO and the new legal commitments was an important achievement.

The early history of the WTO is one of an ascending organisation that, in the 1990s, attracted considerable attention from the public at large. More and more states accelerated or started the process of gaining WTO accession (including China and Russia). Most notably, the dispute settlement arm of the organisation swiftly established itself as an authoritative voice by providing guidance as to how to interpret the thousands of new legal obligations when put into practice. It did so not with a rod of iron, but through persistent legal interpretation to foster a rules-based system and the development of case law. The first group of Appellate Body (AB) Members were aware that the 'young plant' needed to be tended and nurtured with a calm, but steady hand.

Towards the end of the 1990s, many WTO Members expressed the opinion that some rules needed to be updated and new agreements needed to be explored through a new trade round that would go beyond increased liberalisation in services and in agriculture (built-in agenda from the Uruguay Round). The failure of launching a new round in 1999 at the Ministerial Conference in Seattle exposed the difficulties in setting joint objectives for new rules in a growing organisation. Different expectations about the new round's mandate reflected important divergences of interests among WTO Members. In addition, the perceived strong dispute settlement arm (unintentionally) hampered efforts to quickly conclude new arrangements. The imbalance between the judicial and the legislative arm became all too obvious. Notwithstanding the successful start of a trade round in Doha in 2001, the organisation has not been able to formally update existing rules (either substantial or procedural). The growing network of bilateral and plurilateral agreements, including new mega-regionals, is partly a result of stagnation in the WTO and the difficulties of making new rules.

The objective of this volume is not to investigate further the root causes of this development (see e.g. Hoekman 2014; Francois and Hoekman 2015), but rather to take stock of what the WTO has achieved. The rhetoric of a 'deadlocked' organisation does not do justice to the WTO's continuing role as the multilateral anchor of trade relations. New Members join the organisation, multiple WTO committees monitor implementation and address trade concerns, WTO jurisprudence further evolves and the dialectical relationship between preferential agreements and the WTO inspires the daily work of the organisation on all levels. The WTO continues to provide transparency about its Members' trade policies and offers technical assistance and capacity building to the weaker actors, encouraging them to participate fully in the deliberations and negotiations (including dispute settlement procedures).

There are twenty years of WTO history providing fertile ground for inquiry into how well the WTO has performed. The collection of work presented in this volume is the result of the World Trade Forum 2015 conference where scholars representing various academic disciplines and traditions gathered to present their analyses of the WTO. The scholars who contributed to this book have closely observed and critically accompanied many of the steps the WTO has taken, from its pre-existence reflected in the nascent ideas formulated in the Uruguayan seaside resort of Punta del Este, to the most recent attempts to continue the journey at the 2015 Ministerial Conference in Nairobi. Contributors to this volume

have different stories to tell, grounded in the theoretical and empirical traditions of their respective disciplines. Their analyses come to different conclusions, but, in the end, the collected work in this volume shows that the impact of the WTO might be much more positive than we are led to believe by the media and news on the current stage of the trade negotiations in a failed Doha Development Round.

Overview of the Contributions

This volume features fourteen substantive chapters that cover extensive ground. Reflecting the importance of dispute settlement, six of the contributions analyse the WTO's allegedly successful system. The other contributions focus on various issues ranging from the origins of the multilateral system, the accession process, the interaction between preferentialism and multilateralism, the prevalence of WTO-type provisions in preferential trade agreements (PTAs) and the interaction with other international organisations. The selection of these topics was inspired on the one hand by new findings and intriguing insights that have been largely overlooked in the past and on the other hand by the desire to reflect on important lessons drawn from twenty years of scholarship on trade policy and the WTO. We have chosen not to focus on governance in rule-making in the narrow sense as a recent volume in the World Trade Forum Series analysed the trends in and limits of decision-making in considerable depth (Cottier and Elsig 2011; see also Elsig 2016).

Below, we summarise the key findings of each of the chapters and how they relate to thinking about the achievements of the global trading system with the WTO at its centre. Chapter 2, 'Thinking About the Performance of the World Trade Organization: A Discussion Across Disciplines' by Manfred Elsig, Bernard Hoekman and Joost Pauwelyn, draws on the concept of performance and discusses different narratives from three disciplines: international relations, economics and law. The authors posit that these debates have often occurred in isolation, although they have considerable common ground. An important objective of this chapter is to summarise key contributions in the three disciplines and to encourage further cross-fertilisation across disciplines. What the chapter further shows is that, depending on the performance matrix used, the assessment of how the WTO matters (performance) can vary significantly (the 'eye of the beholder' effect). This has implications not just for research and future research programmes, but is important from an accountability and 'ownership' perspective. Governments find it

increasingly challenging to explain why they negotiate trade agreements and what the impacts of trade agreements have been.

Chapters 3 and 4 offer new and intriguing insights into the early days of the multilateral system. Chad P. Bown and Douglas A. Irwin in their contribution 'The GATT's Starting Point: Tariff Levels Circa 1947', provide a new estimation approach for establishing the average tariff level when GATT participants began tariff negotiations after World War II. They find that starting tariffs were significantly lower than general wisdom has assumed (22 per cent rather than 40 per cent). These results help us reconsider the true success of the first rounds of trade negotiations. The GATT has still performed remarkably in terms of tariff reduction, but less so than the established trade community has suggested. This also shows other outcomes in an even more favourable light, such as binding the agreed tariff reductions, establishing the concept of non-discrimination through most-favoured nation (MFN) treatment and national treatment, ensuring increased transparency of trade policy measures, paving the way for future negotiations, and for establishing a system for long-term peaceful resolution of bilateral disputes.

Judith L. Goldstein and Robert Gulotty in their contribution 'Negotiating in the Early GATT: Norms, Rules and the US Tariff Schedule', provide a historical analysis of the success of the early regime in terms of trade negotiations. They offer new evidence based on archival data on how the early GATT negotiation rounds functioned. They analyse in detail how tariff reduction swaps took place, in order to gain a better understanding of when and why nations were able to conclude bargains. They show that the success of the organisation in its early years was less in the creation of strict rules to regularise trade, and more in accommodation of the domestic constraints faced by those who came to Geneva to negotiate tariffs. These lessons are interesting against the background of the current deadlock in WTO negotiations.

Part II is devoted to general trends and patterns in WTO dispute settlement. Frieder Roessler in Chapter 5, 'Dispute Settlement in the WTO: From a Deliberately Designed to a Spontaneously Grown Order', discusses how different practices affect the direction of the legal order. Roessler sees two types of order that have guided expectations in the field of dispute settlement in the GATT and the WTO: spontaneous orders, which grew out of practices, and directed orders, which were deliberately created by agreement. The dispute settlement order of the GATT grew spontaneously out of an accumulation of practices that the contracting parties to the GATT agreed to codify and refine. The dispute

settlement order of the WTO, originally purposefully created by agreement, is turning into an order in which the expectations of Members are less and less based on the agreed provisions and more and more on practices that the disputant parties and the judicial organs of the WTO are adapting *praeter* or *contra legem*. This chapter nicely contrasts the different evolutionary pathways legal order can take.

In Chapter 6, Dirk De Bièvre, Arlo Poletti and Aydin Yildirim survey the literature that focuses on the important question of what explains the launching and resolution of disputes in the WTO. In 'About the Melting of Icebergs: Political and Economic Determinants of Dispute Initiation and Resolution in the WTO', they explore in particular how actual disputes relate to potential cases, i.e. WTO dispute settlement cases that could have been brought, but were not. In addition, the authors review possible political and economic determinants of dispute resolution. In doing so, they map out the universe of potential WTO disputes and then shed light on some of the political and economic factors that can explain under what conditions government representatives select the foreign trade barriers they want to target through WTO litigation. The challenge of analysing the submerged part of the iceberg remains in identifying the universe of potential WTO cases that government representatives can act upon and in assessing the relative weight of, and the relationships between, possible political determinants. In other words, without knowing how much of the iceberg is under the water, a systematic analysis of the functioning of dispute settlement can only be partial.

Chapter 7, 'The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges', takes stock of the operation of both panels and the Appellate Body. In this chapter, Giorgio Sacerdoti, a former Member of the Appellate Body, critically reviews the overall performance to date before going on to discuss a number of problems that have emerged in the dispute settlement process and the challenges that will confront WTO Members in the future. This chapter puts forward concrete proposals for dealing with both immediate constraints, and the longer-term challenges of ensuring the sustainability of the dispute settlement system, such as procedures for appointment and reappointment of Members of the Appellate Body.

The final chapter in Part III, 'Does Trade Comply?: The Economic Effect(iveness) of the WTO Dispute Settlement Process', analyses the performance of the WTO dispute settlement process by focusing on the effects on trade flows between disputing parties. Tobias Hofmann and

Soo Yeon Kim offer an important test for whether the dispute settlement mechanism works in the way it was intended to by the designers of the system. In their empirical analysis they find little support for such an assertion. The chapter focuses on two particular questions. First, does WTO dispute settlement matter? And, second, why do trade flows not necessarily resume following dispute settlement of compliance cases? The results show that trade 'does not comply'. The empirical analysis investigates the effects of tariffs and trade remedy investigations on trade between parties. The authors advance a new explanation that relies on trade policy substitutes that enable respondents to achieve non-compliance by other means. This is another form of unintended consequences.

Part IV focuses on specific debates. In Chapter 9, 'Twenty Years of Third-Party Participation at the WTO: What Have We Learned?', Krzysztof J. Pelc discusses the effects of opening up the WTO's litigation process, partly in an attempt to increase the transparency of dispute settlement, to third parties. Through this mechanism, countries that are not party to the dispute can be present in the room during otherwise private consultations, and their views are recorded as an integral part of the final report of the panel and the AB. The chapter addresses questions such as: how has the function of third parties and their views evolved since 1995?; how have litigants' attitudes to third-party participation changed?; and, finally, is third-party participation a net good, by making litigation more open, or a net bad, by making settlements more difficult? The most important finding is that third-party participation reduces the possibilities of settlement, which goes against a fundamental objective of the dispute settlement system. At the same time, when settlements are reached, they are less likely to be discriminatory.

Julia Qin's contribution focuses on the accession protocols and relationship with the WTO Agreement, an area that has been largely overlooked when focusing on WTO dispute settlement. In Chapter 10, 'Mind the Gap: Navigating Between the WTO Agreement and Its Accession Protocols', she re-examines the legal basis for member-specific rule-making, assesses relevant WTO jurisprudence and proposes a new approach to navigating such a relationship. Further, she addresses four specific interpretive issues arising from such a relationship: how to determine the availability of general exceptions of WTO Agreements to member-specific obligations; how to determine the scope of derogation from WTO provisions by the member-specific rules; the relevance of accession

protocols to the interpretation of WTO multilateral agreements; and the relevance of the accession protocol of one Member to the interpretation of the accession protocol of another. These interpretive issues have arisen in one form or another in WTO disputes, but not all of them have been properly resolved and some have not even attracted much attention.

Luca Rubini's contribution in Chapter 11, 'The Age of Innocence: The Evolution of the Case Law of the WTO Dispute Settlement: Subsidies as a Case Study', provides an analysis of the work of both panels and the AB in this important area of WTO jurisprudence. Against a paradigmatically unclear regulatory framework, he examines the attitude of the panels and the AB during the first twenty years of the WTO by asking the following questions: Was the first phase one of simple discovery? Has this progressively given way to a more active approach towards the law, which could be – and has been – tagged 'activism'? Using representative examples of decisions on subsidies by panels and the AB, this chapter argues that the panels are on the whole more deferential than the AB. The latter is, in Rubini's view, adopting increasingly innovative decisions, which either raise serious doubts about their correctness or should be assessed as seriously wrong. The author advocates that WTO adjudicating bodies should pay more attention to the 'negotiated balance' and the 'point of balance' of the various disciplines and that, in this respect, a stronger use of the negotiating history is necessary

Finally, Part V looks at interactions within and across regimes. In Chapter 12, 'The Presence of the World Trade Organization Within Preferential Trade Agreements', Todd Allee and Manfred Elsig question the conventional wisdom that PTAs are at odds with the multilateral trading system and that they present a major challenge to the WTO's preeminence. They analyse the texts of hundreds of PTAs in two novel ways to see how compatible they are with WTO rules. First, for ten notable issues typically found in PTAs, they tally the number and prominence of references to the applicable GATT or WTO Agreement. Second, they calculate the percentage of text in a given PTA Article that is copied from the analogous GATT or WTO Agreement. Perhaps surprisingly, they find that many PTAs take the majority of their language from WTO Agreements and that across several notable trade issues PTAs defer heavily to the WTO. These unique findings illustrate an underappreciated role played by the WTO and suggest that perceived tensions between PTAs and the WTO are somewhat overstated, and that in

assessing the true performance of the WTO one also needs to address the export of legal texts to the world of PTAs.

Chapter 13 focuses on the dialectical relationship between the multilateral system and PTAs. In 'The WTO and Regional Trading Agreements: Is It All Over for Multilateralism?', Alan Winters sets out the WTO's scorecard on regionalism starting with the inheritance it received in this respect from the GATT. He suggests that the WTO has been able to do very little about the march of PTAs and that we cannot expect very much more from it in the future. He discusses the argument that by avoiding the issue, the WTO has preserved itself and its other functions and has thus made the best of a very bad hand in maintaining multilateralism. He also suggests, however, that if we are to bequeath an effective multilateral system to the next generation, we will need to engineer a significant change in the hand that the WTO is dealt. These are important lessons for the potential future performance of the WTO.

Chapter 14, by Cédric Dupont and Manfred Elsig, addresses the question of the relationship of the WTO with other IOs. In 'Performance and International Organisations' Borders: The Case of the World Trade Organization', they argue that the international relations literature has paid little attention to questions related to boundaries between IOs. An analysis of the performance of the WTO, however, is not complete without an understanding of these politics at the border. This chapter aims to contribute to the literature by providing a framework of analysis. After conceptualising various border dynamics and outcomes, the chapter outlines conditioning factors and links these through a series of bivariate relationships with outcomes at the border. The analytical relevance of the framework is discussed with cases from the WTO and its border relations with other IOs, and a future research agenda on border politics is sketched out.

The final chapter, by Joseph Michael Finger, 'The GATT/WTO System and National Trade Policies: Which Comes First?', discusses the interrelationship between the WTO and national policy formation on the basis of case studies of Peru, Argentina and the United States. Finger argues that it is incorrect and misleading to regard the WTO as a 'top down' institution that imposes binding constraints on governments. Much depends on the preferences of national governments and how they respond to domestic political economy pressures. The case of Peru and the US illustrate how governments can use the WTO productively to

manage such pressures; the case of Argentina in contrast illustrates how WTO rules can be circumvented for long periods of time, notwithstanding the DSU.

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Thinking About the Performance of the World Trade Organization

A Discussion Across Disciplines

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A Introduction

The World Trade Organization (WTO) officially opened its doors in 1995 on the shores of Lake Geneva. Although it is one of the youngest major international governmental organisations, the WTO is built upon customs, principles and rules that developed over nearly half a century under the loosely institutionalised platform of the General Agreement on Tariffs and Trade (GATT). Notwithstanding its short history, in the past twenty years the organisation has drawn significant attention from various segments of society in both developed and developing countries and has attracted thirty-three new members, transforming it into a nearly universal organisation. It has also become the focus of extensive academic research spanning a number of disciplines, most notably international economics, international law and international relations (IR). While most experts would argue that the WTO matters, and research has focused on a variety of WTO-related achievements, there are conceptual and empirical holes in WTO scholarship. In particular, significant scope exists to extend interdisciplinary research – much of the scholarly literature is limited to specific disciplinary 'silos'. Consequently, the questions that are analysed by economists, legal scholars and political scientists differ significantly. While this makes research on the WTO complementary, it also implies that there are unexploited opportunities for synergies.

This chapter focuses on WTO outputs and outcomes by drawing on concepts that measure the performance of the organisation, providing different disciplinary narratives from IR, economics and law. A key objective of this chapter is to explore further cross-fertilisation across