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**See you in Geneva? Pluralism and centralism in legal
representations of the trading system**

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Abstract

When officials disagree about trade policy, some say ‘see you in Geneva!’ meaning ‘see you in court!’ In offering a pluralist alternative to this centralism of analysts and practitioners, I represent the World Trade Organization (WTO) not as a coercive court used for enforcement but as a site for the elaboration of a system of ‘law’ that arises from and provides a framework for self-directed human interaction. I contrast this legal representation with ‘legalization’ to show the contribution it makes to constructivist international theory. An empirical probe in the contentious domain of the *WTO Agreement on Sanitary and Phyto-sanitary Measures* (SPS) asks about the relative importance of the few formal SPS disputes compared with other ways that WTO law affects global food safety. A discussion of how the trading system responded to ‘mad cow disease’ provides empirical confirmation of pluralist insights. Far from being only in Geneva, trade law is everywhere.

When officials from different countries disagree about appropriate trade policy, some say ‘see you in Geneva!’ in the tone of voice people use when ending an argument by saying ‘see you in court!’ The norm of *laissez-faire*, it seems, has been replaced by ‘*laissez litiger*’ (Ostry, 1999, 174).¹ This legalistic reduction of the World Trade Organization (WTO) to its dispute settlement system is if not absurd at least misguided. Economists who hold this view see the WTO want it to enforce free trade, jurists want it to enforce a court-based international rule of law, and civil society worries that the WTO will actually succeed in meeting both objectives, with no regard for local democracy. Even some political scientists see the apparent ‘legalization’ of the WTO as its most interesting characteristic. I argue that the theoretical models of international relations and of law on which these ideas are based offer an inadequate account of the role of the WTO in the trade regime, even if it is one heard frequently from scholars, officials, and activists. Inadequate representations affect how trade negotiators understand their task and how citizens understand the legitimacy of the WTO role in global governance. The WTO in a familiar phrase may be ‘rule-based’, but officials do not ‘make’ the rules; participants in the trading system make the rules. And in the WTO as at home, adjudication is far from the most important institutional technique available for resolving policy disagreements.

Theoretical models matter. Many economists have a political economy theory of trade (for example, Baldwin, 1998), from which they derive a theory of the trading system as a solution to the collective action problem of liberalization in the presence of lobbying by interest groups. Scholars who use ideas borrowed from economics about how individual rationality can explain political behaviour have a theory of cooperation in general, rather than a theory of the trading system (for examples, see Goldstein, 1998; Gruber, 2000; Keohane, 1997). The two strands of theory can be seen in the ‘legalization’ literature in international relations (Goldstein, et al., 2000) and in the literature on ‘international economic law’ (Jackson, 1997; Petersmann, 1998), also a utilitarian approach to collective life. (For a critique, see Kennedy, 1995.) These two approaches see the WTO’s primary role as reinforcing open markets by constraining cheating on deals, or helping the state resist domestic protectionism, as if the only reason the trading system works at all is because of the threat of legalized enforcement and retaliation.

My contrasting view of law and the trading system rests on the assumption that the purpose (*telos*) of any system of law is to create a framework to guide the future interaction of the parties, and that the WTO is only a part of the trade regime. International regimes are social creations. We know them through the convergent expectations they foster, and we observe them in the conversation they structure not the transactions costs they reduce: the regime *is* the intersubjective communication among participants (Kratochwil and Ruggie, 1986). This global conversation about trade constitutes and is constituted by the regime. In this sense, the trade regime is not the WTO treaty or the decisions of the Appellate Body, it is the way in which traders think about reciprocity and non-discrimination in global trade.

The WTO, which incorporates the *General Agreement on Tariffs and Trade* (GATT), continues the long process of institutional innovation that began in the free trade era of the mid-nineteenth century (Winham, 1992). The evolution of this legal system has also been shaped by a

¹ ‘Litiger’ is not of course a French verb, but I think Ostry’s critical observation is better made by her neologism than by the more accurate ‘*laissez poursuivre*’.

broader constitutional order. The procedural norms of the society of states that constitute the WTO include notably sovereign equality and the peaceful settlement of disputes. This objective of ensuring that legitimate policy differences between states do not lead to conflict comes from the ‘constitutional structure’ of the multilateral international order (Jackson, 2000; Reus-Smit, 1997; Ruggie, 1998). The GATT, negotiated in 1947, was a dynamic compromise between the need to end the managed trade of the 1930s and the equal imperative of preserving the social innovation of the New Deal. The WTO is founded on the same principled beliefs that open markets are good for prosperity and that non-discrimination is good for stable international relations. The economic logic may be support for free trade, but the political logic is that a country can have whatever policy it likes at home, so long as goods and services from other countries are treated equally to each other and to the products of domestic firms.² This ‘compromise of embedded liberalism’ (Ruggie, 1983) was not a grand decision sealed by a treaty but an ongoing process first evident in the actions and words of state officials during the 1940s. Embedded liberalism is not a fixed bargain about levels of social spending or tariff bindings but a dynamic commitment to allowing countries to be different within a multilateral framework. Embedded liberalism summarizes the constitutive basis for the trading system as a compromise between the needs for universality on which a strong order must rest, and the needs for particularity that are inevitable in a plural world order. In offering a pluralist alternative to the centralism of the ‘see you in Geneva’ thinking of analysts and practitioners alike, I represent the WTO not as a coercive court used for enforcement but as a site for the elaboration of a system of ‘law’ that arises from and provides a framework for self-directed human interaction.

In the first section of this paper, I describe and contrast the assumptions of my pluralist view of law to the views that I collectively characterize as ‘see you in Geneva.’ In the second section I situate pluralist and centralist conceptions of the main legal issues in the trading system with respect to three representations of law and the role of international organizations common in the international relations literature. Where the ‘see you in Geneva’ approach stresses enforcement, and expects to see significant difficulties in living with an agreement adjudicated in formal disputes, the pluralist view stresses law as guidelines and expects to see a continuous process of social interaction in which the parties adjust their expectations of each other. In the third section, I contrast the representations of WTO law found in the literatures on ‘legalization’ and ‘legal pluralism’, showing the contribution that legal pluralism offers to international relations scholars interested in the social context of the law (Brunnée and Toope, 2000). I do not comment on WTO jurisprudence as such; rather I situate the role of adjudication in the evolution of WTO law and the trading system. In the fourth section I ask how centralist and pluralist expectations fare in the contentious domain of food safety under the *WTO Agreement on Sanitary and Phyto-sanitary Measures* (SPS). Can analysts understand the evolution of the SPS agreement by looking at the few formal SPS disputes filed to date, most of which never end with a formal decision, or ought we to look for other evidence of how WTO law affects collective life in this domain? A discussion of how the trading system responded when a ‘mad cow’ was found in Canada in 2003 provides empirical confirmation of pluralist insights. In the conclusion I argue that far from being only in Geneva, trade law is everywhere.

² The prescriptive rules of the TRIPs agreement may be anomalous.

1. Social interaction and the implicit rule of pluralist law

Scholars commonly write about the WTO in terms of rule-making, legalization, even constitutionalization (Howse and Nicolaidis, 2003). What these representations of the WTO have in common is the equation of the law with written texts and judicialized interpretation. Rather than challenge this use of legal images to describe the role of the WTO, I show how other legal theories provide more satisfying representations of what actually goes on in the trade regime.

The ‘see you in Geneva’ view of the WTO makes three legal assumptions that are respectively centralist, positivist and monist (Macdonald, 1998; 2003). Analysts need not adopt all three, but the assumptions are usually found together. First, the *centralist* assumption is that states, the only relevant actors in the trading system, are the source of all law. Second, the *positivist* assumption is that the text of the WTO treaty, as interpreted by the Appellate Body, is the law. Third, the *monist* assumption is that the WTO is the centre of the trade universe, as if other sites of normative authority have no purchase on trade. These assumptions lead to theories of the trading system, in economics, international law and international relations, that I claim to be inadequate. In contrast to this centralist view, my pluralist view of law and global governance is rooted in two complementary literatures, implicit and interactional law in the legal process theory of Lon Fuller (1940; 1969c)³ and legal pluralism in the work of Roderick Macdonald (1998; 2003). The way in which these literatures address the nature of social order, good institutional design, and law as a social construction suggests that the role of institutions in the establishment of a stable and prosperous global order is to create a framework for self-directed human interaction rather than coercion of self-interested individuals. I set out this approach in this section before contrasting it to conventional approaches in the next.

Contra centralism and monism: legal pluralism

Legal pluralism is not the mainstream approach to legal theory. Despite apparent affinities, it differs from the rational literature on decentralized cooperation exemplified in the transactions cost approach to law (Ellickson, 1991) and international institutions (Keohane, 1984), or the claims of international economic law that WTO must show ‘institutional sensitivity’ (Howse, 2001) to other international organizations. Legal pluralism is not a way to understand how interest groups compete for control of the state, nor is it a way to think of the possibility of governance as if the state did not exist. It is a way to move the state out of the centre of the frame, to develop an overview of world politics that recognizes not merely a multiplicity of issue-areas but multiple sources of normative order. Legal pluralism does not make the public/private distinction, as if only state law mattered for collective purposes, and as if

³ For an assessment of Fuller’s importance, see Witteveen and Burg (1999). On the Legal Process School, see Hart and Sacks (1994). For a critique of the foundational work of Friedrich Kratochwil (1989) and Nicholas Onuf (1989) that suggests that constructivists use an ‘interactional’ understanding of law grounded in Fuller’s work, see Brunnée and Toope (2000). The concept of ‘legalization’ in neoliberal institutionalism (Goldstein, et al., 2000) takes its theory of law from H.L.A. Hart, with whom Fuller had a famous debate on positivism in the 1950s. These authors have the legal positivist’s view that law is what the sovereign (government) wills and legalization, therefore, is something that governments can choose, as opposed to something that emerges through interaction (Finnemore and Toope, 2001).

the rule of law applies only to the state. The import of the legal pluralism hypothesis is obvious within a federal state, where national, provincial and municipal governments claim authority, and within the administrative state, where legislatures, tribunals, courts, administrative agencies, and even political parties have degrees of simultaneous legitimate authority within the same domains. It should equally be obvious that various formal and informal institutions, from firms through standard-setting bodies to charitable organizations share governance roles with government bodies (Freeman, 1999; Salamon, 2002; Teubner, 1997). Legal normativity is associated with the family, firms, churches, and other civil society organizations—law is pervasive in everyday life (Macdonald, 2002b). And if law is pervasive in the everyday life of the family, then it is also pervasive in the everyday life of the trading system. In borrowing from this approach I am claiming that social dynamics are not different at global level: the norms that structure the representation of our relationships with other people often travel between the different spheres of social life (Jutras, 2001). It is in this sense that the normative universe of trade in food, for example, includes the actions of multinational firms, the preferences of consumers, and standards promulgated by the relevant international organizations—as well as the rules of the WTO. Centralist and monist assumptions do not fit well with a farm to fork food safety regime.

Contra positivism and monism: the morality of implicit law

The conventional metaphor for positivist law is the unitary statute book in which all of the state's codified explicit legislation is collected. The role of international organization then is to contribute to an international harmonization and codification of explicit law. In contrast, the pluralist fantasy of the legal framework is like the North American family's fridge door. That is the place where everyone posts the relevant textual evidence of our mutual commitments for all to see, from the school timetable to the municipal garbage schedule. Understanding the injunction of the fridge door differs from reliance on the statute book, yet the fridge door may be a better metaphor for how law actually shapes everyday life (Macdonald, 2001). Explicit WTO texts have a place, and their formality can be useful as an indication of what officials thought important, but other texts also compete for influence. The daily life of a dairy farmer implicitly includes both the Uruguay Round *Agreement on Agriculture* and the practices of the local cooperative. The WTO texts work well, but they do not work alone in guiding governments let alone the interactions of millions of traders.

The positivist assumption is that 'law' is the explicit unitary expression of the sovereign's will, even if the sovereign is thought to be 'the people', whereas the fridge door metaphor sees law as a plural social creation. The metaphor is rooted in Fuller's idea that 'law' is the way in which we create and monitor social order. Contra the positivist attention to texts, or to formal 'sources' of law, he defined law as 'the enterprise of subjecting human conduct to the governance of rules (Fuller, 1969c: 106).' He rejected defining law merely by its tools (e.g. courts), or by its results (e.g. order), and he dismissed the assumption that we can know law by its use of coercion or force. The difficulty for legal positivists lies in separating the text of an agreement from the purpose sought by the parties, which may or may not have been well expressed in the text, which may or may not be consistent over time, and which is only one indicator of the law in any social context. Positivists separate law and behavior in order to examine the relation between them. Constructivists focus on the continuous intersubjective constitution and reconstitution of social relations and of the very identities of actors (Kingsbury,

1998: 371). The law of the WTO, for example, is not separable from the objectives of the officials who read the law, either in Geneva or a national capital; nor is the implicit law of the WTO separable from the actors for whom it provides a framework for the everyday life of the trading system, actors who are both *creators* and *subjects* of WTO law. WTO law is interesting to legal pluralists, therefore, not as machinery but for how it gives meaning to one dimension of global collective life.

Fuller claimed that legal norms can guide self-directed social interaction only if they are broadly congruent with the practices and patterns of interaction extant in society generally. He came closest to a traditional statement of the rule of law in his discussion of eight generally familiar principles for assessing legal excellence that, he said, are linked by an ‘inner morality’ (Fuller, 1969c: 39, 41-2). In the end, it is with these principles and not the positivist’s formal tests that we identify ‘law’. By ‘inner morality’ he meant that law’s legitimacy is not instrumental. Trade law cannot be justified in functional terms, as if any one legal institution is necessarily the best way to promote a desirable objective, like efficiency, order, or social justice, all of which are exogenous to the inner morality of trade law as law from whence its legitimacy comes. Law is rooted in human interaction.

This concept is not intuitive. Fuller (1975: 94-5) remarked that ‘The notion that human subjects of law can, through their interactions, generate rules of law is something that legal theory has never felt comfortable with. In reality, a modern system of written statutory law depends for its successful functioning on what may be called a form of customary law, in the sense of a system of stabilized interactional expectancies.’ This idea is not at all the same as creating a kind of mechanical ‘predictability’ nor, despite the affinity with notions of ‘customary international law’ (Fuller, 1969b), does it require that custom be treated as an explicit source of obligation, a matter of greater concern in a centralist than a pluralist approach to law.

Institutional implications

To the adherents of what came to be called the ‘Legal Process School’ in American public law scholarship, with which Fuller was associated, courts are part of a larger institutional structure that might be imagined as ‘The Great Pyramid of Legal Order’ (Hart and Sacks, 1994: 286-7). Most things in life just happen, usually in accord with some understanding of appropriate action, with no subsequent questions asked. These billions if not trillions of social interactions are the base of the legal pyramid. The second layer of the pyramid comprises those situations in which some general arrangement is thought to have been violated. Most such cases, inevitably a small fraction of the unobjectionable cases in the first layer, do not give rise to formal dispute settlement. A small fraction of this fraction are subject, on the third layer, to some formal process, but that process is usually private—examples include commercial arbitration, and the internal processes of associations. The fourth layer of the pyramid are those cases that are launched in formal courts and tribunals. Hart and Sacks observe that the larger number of the cases at the third and fourth level are settled prior to any formal decision being rendered. The fifth level are cases settled by guilty plea or consent decree. The sixth layer of this great pyramid of the legal order is where we find the relatively tiny number of litigated cases. The final layer, the farthest from the great mass of actions that consciously or unconsciously follow legal

arrangements, are the few cases that come before some sort of reviewing tribunal. When people say ‘see you in Geneva,’ they reduce the law of the trading system to the top of the pyramid.

The way we represent WTO law affects how we represent the institutions of the trading system. The implication of Fuller’s view of institutional design and of compliance is that a court is not necessarily a central institution for law: he argued that adjudication as ‘a *social* process of decision’ (Fuller, 1963: 41) depends on decision by a third party after the presentation of proofs and reasoned arguments (Fuller, 1981: 91, 93), a form of participation that serves some ends but not others. When we see law as ‘stabilized interactional expectancies’, we then see texts as guidelines not commands, and courts become one of many social institutions for making collective decisions, rather than as a uniquely authoritative site for determining what is ‘legal’. When we see the possibility of choosing among multiple institutions, we are able to consider the democratic potential of the institutional choices that we make. No exogenous set of value preferences provides any useful guidance for the designer of social institutions. No one institutional site addresses all democratic concerns. Sometimes we wish to ensure that minority voices are heard in the making of state policy; other times we wish to ensure the full participation of developing countries in global governance. Sometimes we vote to make decisions, but in other contexts we negotiate or allow deliberate resort to chance (Macdonald, 1999). The choice of decision process is a reflection of the form of participation desired and the end in view. When the only institution that we can imagine is adjudication, we limit the way in which we can understand the problem, the scope of participation, and the types of possible outcome.

The nature of courts is therefore worthy of reflection. Courts, and the WTO dispute settlement system, have high thresholds for bringing issues before them; their independence and small numbers limit the range of issues that they can or will hear; and their formality raises the costs of participation, especially information costs. The nature of the stakes affect what sorts of issues are likely to be adjudicated, and why. Most public goods issues, for example, are excluded from litigation because the highly dispersed interests associated with public goods reduce the profitability of litigation. In contrast, when the stakes are high and concentrated, as is the case with many private goods, participants can often resolve the problem in the market (Komesar, 1994). All of these costs are orders of magnitude more significant for WTO dispute settlement panels than for domestic adjudication. Courts can only resolve matters that are brought to them, and what is brought to courts (such as the Canada-US softwood lumber battle) will often be skewed to losses by concentrated minorities (American loggers) not diffuse majority gains (American home buyers).

Commentators like to see WTO as ‘rule’ oriented, meaning that relative power does not decide disputes that are adjudicated on the basis of the rule of law. In practice, however, rules do not really decide outcomes, power is always present, and in international law, at least, rule-oriented interpretation leaves much discretion to the interpreter (Alvarez, 2001, 114-5). ‘Rules vs power’ is a truncated understanding of the institutional choices in the trading system, as if diplomacy is always dominated by power but rules never are. (For a review of the literature on legalist vs. pragmatic interpretations of the trading system, see Waincymer, 2002: 34.) Moreover, expertise is never neutral; every choice of forum privileges some set of actors. Trade lawyers displace microbiologists and regulators when a food problem moves from the SPS committee to

a dispute panel. As Komesar (1994) shows, institutional deficiencies can move together. That is, **if** power or money is present in one institutional setting, then it might be in another too. People in Kampala do not necessarily participate in the trading system in the same way as people in Toronto. The ability of Canada and Uganda to participate in the trading system will be affected by relative poverty, access to information, and power even as they move from one forum to another.

In the next section I situate this pluralist approach with respect to three familiar models of law and international organizations; in a subsequent section I test my approach at the intersection of WTO law and food safety.

2. Pluralist and centralist representations of the WTO

The most important point that I am trying to make in this paper is that seeing the WTO as part of a system of 'law' does not require seeing the dispute settlement system as its most important feature. What then is the legal role of the WTO? One legal schema sorts claims about the role of the WTO into managing the trade regime, managing markets, and providing a forum for stakeholders (Shell, 1995). In Table 1, I show these roles corresponding to three familiar institutional forms in the international relations literature that see international organizations in intergovernmental, transgovernmental and transnational terms. (For a helpful review of the literature on these models, see Pollack and Shaffer, 2001.) These stories about the role of the WTO are tied to assumptions about social order, the purposes of the dispute settlement system, the sources of law, the nature of good institutional design and decision rules (Macdonald, 2002a), and the causal effects of law. They also map on to realist, utilitarian, and sociological approaches to international relations.

The parsimonious representation of the *first row*, familiar in state-centric models of international relations based on power, does not challenge 'see you in Geneva' assumptions. In this model, which accords well with visible aspects of the WTO, decisions are officially made by an institutional rule of formal equality (the consensus rule), but the institutional rule of market power affects bargaining.

Table 1 Representations of the WTO

WTO role	Institutional form	Dispute settlement serves	Source of law	Decision rule	Force of law
Manage regime	intergovernmental	States (as unitary actors)	States; codified texts	Power	Coercion
Manage markets (economic efficiency)	transgovernmental	States (as networks of officials) and economic actors	Multiple sites of (implicit) authority	Third party delegation	Interests
Provide forum for stakeholders (transparency, knowledge)	transnational	States (as networks of officials and international administrative agencies), economic actors, and citizens	Human interaction	Interactional expectations	Norms/legitimacy

The common claim, on the *second row*, that the WTO serves the cause of economic efficiency directs attention to transgovernmental networks that include officials from many parts of government and other international organizations (Keohane and Nye, 1989; Slaughter, 2000). Here decisions are made by a third party, either by fiat or after formal adjudication. The efficient market model explains the creation of the WTO's tough dispute settlement system as a response to business wanting to enforce market opening decisions without diplomatic maneuvering. WTO disputes may even be driven by the interests of firms trying to resolve commercial competition by using states as their champions in the dispute settlement process.⁴ These disputes end up in the WTO, as opposed for example to private commercial arbitration (Mattli, 2001), because of the interaction between the firms and the state: WTO dispute settlement is much more than an intergovernmental system of trade diplomacy adjudicating behind closed doors (Shaffer, 2003). It is not a system run by and for private as opposed to national interests, but it is not hermetically sealed from firms. This representation also suggests that analysts should consider at a minimum not just the formal dispute settlement system but all of the dozens of WTO bodies where Members discuss their mutual obligations. When they do, however, analysts start finding anomalies that they try to wash away with the distinctions between hard and soft law discussed below.

Scholars who claim, on the *third row*, that WTO also serves the 'stakeholders' in the trading system are in the more complicated realm of transnational relations (Risse-Kappen, 1995), where the analytic focus extends to all the forms of human interaction in the trading system that constitute and are constituted by its law. What contribution then does the WTO make to the regime? International organizations are said to provide *transparency* about actor intentions, a forum for the *legitimation* of the regime, and help in developing new *consensual knowledge* about how the system works (Kratochwil and Ruggie, 1986). In this representation of the WTO, decisions are made by the parties: people are left to adjust their interactional expectations themselves, as in writing a contract, and law is found on the fridge door. The formal rules shape feasible responses; interaction on the ground shapes the formal rules.⁵ This approach does not ignore formal dispute settlement, it simply sees it as the tip of the pyramid.

Traditional discussion of border measures in the GATT could be said to be largely intergovernmental, while newer discussion of regulatory matters in the GATS is inherently transgovernmental. Understanding the informal processes of the trading system can be helpful in a transgovernmental representation of the trading system, but such analysis is essential when the WTO is seen as embedded in transnational networks, rather than being an entity unto itself. Civil society organizations, commonly treated as evidence of the importance of a transnational model,

⁴ This dynamic is most obvious in the civil aircraft competition between Boeing and Airbus, or Bombardier and Embraer, which manifest as WTO subsidies disputes between the EU and the USA, or Canada and Brazil, respectively. It is also the key factor in the fights between North American saw mills that manifest as the interminable softwood lumber dispute between Canada and the USA.

⁵ To the extent that there is an international air traffic 'regime', for example, it is organized on bilateral lines. The current KLM-Air France merger challenges bilateral trade deals in the expectation that the norms are about to be swept aside, and therefore contributes to that outcome. I owe this observation to Richard Janda.

in fact often operate on the basis of an implicit transgovernmental model of the WTO, and the efforts of protestors to influence heads of government at Summits depends on their internalization of an intergovernmental model. Law is not especially important on the first row of the table, where some international relations scholars dismiss the relevance of international law. On the second row, the logic of ‘see in Geneva’ is that the dispute settlement system is the distinguishing feature of the WTO. In the legalization literature, this feature is seen as allowing disputes to be resolved by ‘third party delegation’. On the third row, in contrast, the logic of legal pluralism is that disputes are more often avoided by law’s role in shaping expectations. In the next section, I contrast these centralist and pluralist expectations of the WTO.

3. Legalization, legal pluralism, and the WTO

My argument does not depend on doctrinal analysis of WTO jurisprudence or on a detailed description of how the system works.⁶ It will be helpful, however, to contrast the way legalization and legal pluralism characterize the principal issues in WTO law. ‘Legalization’ is defined along the dimensions of obligation (bindingness), precision (unambiguous definition of appropriate conduct) and delegation—meaning that ‘third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.’ (Abbott, et al., 2000: 401). I consider each of these elements in turn.

‘Bindingness’

One of the ‘see you in Geneva’ assumptions is that codified international law is ‘binding’ on signatories. The ‘legalization’ of the WTO as compared to the GATT is therefore said to represent ‘a transition from a ‘soft law’ to a ‘hard law’ system’ (Abbott and Snidal, 2000). Hard law is used to refer to ‘enforceable’ rules while soft law, or ‘non-binding’ law, means indicative standards. Legal pluralism sees the distinction as an illusion. Analysts use the term ‘soft law’ to recognize as ‘law’ things that are obviously legal in their effects yet are neither state legislation nor international treaty. Legal pluralists, in contrast, think that while commitments may vary in their degree of formal codification and their judiciability, if neither explicitness nor courts are indicators of ‘law’ then the hard/soft distinction has little analytic utility. Understanding the law that governs trade and trade policy is not helped by fragmenting the continuum into hard, soft and private. When actors in a given domain are responsive to an International Organization for Standardization (ISO) standard, do we think that this law is private, because it comes from the ISO? Is it soft, because it is ‘non-binding’? Is it hard, because incorporation by reference in the WTO standards agreements allows adjudication in the WTO? Or should we simply say that ISO standards are legal in their effects on how actors understand their situation?

Whether or not a rule is formally ‘binding’ is seen by interactional legal theory ‘as an internal quality of the subjects (and creators) of the legal system; bindingness is self-bindingness’ (Brunnée and Toope, 2000). Legal positivists mistake the written contract for the substantive agreement, and think that the role of the contract is to create an enforceable

⁶ For a review of all the debates about the role and functioning of the dispute settlement system, see Waincymer (2002). The best book on the evolution of the system is Hudec (1990).

obligation rather than structuring the future interaction of the parties (Luban, 1999). In contrast, pluralists think that contracts and treaties often furnish a kind of framework for an ongoing relationship, rather than a precise definition of that relationship. The ‘law’ created by a contract may often be determined by the interaction of the parties after the creation of the agreement when they can tacitly modify or even rescind the agreement (Fuller, 1969a: 15). Seen in this way, WTO law serves to guide Members’ relations with each other, to make it possible for them to interpret behavior.

I want to explore an example that shows the practical difficulties caused by the hegemony in trade thinking of the legal positivist view of binding. Developing countries are said to be hesitant about negotiations on a set of new issues first introduced at the WTO’s 1996 Singapore ministerial meeting, notably investment and competition policy, because they fear that they will be subject to expensive litigation for failing to implement complex ‘binding’ rules that they do not understand. Even in the absence of agreement on substantive principles, the working party considering the possibility of negotiations on competition policy thought it prudent to devote considerable attention to what it termed ‘compliance mechanisms’ that might be applicable (WTO, 2003d, paras. 79-100). Worries about whether new WTO rules should be ‘binding’ drove the debate. On the one hand, many WTO agreements contain ‘soft law’ measures, which might be appropriate in this domain too; on the other hand, all contain rights and obligations subject to dispute settlement, so competition policy should not be different. Many Members recognized that the WTO has other institutional design options, and some wondered whether dispute settlement was really needed. Perhaps it would be sufficient to allow for consultations in a Competition Policy Committee? Others suggested using ‘peer review’ either as a complement to or a substitute for dispute settlement.

WTO may create an international **supply** of rules to be incorporated in national law, but it has few tools to affect the domestic **demand** for its rules. When WTO law attempts to influence border measures, the target is the discriminatory actions of central governments, for which inter-governmental dispute settlement has some use, but the moment WTO’s reach extends behind the border, the purpose of its law is to shape the domestic legal order. The working party tried to cut the knot by wondering if dispute settlement could assess whether the appropriate principles had been incorporated in domestic law, but not whether that law was appropriately administered, for which presumably consultations and peer review might be useful. Law in one domain is interdependent with law in other domains, and with general legal concepts; those domains and concepts, and the nature of the interdependencies, will differ from country to country, meaning that even good faith efforts to comply with new international rules can founder. Norms and principles will be understood differently from country to country. Formal passage of a new law written to WTO specifications will have little impact if the text is incongruent with the informal practices and mutual expectations of a given polity, one aspect of Fuller’s concept of law’s ‘inner morality’. The latest thinking in commercial law from New York will fail to thrive if transplanted to a country whose market practices are rudimentary.

The fact that a rule is ‘binding’ will not necessarily increase the likelihood of its making a difference on the ground. Misplaced stress on the ‘binding’ characteristic of WTO seems to increase the difficulty of negotiations on complex regulatory matters without necessarily improving regulation. It also leads to misplaced emphasis on compliance.

Compliance, delegation and precision

My representation of the WTO does not see the formal dispute settlement system as its central feature. Law as ‘guidelines for behavior’ rather than as commands of the sovereign sees law as a form of prospective ordering not merely retrospective adjudication. I get this idea from Fuller, but the ‘international legal process’ approach to international law (Kennedy, 1994: 20-21, and notes 23 and 24) also derives from the Hart and Sacks approach (Koh, 1997: 2618-9). Rosalyn Higgins, part of the related New Haven approach, argued that ‘If a legal system works well, then disputes are in large part *avoided*’ (Higgins, 1994: 1). For Higgins, the ‘legal system’ was still the explicit deposits of formal processes—treaties, ICJ decisions and so on—but unlike legal positivists she did not think that sanctions were necessary to ‘law’. Utilitarians who think that the purpose of the WTO is to discipline cheating by governments will wonder how either approach can deal with the compliance problem.

The first difficulty with compliance is knowing when the problem arises, since treaty language can be ambiguous. In a helpful review of the centralist view of compliance, Raustiala and Slaughter (2002, 539) define it as ‘a state of conformity between an actor’s behavior and a specified rule.’ Their positivist definition restricts international law to treaties, and assumes with the legalization approach that ‘precision’ will make ‘compliance’ more automatic (Goldstein and Martin, 2000, p. 620). They assume that the analyst can know both what the relevant rule is and how actors are behaving. They admit that under their definition, an actor can be in ‘compliance’ with a rule by accident (they cite the example of how economic collapse in the former Soviet Union led to coincidental conformity with environmental agreements), which makes their understanding of the force of rules moot.

Some might respond that compliance is aided by ‘clarification’ of the rule, which implies that an Appellate Body report can be an authoritative (and precise) statement of what the law is. But do dispute settlement panel reports really contribute in a determinative way to the WTO ‘acquis’, as if some implicit legal mind could articulate it? Such a traditional positivist inquiry by lawyers directs attention first to the text of legislation, or treaties, and then to formal explicit interpretations by judges (or in international law, by other recognized authorities). Such explicit formulations allow us then to say what the ‘law’ actually ‘is’. Some argue that the interpretations of the WTO dispute settlement system have provided guidance to Members on interpreting their own and their trading partners’ obligations, and that many WTO obligations now cannot be understood except in light of WTO jurisprudence (McRae, 2004: 5). This enterprise is not without difficulty, because legal texts must earn their way into the canon. (On this line of argument, see Vining, 1986, 30-1.) When the judgment is the result of a bureaucratic or panel process, what is the status of the reasoning, beyond its disposition of the dispute at issue? The WTO ‘acquis’ is an uncertain thing in terms of how the reasoning of one panel can affect the deliberations of a subsequent panel. Well-written, unanimous decisions may have more impact than muddy, split decisions. But going beyond doctrinal analysis to socio-legal analysis, it is a big leap from a community of interpreters who think they know what the ‘law’ is to the law as lived in daily life, where ‘precision’ is always illusory, because interpretation depends on context (Kratochwil, 2000). Given the complexities of language, system, and circumstances in a diverse and changing world economy, there are physical limits to any rule. Immense conceptual

difficulties attend trying to show that any law or court decision bears any correlation to a given outcome (Bogart, 2002). Among the problems with legal causality, social changes supposedly attributed to a legislative enactment and subsequent court decisions might have been in train for decades. Indeed the legislation itself might be a consequence of such changes, not a cause, if law arises from human interaction.⁷ Of course people are aware that what they do not settle themselves, a court may have to decide, but does this knowledge lead them to decide the matter as a court would, or to decide according to their own conception of what the 'law' requires?

The second difficulty with compliance is assuming that international order depends on coercive enforcement. Utilitarians think that law has causal effects that operate by changing an actor's cost-benefit calculations, if not through sanctions then through damage to reputation (Kingsbury, 1998: 352). It seems not to work in the case of the USA. Of the four WTO cases that the USA has 'lost' where implementation required a change in legislation (as opposed to a change in regulation), Congress has so far failed to act in each one (WTO, 2003f). One case, known as 'Tax Treatment for 'Foreign Sales Corporations'' (DS108), is especially salient because of EU threats of massive retaliation if the USA fails to change its law. On the other hand, the USA removed egregiously protectionist steel tariffs in December 2003, apparently in response to an EU threat of retaliation after an Appellate Body report that ruled against the USA. Does causality run from the panel report, or from the threat to U.S. interests affected by the sanctions? Or was the President also sensitive to the effect on the image of the Republican Party as proponents of free trade and open markets? And does either case tell us much about the force of WTO law in maintaining international trade order?

In the legal process approach, merely accepting that the issue is legitimately in dispute within the frame of the agreement is a form of compliance with the normative authority it establishes. Often, participants in a regime can decide among themselves that a certain amount of variance around the central limit is acceptable (Chayes and Chayes, 1995: 10-22). The legal process approach knows, moreover, that regimes have other processes for shaping state action. One is transparency, which works, the Chayes argue, 'because modern states are bound in a tightly woven fabric of international agreements, organizations, and institutions that shape their relations with each other and penetrate deeply into their internal economics and politics. The integrity and reliability of this system are of overriding importance for most states, most of the time' (Chayes and Chayes, 1995: 26-7). It is in this sense that more sophisticated legal positivists, at least those with a contract law orientation, would say that the WTO is 'enforceable', although it has no enforcement mechanism, because it is embedded in a set of mutually reinforcing obligations.

One way to go beyond this 'managerial' approach is to study what Koh calls the 'transnational legal process: the theory and practice of how public and private actors including nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret, internalize, and enforce rules of transnational law. (Koh, 1997: 2626)' My approach, following Fuller, is to see law as more all pervasive; to see legal subjects as law-creating and not only law-abiding; to see law arising not merely in legal fora, but

⁷ I owe this observation to Harry Arthurs.

in all sites of human interaction. In Fuller's conception of compliance, Gerald Postema (1999: 261, 265) observes, 'The meaning and content of laws depends on interaction between citizens and officials; compliance thus depends on a kind of reciprocity—officials have to anticipate what citizens will understand to be law; the legal subject has to anticipate that the government will abide by its own rules in judging acceptable action.' Without reciprocity of this sort, social order might be maintained—perhaps through an exercise of power—but 'it would lack a feature essential to law, for it could no longer adequately provide baselines for self-directed human interaction, which, according to Fuller, is the central task of law.'

Where the 'legalization' literature stresses enforcement, and expects to see any significant difficulties experienced by Members in living with a trade agreement adjudicated in formal disputes, the pluralist view stresses law as guidelines and expects to see a continuous process of social interaction in which the parties adjust their expectations of each other. The analytic challenge for my alternative approach is taking state formality seriously, while also investigating the underlying informal processes that may be more important. Every organization is a mix of tacit and explicit, of formal and informal processes: some of these organizational tasks must clearly take place in formal WTO bodies. Formal decision making bodies, like the dispute settlement system, may not be where the real action is, yet informal decisions take place in their shadow: informal conversations address questions posed through formal structures (Macdonald, 1990). In the next section, I address the analytic challenge in the domain of food safety, one of the most politically contentious aspects of the trade regime.

4. The intersection of food safety and trade

Food has been traded for millennia, but trade in food is now one of the most complex domains of international life because of the challenges of ensuring that food is safe to eat when production and consumption are widely separated in space and time. Plants and animals are as susceptible as people to novel pathogens that can spread rapidly around the globe. Rules adopted in one country are therefore consequential for the prosperity of producers and the health or confidence of consumers somewhere else, yet the rules may not appear to serve commensurable ends. The central problem for risk analysis in food safety is the familiar administrative law question: when is discretion the better part of valour, who should exercise it, and how can it be reviewed? When food crosses a border, the WTO raises an additional question, about whether the regulatory action is legitimate or protectionist. In this section, I first describe the WTO rules in this domain to provide institutional context. I then conduct two probes of my ideas. In the first, I ask about the relation between the *Agreement on Sanitary and Phyto-sanitary Measures* (SPS) and social life in its domain using trade flows and evidence of conflict as indicators. In the second I ask how one conflict was affected by the agreement.

The SPS agreement

The basis of the SPS agreement, as stated in its preamble, is 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 Members where the same conditions prevail or a disguised restriction on international trade' (WTO, 1998). This

language is an attempt to specify how the non-discrimination principles of the GATT (Articles I and III) and the general exceptions for domestic public policy (Article XX) should apply in this domain. It is not easy to tell the difference, however, between a necessary measure, and protectionism (WTO, 2003c). The WTO has no capacity, or authority, to get involved in the substance of social regulation aimed directly at the actions of individuals and firms, but the administration of these regulations is its domain. The agreement seeks to resolve the tension between necessity and protectionism in three ways. The first is by encouraging Members to rely on hitherto underutilized international standards because those standards have already passed international scrutiny. The WTO can free-ride on places where regulators already talk to each other by developing principles under which international standards can be seen to be consistent with WTO objectives without the WTO trying to tell others what to do.⁸ Food safety is a domain with many sites of normative authority, including the Organisation for Economic Co-operation and Development (OECD), the Codex Alimentarius Commission, the World Organization for Animal Health (known as the OIE for Office International des Epizooties) and the International Plant Protection Convention (Phillips, 2001). The idea is not to make the norms and standards of other international organizations ‘enforceable’ obligations—it is simply to recognize and validate other sites of normative authority. Since such standards will not always be appropriate, however, the second device is a procedural requirement that any national deviation from an international standard should be based on a scientific risk assessment. Finally, since the way a measure is implemented is also important, the third device used is regulatory transparency (Wolfe, 2003). ‘Transparency’ here is a device for managing administrative discretion. It refers not only to Members keeping each other informed about their sanitary and phytosanitary measures, but also to ensuring that other Members, citizens, and producers are able to query whether a given SPS measure is the most appropriate solution to a problem. The agreement is certainly meant to be legal in its effects, but it poses challenging problems of interpretation.

When the SPS agreement was drafted in the early 1990s, the consensual idea was that regulation should be based on a ‘risk assessment’. Since then the international standards bodies have elaborated a more sophisticated concept of ‘risk analysis’ that includes distinct but interrelated elements of *risk assessment*, *risk management* and *risk communication*. Risk assessment uses science-based probabilistic reasoning but risk communication uses safety-oriented deterministic reasoning and risk management responds primarily to market reasoning. Science cannot be a ‘neutral arbiter’, because findings of risk require non-scientific decisions (Walker, 2003). The commercial practices of multinational firms, the attitudes of consumers and the work of scientists all affect the evolution of authority. None of these perspectives tells the whole story on its own, no neat line divides them, and individuals can legitimately differ over whether an issue should be characterized as lying at one or another pole.

Deciding in case of conflict whether deviation from an international standard is appropriately based on a ‘risk assessment’ or is disguised ‘protectionism’ is therefore not straightforward. The assumption of traditional rule of law thinking is that judges can decide when officials have abused their discretion. The ‘rule of science’ corollary thinks scientists can perform this task, but science is better at structuring analysis than resolving disputes. (On the

⁸ The same thing happens in other domains. For a description of many of the other sites of international regulation of services, for example, see (WTO, 1999.)

legal literature in this domain, see Atik and Wirth, 2003.) In politically contentious areas (risk communication), even when the science may be consensual (risk assessment), it may be more difficult to arrive at a Codex standard (risk management), if countries are worried that a Codex standard will somehow become ‘binding’ through the WTO dispute settlement system (Cottier, 2001; Victor, 2000, 891-2, 929ff). A WTO panel, which has no food safety expertise, is not well-placed to decide whether a measure that is not ‘based on’ an international standard is appropriately justified. Robert Hudec thought WTO has no business trying since its role should be preventing discrimination. He was skeptical that science would be much improvement on the other ways the WTO has for assessing whether an action is discriminatory by intent or from necessity (Hudec, 2003).

The role of law in this domain, therefore allows a comparison of the legalization and the legal pluralism hypotheses. The first would look for evidence of third party delegation and for signs that the resulting decisions help to clarify the agreement and induce compliance. The latter would try to place food in the great pyramid of the trade legal order. Given the complexity of that task, I look only at the place of the SPS agreement, which restricts my focus to the actions of states.

The SPS Agreement in its domain

My first probe of the relation between the SPS agreement as part of WTO law and collective life in its domain is quantitative. It may be hard to show that the SPS Agreement has increased trade (OECD, 2004: Chapter 5), but can we measure its effect in levels of conflict, or in the actions required by the agreement? I look for formal complaints, the tip of the SPS pyramid, or at the operation of the variety of institutional mechanisms that are available to Members in this domain. Aside from trade disputes in the Dispute Settlement Body, Members are able to raise ‘specific trade concerns’ with each other under the provisions of Article 12.2 of the SPS Agreement, which provides for informal ad hoc consultations (WTO, 2003e).⁹ These concerns are discussed at each of the three meetings of the SPS committee every year. In addition, surveillance of SPS implementation is frequently an issue in the Trade Policy Review process (WTO, 2003a). If we look for the agreement in action, then we might look at the agreement’s elaborate transparency procedures that require formal ‘notification’ of a Member’s SPS measures. Thousands of such notifications have been filed since 1995. Members must also maintain an ‘Enquiry Point’ to allow other members to pose questions about the notifications (WTO, 2002).

I first look at the SPS pyramid horizontally, in comparison to other domains at WTO. Is the number of SPS disputes significant compared to the universe of all WTO disputes, or all regulatory (‘behind the border’) disputes? Scholars who see the WTO dispute system as evidence of a trend to ‘legalization’ claim that the increased use made of the system proves their point: by the end of 2003, 305 complaints had been notified to the WTO since its creation.¹⁰ If we count

⁹ The Technical Barriers to Trade agreement (TBT) has a similar procedure, with 63 specific trade concerns raised from 1995 to 2001, 20 of which were about agro-food related matters (OECD, 2004: 12).

¹⁰ A ‘complaint’ is counted when a Member requests consultations with another Member under the Dispute Settlement Understanding. Not all complaints lead to panels.

closely related cases as part of the same ‘matter’, however, then the number of cases to the end of 2003 is only 221 (Leitner and Lester, 2004: 171). Propensity to be involved in these cases is closely related to a country’s share in world trade—larger traders come into conflict with each other, whether or not they are rich, where small traders do not (Holmes, Rollo and Young, 2003). Many complaints never move beyond the consultation stage—most simply disappear. Of the ones that do move past the request for consultations, as of November 2003, 73 reports had been adopted, 26 panels were still active, 42 disputes had reached a mutually agreed solution, and 24 were settled or otherwise inactive (WTO, 2003f). Only 37 cases were filed in 2002 and 26 in 2003, well down from the peak of 50 in 1997. This pattern is the one that Hart and Sacks would suggest is typical in a public law system. The dispute settlement system may handle an exceptional number of cases in comparison both to its predecessor in the GATT and to other sites, such as the International Court of Justice (ICJ), but that increase is an illusion. The apparently large number of cases is closely related to the expansion of WTO membership and the growth of world trade (Busch and Reinhardt, 2002: 465) rather than to inherent differences between GATT and WTO. The WTO caseload is still tiny compared to that of domestic courts in North America or Europe charged with judicial review of administrative action. Most of the US\$6 trillion in annual world trade in goods and services is responsive to law but does not give rise to WTO disputes. These formal disputes are at the very tip of the trade pyramid.

The significance of formal disputes is further diminished by separating cases into ‘trade defense’ cases (anti-dumping, countervail, safeguards) and ‘within border’ cases, including SPS. The latter group of cases peaked in the first two years of the WTO, and has been falling ever since—perhaps because unfinished business from the GATT era had been dealt with. These ‘within border’ cases account for a high proportion of the cases settled before completion of the whole process. Given the domestic political salience of the policies in question, these may be a class of cases where Members have an incentive to find a compromise that does not require major policy change (Holmes, Rollo and Young, 2003).

Do SPS cases deviate from the pattern? By the end of 2003 as shown in Table 2, the SPS agreement had been invoked in 29 formal complaints, which does not mean that SPS was the central issue in each matter—arguably there have been only 21 SPS ‘matters’ because the SPS agreement was a minor concern in 5 cases¹¹ and 7 cases dealt with 3 ‘matters’.¹² The parties resolved 4 of these 21 disputes by the end of 2003,¹³ and only 2 others reached an agreed solution. The number of new SPS cases declined almost to zero in 1999-2001, but rose to 4 in 2002 and 6 in 2003. Of the 10 new cases in 2002 and 2003, one has gone all the way through the

¹¹ DS96, DS134, DS135, DS203 and DS279.

¹² DS18 and DS21 both dealt with Australia-salmon; DS26 and DS48 were combined as one panel on EU-hormones; and DS291, DS292, and DS293 were combined as one panel on EU-biotech marketing.

¹³ DS18 and DS21 Australia-salmon; DS26 and DS48 EU-hormones; DS76 Japan-varietal testing; DS245 Japan-apples. For a good description of how the SPS agreement was applied to the three early disputes that went all the way through the system, see (Pauwelyn, 2001).

process to an Appellate Body decision, 4 are still ‘pending consultations’¹⁴ and 3 ‘matters’ are still before active panels.¹⁵

Table 2 Formal SPS complaints, 1995-2003

Complaints	<i>Matters</i>	<i>Minor concern</i>	Adjusted cases	Agreed solution	DSB Report	Consultation Pending	Active panels
30	25	5	21	2	4	12	3

If we next look at the SPS pyramid vertically, we might ask if the number of formal disputes is significant when compared to the number of ‘specific trade concerns’ discussed in the Committee? By contrast to the small number of formal disputes, the number of new specific trade concerns raised each year has tended to increase over time, with over 40 new matters raised in 2002, and nearly 30 in 2003 (WTO, 2004). Of the 183 trade concerns raised by the end of 2003, only 29 solutions have been reported, perhaps because many are solved bilaterally with Members seeing no need to inform the Committee. In some cases, concerns are raised in the committee as well as in a formal complaint. Of the 2 new cases in 2003 still ‘pending consultations’, one was also raised in the SPS committee, but none of the 2003 cases that became active panels was raised as a ‘specific trade concern’.

Table 3 Specific Trade Concerns, 1995-2003

Concerns raised	Solution reported	No solution reported	New 2002	New 2003
183	29	140	42	29

Finally, if we are interested in the lower layers of the pyramid, we might ask about the relative significance of the number of formal notifications, and other forms of transgovernmental interaction. We know that many thousands of notifications of national policies have been received by the secretariat, many of which have been discussed in or on the margins of the committee, but there is no way of counting questions posed directly to national Enquiry Points, which might even be posed not in writing to a country’s designated Enquiry Point itself but by phone to an official known to be involved. We also know that while the agreement effectively calls for the kind of regulatory structures common in developed countries, developing countries have had varying degrees of success in living with the agreement (Wolfe, 2003). I conclude from my vertical probe of the SPS pyramid that the specific trade concerns process seems more important than formal dispute settlement. The unobservable interactions among officials at meetings of the committee and elsewhere might be the most important of all. These interactions take place in the committee’s shadow, but they take place on the lower layers of the pyramid. Most ‘clarification’ of the SPS agreement seems to come not from Appellate Body decisions but from how officials understand the WTO ‘acquis’ through their on-going interactions with each other, including in special meetings called to try to understand the confusion left by the rulings (WTO, 2000). Indeed the formal disputes might have little impact outside the small group of officials and jurists capable of understanding the complex jurisprudence. The confusing results

¹⁴ DS297, DS284, DS271 and DS256.

¹⁵ DS270, DS287, and DS291/DS292/DS293

(Quick and Bluthner, 1999), especially in the notorious (and still unimplemented) beef hormones case (Kerr and Hobbs, 2002), may explain why Members now tend to avoid formal disputes. Formal SPS cases are expensive, requiring many technical experts, specially commissioned studies, and sophisticated legal advice. It takes years to get a decision, and by the time a decision is rendered (e.g. Canada's complaint about Australia's rules on salmon) the commercial interests of producers have moved on—or, as in the case of beef hormones, the Parties keep waiting for one side (the EU) to implement the decision, while the Appellate Body report generates enormous doctrinal debate among jurists about what it means, if anything.¹⁶

WTO Members are certainly guided by law in this domain, and they have devoted considerable effort to elaborating that law, but their first response to conflict is not to make a formal complaint. This expectation about how countries deal with SPS problems was borne out when the mad cow crisis reached North America in 2003.

How the trading system responded to the mad cow crisis

On May 20, 2003 Canada announced that a cow slaughtered in Alberta in January 2003 had suffered from Bovine Spongiform Encephalopathy (BSE), the so-called 'mad cow' disease. Every Canadian producer's worst nightmare then unfolded, as all of Canada's export markets for beef closed their borders immediately.¹⁷ The consequences were devastating to the beef industry, and significant for the economy as a whole. In 2002, Canada exported over \$4 billion of beef, 90% of it to the USA (Poulin and Boame, 2003). The beef industry won considerable public sympathy for its demands that the government do something to get the border open quickly. (For the full story, see Wolfe, forthcoming)

Animal health measures often result in trade restrictions, but governments accept that these restrictions may be necessary and appropriate in emergency situations to ensure food safety and animal health protection (Marabelli, Ferri and Bellini, 1999; WTO, 2001). Mad cow disease created just such a crisis. The issue exploded in the trading system not when BSE was discovered in cows in 1986, but in 1996 when it became clear that BSE could be transmitted to humans, making it a risk to human as well as animal health. Since 1997, as the trade consequences of tighter beef regulations have been felt, BSE has been raised more than two dozen times in the SPS committee under the 'specific trade concerns' procedure discussed above. Many of the complaints came from exporting countries where BSE was a low or minimal risk, countries who thought that some aspect of the import regime of another country was too restrictive (WTO, 2004).

Most of the BSE complaints raised in the SPS committee were resolved through discussion—indeed what we really see in the committee notes is evidence of extensive discussions among officials about appropriate regulatory practice. Only one of the BSE

¹⁶ Two jurists conclude, for example, that the Appellate Body decisions do not present "a clear and unambiguous articulation of the central governing principles of the [SPS] Agreement." (Trebilcock and Soloway, 2002)

¹⁷ A similar story unfolded when one mad cow was found in the USA in December 2003.

complaints raised in the committee has gone on to become a formal WTO dispute, but there is no evidence that that particular matter was actually pursued either in the committee or in the dispute settlement system. (Another complaint was raised in the dispute settlement system without being raised in the committee; it too is still ‘pending consultations’.) Again and again, the central question in the BSE cases discussed in the SPS committee is whether the measure is supported by a risk analysis. Sound analysis matters because the whole process from calf to table must be controlled, given that no means exists to test for BSE in a live animal, or in processed products (the only test is microscopic analysis of brain tissue). Science can explain the links where the disease might be transmitted, but a risk analysis is needed to understand where such transmission may actually be possible in a given Member’s circumstances.

The guidelines of the OIE are accepted standards under the SPS Agreement, and those guidelines clearly allow discrimination between countries based on the degree of disease prevalence. Discrimination is not *prima facie* wrong in WTO terms, therefore, but the usual problem arises of distinguishing between protectionism and a health necessity: interpreting the OIE guidelines is not straightforward. As the response to the Canadian case unfolded, the OIE expressed its worries to the WTO SPS committee, observing that some Member Countries apply trade bans when an exporting country reports the presence of a significant disease, without having conducted a risk analysis, even though the OIE rarely recommends a ban on animals or specific animal products coming from an infected country. These unnecessary trade bans may result in a reluctance to report future cases and an increased likelihood of disease spread internationally (WTO, 2003b, paras 23-28). The OIE implied that if Canada brought a formal dispute, countries that had closed their border to Canadian beef would have trouble showing that their restrictions were ‘based on’ either a risk analysis or an international standard. But Canada did not bring a case. The problem was discussed intensively between scientists, officials and politicians on the phone, in bilateral meetings, and at OIE and SPS meetings. International agreements certainly structured the response of all concerned—actors were ruled by law—but nobody thought that adjudication would help. No delegation of decisions to a third party could have moved this process more quickly, especially in Canada’s largest market. No third-party could be better placed than American officials for assessing whether Canadian progress in understanding the source of the outbreak and in improving procedures was sufficient to allow the American authorities to discharge their responsibilities under U.S. law.

Representations of the law shape how analysts and participants understand the trading system. When we look closely at the North American mad cow crisis of 2003, affecting billions of dollars in trade, we see that it was indeed shaped by law, but an intergovernmental representation would not tell us much about the case. A transgovernmental story about the close collaboration of officials in governments and international organizations would illuminate more of the picture, but it would leave out the actions of the millions of people who are also guided by the law. If farmers followed the advice of one Canadian politician to ‘shoot, shovel and shut up’ instead of reporting sick animals, the OIE system for managing international animal health emergencies would collapse. Farmers are also implicated in the trading system, and legal representations of the system must be able to account for their actions. This illustration of the great pyramid of the WTO legal order based on pluralist legal theory is therefore a useful addition to conventional legal representations of the WTO.

5. Conclusion: see you in Geneva, or see you everywhere?

‘See you in Geneva’ sees dispute settlement as the most important feature of the WTO because the rule of law as formal adjudication of explicit texts will ensure liberalization: economic efficiency, in the form of enhancing comparative advantage, trumps all other goals, and there is one uniquely right institutional path to that goal. The narrative that flows from this caricature sees the state as an obstacle to freedom not the guarantor of democracy. It represents the written law and the courts with coercive power, reduces the trade regime to the WTO, and the WTO to the dispute settlement system. It collapses all possible ordering devices into one, and it turns all problems into disputes. Discussions of the impact of the WTO are then reduced to the significance of specific disputes, and a small number of high profile cases come to justify a critique that the WTO is too intrusive in domestic policy (Skogstad, 2001), or that the WTO’s ‘constitutional flaws’ undermine the trading system (Barfield, 2001). Critics begin to fear that the system is so powerful, and so malleable, that soon the *General Agreement on Trade in Services* (GATS) will make it impossible to regulate health and education in the national interest, not necessarily because such restrictions might be inscribed in WTO agreements but because general rules could be used to attack such policies in the dispute settlement system.

I do not seek to use this argument to challenge the validity of the goals of either proponents or opponents of liberalized trade, nor do I dispute the heuristic value in some circumstances of intergovernmental or transgovernmental representations of the WTO. I do question the belief that valued goals have only one institutional vindication. In the pluralist alternative to the centralism of ‘see you in Geneva’, The WTO as a system of rules is not a basis for enforcing precise obligations, it is a conceptual framework for interaction in the trading system. If the WTO is a democratic administrative agency itself, it is because trade is a separate legal regime with its own approach to its core questions. What troubles many critics is not the adjudication by trade experts of issues with inherent trade properties, such as the application of a tariff, but the application of trade policy concepts to adjudication of disputes involving administrative agencies in other domains, such as food safety.

I have no difficulty in speaking of the WTO as a legal system, not that its formal texts are evidence either way, but to call the trading system rule-based is not to say much at all. Any system of social interaction is rule-based, and power can always trump. Law does not have to be produced by the state, or take written form. People live by all sorts of implicit rules. The formal texts of the WTO as interpreted by judges of the Appellate Body are not the only definition of WTO ‘law.’ All the other WTO processes, the business of social interaction structured by the institution, are forms of learning and sources of law that are central to how obligations are interpreted. One meaning of the rule of law is said to be acceptance that law applies to the actions of the state and its officials, but that need not mean that the simple existence of courts (like the WTO dispute settlement system) is the indicator that the or a rule of law exists, nor does it mean that the WTO itself necessarily acts according to law. Actors, including state officials, can be governed by law without needing courts; to speak of the role of adjudication in the ‘enforcement’ of ‘binding’ rules obscures what the WTO actually does in helping to provide transparency, consensual knowledge, and legitimation for the regime. The test of the WTO law in the trading system is that the parties are able to get along with each other, creatively if need be,

when unanticipated situations arise, without interminable conflict. Adjudication is a particular *form* of law and not the *measure* of law.

The centralist, positivist and monist conception of WTO law carries the implication that ‘predictability’ is improved by removing decisions from administrative or political whim. Adherents search for precision so that they can exert hierarchical control over others, and so that the rule will be applied as they intended. They see people as only law-abiding and have no conception of how people through their daily lives can be law-creating. This view of the rule of law elevates the dispute settlement system to the status of courts responsible for defending individual rights, procedural fairness and the supremacy of written texts over discretionary interpretation. Predictability really comes from law’s function of channeling everyday life. If law provides a framework for interaction, then it makes actors (firms as well as states) comprehensible to each other. Most of the time, if rules arise from social practices, actors know what to do even in novel situations. Conflicts and thus disputes often arise not because of ‘cheating’ but because of a good faith disagreement on the meaning of Member’s mutual obligations. If they cannot agree, adjudication may be necessary, although the outcome could hardly be predictable *ex ante* in the sense of knowing what a court might do.

An obsession with the WTO as a court obscures all the other places in the trading system where participants resolve conflicts and discover the law. The dispute settlement system suits some people well, but actors are free to characterize a dispute as they choose, and therefore free to choose their favoured form of resolving the conflict (Macdonald, 2003: 106-7). Too much of the legal literature is doctrinal in nature, asking what the ‘law’ is or should be in the light of Appellate Body decisions. Given the importance of ‘specific trade concerns,’ SPS Committee minutes are at least as important as Appellate Body decisions as textual evidence of the ‘law’. But the rule can also change through practice before being clarified in subsequent codification. Individuals, firms, associations, states, international (non)governmental organizations—all are in ‘interaction,’ to use Fuller’s term, with each other, and with the effects of globalization, every day. Because it is in the nature of being human to do so, and because some order and predictability is essential, this interaction produces law. Put differently, law channels interactions and interaction produces law. We then try to write those rules down, to publish them and make them general. These new rules are law before they are promoted by states or incorporated in a WTO treaty. The process of discovering new rules to shape future interaction is more important than efforts to discipline past cheating. In this view of law as plural, implicit and pervasive, any formal dispute settlement system only plays a small, if important, part in the maintenance of a rule of law.

‘See you in Geneva’ thinking distorts understanding and action. Analysts allow dispute settlement to obscure the rest of the trade policy universe; participants who act ‘as if’ it has eclipsed other sources of authority fail to exploit other institutional forms. Legal experts study the implications for WTO ‘law’ of the complicated reasoning of Appellate Body reports rather than study the effects, if any, of the WTO on life in the trading system. Civil society organizations worry that WTO cannot make appropriate environmental and social decisions without being more open and transparent. Lawyers who advise business think it is hard to offer much certainty about the rules where the environment and health are concerned. Developing countries are reluctant to discuss new and complicated negotiations for fear that once again, they

will potentially be exposed to expensive litigation for failing to implement obligations they do not even understand. Yet developing countries squander diplomatic capital trying to make Special and Differential treatment ‘mandatory’ so that they can use the dispute settlement system against OECD countries that fail to provide such treatment. Similarly, some governments want new issues like the environment, labour standards, investment, and competition policy covered by the WTO not merely because these issues are (however tenuously) trade-related but because they think that the WTO dispute settlement system makes agreements ‘enforceable’ in ways that are not possible in other international organizations. These misperceptions of what the WTO is and can do are based on a belief that law commands. If we have a piece of paper in Geneva that makes something mandatory, then it will happen on the ground; and if it does not, then we will ‘see you in Geneva’.

The approach described in this paper offers promising directions for more research. It suggests that it is futile to look only at disputes to see how the WTO shapes collective life in the trading system. Disputes imply WTO failure, not success: the intractable disagreement about genetic modification will not be solved by the dispute launched in 2003 by the USA, Canada and Argentina against the EU. Instead we should be looking for evidence of social interaction, by which I mean both trade diplomacy and the wider set of interactions that are shaped by the trading system. Positivists infer meaning from behavior, but constructivists and pluralists are interested in what the parties say to each other, and whether their understanding of appropriate action changes in consequence, change that is not simply explained in the traditional way by interests or power (Krause, 2002). If the regime is intersubjective, then we know it not by counting ‘complaints’ that we can see but by observing how regime ideas shape the rationales and justifications actors advance and accept (Kratochwil and Ruggie, 1986: 768). Food safety offers opportunities to see WTO law in operation by tracing issues back from the intergovernmental networks in the SPS committee to see if the SPS agreement has an effect, in selected countries, on how citizens and firms characterize and resolve conflicts. It would also be interesting to study the evolution of WTO law. Discussion of E-commerce offers an opportunity to ask how WTO concepts shape the way actors understand this new domain and in turn, how evolving legal practices in a domain are slowly accreted into codified WTO law. Finally, are some agreements more prone to formal disputes than others? Do the disputes reflect a conflict of interests, or a need for authoritative interpretation of the text? Is the degree of codification or prescription part of the explanation? Is the institutional context a factor?

To conclude, contra centralism, the legal pluralism approach recognizes that sources of normativity other than the central institutions of the territorial state are engaged in the regulation of large domains of collective life. Law has more to do than codification, enforcement and formal adjudication of written texts. Neither states nor any of the other actors stand in a hierarchical relation to each other: social order is possible, even if it is not a single unified social order, but rather a multitude of fridge doors. The ‘compromise of embedded liberalism’ as a constitutive rule for global governance is one way to think about how to reconcile this multiplicity of institutions where the state is not the only source of law, and maintaining the rule of law does not require the creation of a uniform supranational order. Contra legal positivism, therefore, it is never easy to know what the law is apriori in a given context, but the fact of a written treaty is not determinative; and contra monism, no international organization has a monopoly of law in its domain. It is not helpful, therefore, to define WTO law in terms of its

texts, and its evolution in terms of disputes, for that is to define the thing by breaches not by adherence to its normative order. A stable prosperous world is one in which law enables the agency of individuals and collectivities, including states. Order must be provided by all of us since it cannot be provided by a hegemon. The WTO exists to facilitate diffuse everyday interaction in the trading system and not to issue liberalization edicts from Geneva. If democratic participation in a trading system ruled by law is the objective, dispute settlement is only one of the institutional forms available, and Geneva is only one of the institutional sites. When we are ruled by law, all law can do is help us ask the right questions, and we should not have to go to Geneva to do that. We make the law, and we do it everywhere.

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