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Introduction

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Constitutional paralysis paved the way for financial ruin, for military impotence, and for foreign invasion. If taxes could not be raised, the Republic's Army could not be maintained, and the Republic's enemy could do as they pleased.

(Davies 2001)

The World Trade Organization (WTO) stands at a crossroads, a situation it shares with many other international organisations (IOs) established after the Second World War. While challenges from globalisation are creating opportunities and the need for enhanced multilateral co-operation, IOs have largely remained on the sidelines, staying with structures shaped for a different and past period. The responses to the most recent financial, fiscal and economic crises and the failure to reach more than a shaky political accord at the 2010 Copenhagen Summit on Climate Change illustrate two facts: the absence of leadership and the preference for unilateral, bilateral or plurilateral approaches, and the lack of an appropriate international architecture able to deal with a highly complex international agenda. Nation states continue to cling to an outdated model of Westphalian sovereignty which translates into limited delegation to and within IOs of global reach. The exact diagnosis of shortcomings and crises varies from one IO to another. In the case of the WTO – formally created in 1995 but strongly building upon the experience and diplomatic *modus operandi* of the 1947 General Agreement on Tariffs and Trade (GATT) – an obvious imbalance between the organisation's modern dispute settlement arm and its traditional negotiation platform emerged (Cottier and Takenoshita 2003). While the WTO's existing rules, backed by the strong dispute settlement system, have provided some buffering against the negative effects of the financial crises (e.g., countries' incentives to turn to protectionism), its negotiation machinery has not produced any substantial outcomes since the late 1990s. It has become obvious that

the old way of doing business does not work properly any more in a multi-polar world and that demand for fresh ideas about governing the organisation is growing (e.g., Steger 2010). This becomes all the more evident when we turn to future regulatory issues which transcend the traditional call for market access and liberalisation.

This book is about governing the most important multilateral institution at the heart of the global trading system. We understand governance as a term of political science capturing the substance and structure, as well as the processes of political systems. While lawyers increasingly tend to structure the argument of governance in terms of constitutional theory in international law (e.g., Klabbers, Peters and Ulfstein 2009), we use the term governance as defined by James Rosenau to mean ‘the maintenance of collective order, the achievement of collective goals, and the collective processes of rule through which order and goals are sought’ (2000: 175). We posit that governance malaise develops from difficulties in defining processes, working within existing structures, or disagreement on the collective goals. We also submit that constructive criticism of how institutions are governed is necessary and important if they are to continue to play an important role. Absence of criticism (lack of voice) would be a sign of states taking the exit option (Hirschman 1970).

In the case of the WTO, however, the amount, tone and origins of criticism directed at the organisation are noteworthy. Even the innermost circle of actors (the Geneva-based trade diplomats) must have come to realise that the WTO has a serious ‘governance’ problem. The first notable efforts towards addressing governance deficiencies started in early 2000 after the infamous third WTO Ministerial Conference held in Seattle in December 1999. Back in Geneva, many contracting parties and a significant number of civil society groups called for a rethink of decision-making. Therefore, in the run-up to the Ministerial Conference in Doha in 2001, some incremental changes were agreed upon to allow greater access for weaker states during the negotiations (to address concerns of inclusiveness). In addition, we witnessed attempts to increase overall transparency (and decrease secrecy) to address concerns of information asymmetry voiced by many developing countries. Yet, the launching of a new round masked the continuing difficulties in making deals at the WTO. After successfully negotiating a formula to address the thorny issue of the protection of intellectual property rights and public health, some participants were even enthusiastic about the ability of the existing governance toolkit to manage the Doha Round.

Whereas it remains disputed in the literature whether 9/11 provided the necessary conditions for agreeing on a mandate or whether changes in negotiations behaviour account for the Doha Declaration (Blustein 2009, Odell 2009); what remains undisputed is that agreement on the Doha Declaration was influenced by concessions towards developing countries. These concessions came in the form of publicly suggesting that the key concern was to strengthen the developmental aspects of the WTO. This rebranding exercise (from a market access endeavour to a development round) raised expectations which would be hard to meet. Since the beginning of the round, little progress has been made in relation to the agenda outlined and many deadlock situations have been encountered, at times paralysing the organisation.

The original WTO treaties foresaw that the organisation would meet at least every two years at the Ministerial level. Given the small progress in the Doha Round and the reluctance to bring Ministers together without the prospect of some success, there had been no Ministerial gathering in 2007.¹ In late 2009, the WTO Members finally agreed to hold a Ministerial meeting. In response to the evolving consensus that another failed Ministerial was to be avoided, the meeting was intended to address governance issues.² This was an attempt to allow Ministers to meet outside the typical bargaining atmosphere (which is usually what happens at Ministerials). While progress by tabling bold new initiatives was not expected in a formal setting (Ministers read out their prepared speeches), it marked the start of a period of reflection on reform of the institution.

It has become evident that while the present round will be completed (or abandoned) on the basis of current procedures, future tasks can no longer be successfully addressed without institutional reform. Beyond classical trade issues, future challenges include additional liberalisation of behind-the-border measures, complex negotiations on trade policy responses to climate change mitigation and adaptation, and finding

¹ When Ministers met it was within the setting of so-called mini-Ministerials among leading economies; these were convened to attempt to unblock issues.

² To quote from the WTO website: 'In his report to the General Council on 17 November 2009, D-G Pascal Lamy said that while the upcoming WTO Ministerial Conference would not be a negotiating session, it would be "a platform for ministers to review the functioning of this house", including the Doha Round, and an occasion "to send a number of strong signals to the world with respect to the entire WTO waterfront of issues – from monitoring and surveillance to disputes, accessions, Aid for Trade, technical assistance and international governance."' www.wto.org/english/thewto_e/minist_e/min09_e/min09_e.htm, accessed on 12 June 2010.

regulatory answers to long-term effects of the financial and fiscal crises, including the absence of sufficient financial regulation in international law. Given this changing environment and the demand for fresh ideas on adapting the WTO governance model, this edited volume is aimed at contributing to the evolving debates on the future of this key multilateral institution in regulating the world economy.

This volume is the result of the 2009 World Trade Forum held at the World Trade Institute of the University of Bern in September 2009. The Forum brought together scholars and practitioners who have been writing on WTO law, economics and international relations as well as colleagues focusing on other global economic multilaterals. The Forum allowed for critical discussions across disciplinary boundaries and political convictions, pushing contributors to sharpen their arguments in terms of theoretical frames, conceptualisation, empirical assessment and policy prescriptions. The book offers more than one diagnosis of governance crises and consequently suggests various paths towards reform (Elsig 2007).

This is not the first book on reform (and will not be the last). However, it offers a number of new aspects: first, by contrasting and complementing various traditions for studying WTO governance, the book goes beyond a mono-disciplinary approach. We posit that the blurring of disciplinary borders will shed some new light on the challenges the WTO faces. Second, a number of the chapters offer explicit comparative perspectives. Lessons learned across IOs are intended to enrich the often myopic view of the WTO, treating the WTO in a *sui generis* fashion. Third, the book addresses change over time. It goes beyond a ‘snapshot’ analysis of current problems and provides for a longer term view of the functioning of the system. Fourth, the contributions rely on critical and constructive analyses.

The book also provides for a variety of readings on how the WTO does business and contributors work with different and competing expectations as to what the WTO is mandated to perform. Therefore, this edited volume does not put forward a uniform set of proposals. While readers will find plurality of voices on reform, they will recognise that contributors to this volume are united in advocating that the WTO cannot continue to renegotiate old rules and create new rules in a business-as-usual scenario. They provide policy-relevant ideas that go beyond incremental redesign but avoid the trap of (overtly) romantic scenarios for changing the dominant governance models of the organisation.

This volume is structured in six Parts. Below we summarise the key messages and findings. In Part I, 'Setting the stage', we start with a personal account of the challenges of the multilateral trading system. In Chapter 2, former Ambassador Julio Lacarte looks back on his long experience of being an active participant in the global trading system since its origins in Havana, Cuba in 1947. Ambassador Lacarte provides a practitioner's perspective on governance. He outlines trends and considers diversity, putting special emphasis on the role of developing countries and discussing the function of the important international civil servant running the Secretariat, the Director-General. In Chapter 3, Tony McGrew argues that WTO reform has been marginalised by far more pressing issues in the wake of the crisis of financial globalisation. However, reform has perhaps never been as urgent given accelerating shifts in global economic power, the centrality of trade to the structural rebalancing of the world economy necessitated by the Great Crash of 2008 and the need to forestall the collapse of globalisation. McGrew examines this paradox by reference to both the ideational and structural determinants of WTO institutional politics. Drawing upon Vivien Schmidt's policy discourse framework and the wider global governance literature (both normative and analytical), the argument suggests that dominant discursive constructions of WTO reform have contributed significantly to a politics of failure: that is failure to realise progressive institutional change. The chapter concludes by exploring some cosmopolitan arguments for a transformed WTO.

Part II, 'Boundaries', takes up prominent debates on the WTO's borders in terms of participation (parliamentary dimension) and issue areas (mandate). In Chapter 4, Marion Jansen provides an economic analysis of what the WTO should be regulating in the first place. Jansen discusses a range of reasons why governments might wish to inscribe negotiating issues on the WTO agenda. She argues that export interests, anti-circumvention arguments and enforcement considerations may have been the most relevant drivers of WTO agenda-setting in the past. In addition, the chapter discusses the way the WTO has dealt with new issues related to countries' internal policies and how the relationship with international standard-setting institutions has evolved. The following chapter by Markus Krajewski focuses on the potential role of transnational parliamentary institutions. He contributes to the evolving debate on legitimate legal order and frames this analysis within the wider debate about democratic legitimacy at the international level (Chapter 5). Krajewski applies a comparative approach, contrasting

the Parliamentary Conference on the WTO (PCWTO) and the Parliamentary Network on the World Bank (PNoWB) as two recent examples of transnational parliamentarisation and discusses the prospects and perils of increasing the parliamentary dimension.

Part III, 'Emerging and established powers', discusses the challenges of the newly emerging trade powers and one of the existing sponsors of the system (the European Union (EU)). In Chapter 6 Amrita Narlikar addresses the way the WTO has institutionally adapted to changing external imperatives, including the evolving balance of power. She investigates why this has not resulted in the smoother functioning of the organisation. Narlikar proposes directions for institutional reform, focusing in particular on decision-making processes within the organisation. She argues that although critical mass approaches, particularly with most-favoured nation (MFN) clauses built in, may offer one way out, they also come ridden with problems. She then develops ideas in regard to a revised voting system, which combines the efficiency of the former Principal Supplier Principle with the empowerment afforded by majoritarian voting formulae. Chapter 7 by Bart Kerremans opens up the domestic side of EU trade policy-making. Kerremans analyses how the strategic negotiating set-up of the WTO affects the EU's ability to participate effectively in multilateral trade negotiations. The chapter combines principal-agent (PA) theory, endogenous tariff theory, and resource mobilisation theory to identify the chain of delegation that matters for the EU whenever it negotiates multilaterally. It also shows how international institutional factors affect the processes of autonomy and control in that chain. He indicates how a PA concept can help uncover the key PA relations that are pivotal to understanding the challenges of reform.

Part IV turns to weaker actors within the WTO/GATT system. In Chapter 8, Chad Bown focuses on the surveillance needs of weaker developing countries, reflecting on current challenges brought about by the economic and financial crises. Bown argues that the lack of a surveillance function of the WTO system is a result of the small amount of private sector monitoring that is taking place. The economic implications of this can be quite important. If developing country exporters cannot monitor the conditions of foreign market access, they are ill-informed when WTO violations occur, and they do not then self-enforce foreign commitments by using the threat of or actual resort to WTO dispute settlement. The chapter suggests, in addition to other existing tools for increasing transparency, the creation of an 'Institute for

Assessing WTO Commitments' (IAWC). The following chapter, written by Kent Jones, explores the compliance costs and burdens upon many developing countries as a result of WTO obligations. Jones examines the current state of trade coherence as defined by coordination among IOs to address aid and technical assistance in support of trade liberalisation and the building of trade capacity among least-developed countries. Jones applies an institutional analysis advocated by John Searle and elaborates on new institutional initiatives in the WTO. He shows how Searle's conceptualisation can guide us in thinking about reform in light of growing regime overlap.

Part V focuses on the consensus principle. In Chapter 10, Mary Footer conceives of the WTO treaties as a mixture of a 'constitutional contract' and a 'living instrument' focusing on the 'intrinsic evolutionary nature' of such treaties. Footer looks specifically at the roles of consensus decision-making and informality in the adoption of decisions and in consensus building at the negotiations stage and in the context of normative developments. The following chapter by Robert Kissack explores the question of the extent to which and how an institutional crisis brings about changes in decision-making rules and processes. Kissack focuses in Chapter 11 on consensus and the ways in which states agree to use innovative methods of negotiation in order to reach consensus. The argument put forward is that an institutional crisis presents organisations and states with an opportunity to promote new negotiation mechanisms previously unused in that institution. Kissack proceeds with a comparative study by providing a theoretical grounding of the concepts of crisis and consensus, as well as introducing the most important element in the argument, the differentiation between active and passive consensus following Barry Buzan's work. He then presents an empirical demonstration of the interplay between crisis and consensus in the Food and Agriculture Organization of the United Nations (FAO) and considers what crisis and consensus can teach us about the WTO.

The final Part, 'Quo vadis?', offers three explicit contributions to the reform questions and avenues. Steve Charnovitz in Chapter 12 uses Montesquieu's analysis of separation of powers and employs it in an updated version to analyse the WTO. Charnovitz examines the operation of the three branches of the WTO, the executive, the legislative, and the judicial, and suggests ways in which the interrelationships of the branches can be improved. He puts forward a variety of practical recommendations to meet the expectations raised through a

neo-Montesquieu analysis. In Chapter 13, Manfred Elsig and Thomas Cottier focus on the current triangle of decision-making (consensus principle, single undertaking, member-driven nature) and explain why the current system is unsustainable in the long run. Based on these findings, the chapter then engages in a contrafactual analysis of how the current system would function when actors experiment with adjusted forms of decision-making, mainly based on incremental reform steps. Finally, the chapter suggests redesigning WTO governance for tackling the future challenges of the trading system, including the departure from consensus decision-making, the single package idea and the limited delegation to the WTO Secretariat. The last chapter, written by Rorden Wilkinson offer a critical reading of current discussions about WTO reform that looks beyond the minutiae of the reform proposals (Chapter 14). Wilkinson proceeds on the basis of two interrelated claims. The first claim is that in the absence of a fundamental overhaul that goes beyond the kind of reform that dominates the most frequently touted proposals, future trade negotiations are unlikely to produce outcomes that are markedly different from those of previous rounds. The second claim is that when confronted with yet another asymmetrical bargain, as Doha is likely to produce, our intellectual industry will most likely turn again to fettling, but nevertheless preserving, the way in which the current system works rather than substantially changing or overhauling it.

In conclusion, this volume adds to the voices saying that reform is necessary and ought to be taken seriously. We sincerely hope that the chapters of this volume will assist in moving forward the necessary debate on trade governance in the WTO and beyond. We are convinced that this debate is necessary if states and IOs wish to avoid the fate of the First Noble Republic of Poland (1569–1795). At the time, the supremacy of a large nobility amounting to 8–10 per cent of the population enjoyed the privileges of individual veto powers and the need for consent in the legislative assembly, the *Szlachta*. No statute could be adopted without consent of all. Insistence on such requirements and veto powers (*liberum veto*), based upon extensive individualism, largely contributed to immobility and decline of the enlightened Republic and laid the country open to Austria, Germany and Russia for partition, leading to disappearance and colonisation (Davies 2001: 290–5). It essentially left Poland in that state until 1990 and subjected the country to a violent history. Let us hope that comparable patterns of immobility enshrined in sovereignty, veto powers and the consensus principle in today's IOs will not produce

similar effects, and that a new and appropriate balance between the prerogatives of sovereignty, cooperation and integration can be found in IOs and common law-making. Constitutional paralysis must be avoided.

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The origins and back to the future: a conversation with Ambassador Julio Lacarte Muró

Mr Ambassador: making decisions at the GATT/WTO; how did it all start?

The genesis of GATT was a Preparatory Committee for a world conference on trade and employment which was to be held in Havana in late 1947 and early 1948; this Preparatory Committee was appointed by the Economic and Social Council of the United Nations and comprised some twenty-odd members. The intention was that the International Trade Organization to be set up at Havana would join the World Bank and the International Monetary Fund as the backbone of the post-war scheme for inter-governmental cooperation in trade, financial and monetary issues.

And who were those 20-odd members?

Almost inevitably they were a reflection of the winning alliance of the Second World War. They included Great Britain, Canada, South Africa, Australia, New Zealand and India; that is, six from the British Commonwealth. The United States, Cuba – which was at the time very close to the United States, due to the sugar quota issue – and Brazil, which had sent troops to Europe in the Second World War. Inevitably, there was France together with the Benelux countries (Belgium, the Netherlands and Luxembourg). Norway, which had also been a belligerent and whose government had taken refuge in Britain throughout the Second World War, was represented. So, out of the total membership of the Preparatory Committee countries, the majority had been Allies and they were the countries that were most influential in pushing in favour of the whole process of the world trading system. And we must not forget China as it was at the time – the China of the Nationalist Government.

What about the Union of Soviet Socialist Republics and its allies?

The Union of Soviet Socialist Republics (USSR) had been invited to participate in the Preparatory Committee but had declined, and one can see why it would have done so, because the USSR's economic system and doctrine were completely alien to those of Britain and the United States. Subsequent political events simply served to confirm this approach. The only Eastern European country that did join was Czechoslovakia. The Czechs had a very big stake in world trade, and as a land-locked country whose outlet to the world was mainly through Hamburg, they had a tremendous interest in being part of this movement.