Public Policy and WTO Law: Regulating Globalization

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Globalization is the buzzword of the present decade. Nonetheless, a global definition of the term “globalisation” has yet to emerge. At the very least, it can be described as “a process whereby regulatory power is shifted from the national level towards the supranational level.” The management of international trade by the World Trade Organization (WTO) might be a classic example of such shifted regulatory power. What is more, the Organization is seen both as an outcome and a force of globalisation. Therefore, globalization generates a primary, vertical tension between international regulations and institutions, such as the WTO, and domestic regulatory systems. At the same time, this regulatory power is attributed to different international organizations (such as the UN, the Bretton Woods institutions, the WTO, and others). Hence, we can identify in the process of globalization a secondary, horizontal tension between different sets of international rules and institutions.

The colloquium “Public Policy and WTO Law: Regulating Globalization” was structured around these two tensions.¹ To paraphrase the words of Prof. David Luff² in his opening speech, the colloquium was an attempt to move from “the first generation of trade law,” which sought to determine what the rules were, to the “second and third generation of trade law,” which begins to focus on the interlinkages between these rules and other regulatory systems. On the first day, the second generation of trade law was explored. Speakers examined the interface between WTO rules and domestic regulatory regimes (vertical axis). The first session focused on economic domestic regulations, while the second session discussed non-economic domestic regulations. “The third generation,” explored during the second day, discussed the position of the WTO in the international regulatory system (international horizontal axis). In this context, the question of the WTO’s

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¹ Organized jointly by the Institute for International Law of the University of Leuven and the Institut d’Etudes Juridiques Européennes of the University of Liège, 24-25 February 2005. Organisers: Prof. Jan Wouters of the University of Leuven, Prof. Damien Gerardin and Prof. David Luff of the University of Liège.

² Associate Professor of Liège University.
legitimacy as an international organization was addressed. But the theoretical
distinction between the vertical and horizontal axes often became blurred in the
presentations and discussions.

“Is the right to regulate right?” With this question, Prof. Joel Trachtman\(^3\) opened
his review of the relationship between international trade law and domestic law.
There is no “institutional” limit as such on the scope of the WTO, and thus no
“domaine réservé”, as exists in federal states, because its decision-making is gener-
ally by consent. There is simply no need for a domaine réservé because States can
decide autonomously whether or not to commit. Therefore, Trachtman proposed
to counter the right to regulate with the right to commit not to regulate. Finally,
he looked at the degree to which the right to regulate is restricted by the WTO
Agreement. The GATT is not very intrusive, as it prohibits only discriminatory
measures.\(^4\) Yet, the concept of “discrimination” is a difficult one to define. In
practice, the Panels often undertook a “smell test”\(^5\) of whether the regulation was
driven by protective intent. The TBT Agreement\(^6\) and the SPS Agreement\(^7\) are
more restrictive as to national regulatory autonomy because non-discriminatory
regulations are not as such excluded from their scope. Yet, their disciplines can be
interpreted in a dual way. On the one hand, they can be viewed as adding new
restrictions on the right to regulate. On the other hand, they may in fact merely
elaborate on the non-discrimination clauses of GATT and thus be an alternative
proxy to detect bad intent.

Philippe De Baere\(^8\) opened the session on economic domestic regulation and
placed trade remedies (anti-dumping, countervailing duty actions and safeguards)
within the field of tension between the WTO and domestic sovereignty. He
approached trade remedies as tools for ensuring that globalization remains a
sustainable process. The WTO members have limited themselves to certain
categories of trade remedies and thereby agreed upon substantial and procedural
rules that must be followed when adopting these trade remedies. As a result, the

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\(^3\) Fletcher School of Law and Diplomacy of Tufts University.

\(^4\) The relevant provision are Article I GATT (Most Favoured Nation), Article III GATT
(National Treatment), Article XI GATT (prohibition of Quantitative Restrictions) and
Article XX GATT (General Exceptions).

\(^5\) Prof. Robert Hudec.

\(^6\) Agreement on Technical Barriers to Trade.

\(^7\) Agreement on Sanitary and Phytosanitary Measures.

\(^8\) Partner Van Bael & Bellis, Brussels.