

**Picking the Wrong Fight:
Why Attacks on the World Trade Organization Pose the Real Threat to
National Environmental and Public Health Protection***

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Abstract

A principal reason for popular concern about the World Trade Organisation is that national rules - especially those for environmental and public health protection - may be overturned because they are incompatible with the WTO's rules. This article argues that while these concerns are not totally unfounded, they are exaggerated. A central reason for this exaggeration is that environmental and consumer advocates discount the pivotal role of governments in the dispute resolution process. Governments agree the multilateral rules in the first place. Governments decide which market access barriers to pursue and how aggressively. Governments determine how to comply with a WTO judgment that goes against them. Furthermore, this article contends that by exaggerating the constraint imposed upon national governments by the WTO, consumer and environmental advocates run the risk of actually discouraging the very environmental and public health regulations they favor.

The World Trade Organization (WTO) has existed for more than 10 years. As the mass demonstrations at the WTO Ministerial in Seattle in December 1999 illustrated, it has become a lightning rod for much anti-globalization sentiment. One of the principal reasons for this is concern that national rules - especially those protecting the environment and public health - may be overturned because they are incompatible with the WTO's rules.¹

I argue that while these concerns are not totally unfounded, they are exaggerated. A central reason for this exaggeration is that some environmental and consumer advocates discount the pivotal role of governments in the dispute resolution process. Governments agreed the multilateral rules in the first place. Governments decide which market access barriers to pursue and how aggressively. Governments determine how to comply with WTO judgments that go against them.

Furthermore, I argue, that by exaggerating the constraint imposed upon national governments by the WTO, consumer and environmental advocates run the risk of actually discouraging the very regulations they favor. By proclaiming that international rules are hostile to public health and environmental protection they give the opponents of regulation an additional argument to use in the domestic debate and give reluctant governments another excuse not to act. They, therefore, may be creating a self-fulfilling prophecy and contributing to a so-called "regulatory chill."

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¹. Kelemen 2001, 622; and Kelly 2003, 131.

I begin by providing a flavor of consumer and environmental advocates' concerns about the WTO and by spelling out how the crude articulation of these concerns runs the risk of creating a self-fulfilling prophecy. I then examine what is new about the WTO that provokes such concerns. I then examine how the politics of WTO dispute resolution serve to ameliorate the implications of the WTO's rules for national public health and environmental regulation.² I conclude by drawing out the implications for how we should understand the challenge that the WTO poses to domestic regulatory autonomy and for the strategies of consumer and environmental advocates.

A flavor of the Concerns

At the outset it is worth noting that the potential implications of WTO rules for national environmental and public health regulations are not the only substantive concern that civil society groups have about the WTO.³ In particular, a significant number of groups are concerned about the impact of multilateral trade rules on global poverty.⁴ There is also extensive concern that the WTO's rules and free trade ethos inhibit the development of effective global environmental governance.⁵ It is with respect to national environmental and public health rules, however, that the WTO's dispute settlement process comes into play and where there is the potential for WTO rules to roll back national rules, as well as to inhibit their development. It is on this aspect of the WTO that this article focuses.

Environmental organizations in developed countries, in particular, have serious concerns about the potential of WTO obligations to adversely affect national rules. A WWF-UK discussion paper, for example, states that the WTO and regional integration projects are "threatening...legitimate national policies in the areas of health and the environment."⁶ The Canadian nongovernmental organization West Coast Environmental Law contends that "...[t]he primary goal of trade law is to limit government law making and regulatory authority" and that "...trade dispute processes have now become a popular weapon for attacking environmental and conservation measures in Canada, the US and Europe."⁷ The San-Francisco-based Earthjustice Legal Defense Fund states that the WTO's rules "treat [health and environmental] protections as obstacles to trade that should be eliminated."⁸ Although many consumer organizations see benefits to free trade and recognize a need to strike a balance between consumer protection and disguised protectionism,⁹ a recent book by Public Citizen's Lori Wallach and Patrick Woodall has dramatic chapter titles such as: "The WTO's Coming to Dinner and Food Safety is Not on the Menu" and "Warning: the WTO can be Hazardous to Public Health."¹⁰

². Given that my argument focuses on governments' use of and response to WTO dispute settlement, I interviewed United States and European Union trade officials and business representatives involved in WTO dispute settlement. These interviews were conducted on a not-for-attribution basis. The focus on trade officials and business representatives is justified because the thrust of my argument is that governments exercise restraint in pursuing trade barriers stemming from environmental and public health protection measures. Trade officials and business representatives would be expected to be the most aggressive in pursuing market access barriers. Consequently, that they initiate disputes with care and caution provides more robust support for my argument. I have focused on the United States and European Union because they are the most frequent users of WTO dispute settlement and because one or other of them has been involved, as either complainant or respondent, in virtually all of the WTO complaints concerning environmental and public health rules.

³. In addition to the substantive concerns, there is a cross-cutting concern about the lack of transparency in and access to WTO decision-making, in both negotiations and dispute settlement (Wilkinson 2002, 131-134).

⁴. For a survey see Said and Desai 2003.

⁵. See, for example, Conca 2000; and Shrybman 1999.

⁶. McNally 2000, 7.

⁷. Shrybman 1999, 3 and 4.

⁸. Wagner and Goldman 1999, 19.

⁹. Consumers International 2003.

¹⁰. Wallach and Woodall 2004.

These groups belong to what Said and Desai have dubbed the “Isolationist” segment of global civil society, which sees global trade as inherently bad and seeks to abolish the WTO.¹¹ Further, Said and Desai contend that since the Seattle Ministerial in 1999, in response to resurgence by actors who see the WTO as good so long as it serves their ends (“Regressives”) and a weakening of those seeking reform of the multilateral trading system (“Reformers”), the “Isolationists” have been gaining strength. As a consequence, such views are becoming more politically prominent.

Two central worries underpin these concerns about the WTO. First, that foreign firms, acting through their national governments, will use the WTO to challenge existing domestic rules. Second, that fear of such challenges will make governments reluctant to adopt strict consumer or environmental regulations - creating a so-called “regulatory chill.”

Risking a Self-fulfilling Prophecy

I contend that these attacks aimed at abolishing the WTO may actually exacerbate the impact of the WTO on domestic regulation by discouraging the adoption of new rules. By exaggerating the threat that the WTO poses to national regulation, the very champions of such regulation are playing into the hands of their opponents. That consumer and environmental critics of the WTO risk of encouraging a “regulatory chill” by exaggerating the WTO’s hostility to national environmental and public health measures was suggested by George Hoberg.¹²

This possibility also resonates with the argument that Colin Hay and Ben Rosamond have developed with regard to the impact of globalization on domestic politics.¹³ They argue that, as far as domestic politics is concerned, it matters less whether globalization actually restricts domestic policy choices than whether political actors believe that it does or perceive it as a useful justification for action.¹⁴ In particular, Hay and Rosamond distinguish between globalization as a discourse - in which actors adopt it as a conceptual lens through which they interpret events - and globalization as rhetoric - in which the discourse is deployed, often in order to legitimate specific courses of action.¹⁵

Likewise, it matters less whether the WTO strictly constrains national regulatory autonomy than whether political actors believe it does, and so do not act, or invoke it in order to avoid paying a political price for not taking popular action. Lori Wallach and Patrick Woodall¹⁶ provide numerous anecdotes of government action not taken for fear of WTO censure. Whether this is causal or not is debatable, but there are indications of policy makers, even those favorably inclined towards environmental and public health regulation, echoing the view that the WTO is inherently hostile to such measures.¹⁷ Further, governments frequently seek to shift blame for costly or unpopular domestically-motivated measures to international institutions.¹⁸ This is common with regard to the European Union¹⁹ and the International Monetary Fund,²⁰ in particular. It is a short logical step from blaming international institutions for adopting unpopular measures and blaming them for not adopting popular ones. Consequently, those environmental and consumer groups that persistently build the WTO up as the enemy of environmental and public health regulation run the risk of either persuading policy makers that adopting environmental and public health measures is futile or

¹¹. Said and Desai 2003, 66.

¹². Hoberg 2001, 213.

¹³. Hay and Rosamond 2002.

¹⁴. Hay and Rosamond 2002, 148.

¹⁵. Hay and Rosamond 2002, 151-152.

¹⁶. Wallach and Woodall 2004.

¹⁷. See, for example, European Parliament 1999, 7 and 11; Meltzer et al. 2000, 106.

¹⁸. Hobson and Ramesh 2002; Levy, Keohane, and Haas 1993; and Martin and Simmons 1998.

¹⁹. Hutton 2005; Mandelson 2005, *The Economist*, 28 May 2005, p. 28.

²⁰. Rogoff 2003.

making more credible their excuses for not adopting popular policies. Thus activists' attacks on the WTO risk contributing to the "regulatory chill" that they claim the WTO causes.

Why the Concerns? (or What's New about the WTO?)

Although overselling the WTO's antipathy to environmental and public health regulations may be counterproductive, the concerns of these environmental and consumer groups are not without some foundation. The Uruguay Round of multilateral trade negotiations that led to the creation of the WTO in 1995 introduced some major changes to how the multilateral trading system operates. These changes involved extending the breadth of issues covered by multilateral rules and making those multilateral rules more binding on the members. In doing so, the Uruguay Round made multilateral trade rules more challenging to domestic policy autonomy.

In particular, the Uruguay Round increased the extent to which multilateral rules apply to national measures that have implications for trade even if that is not their purpose, such as regulations. This is particularly the case with rules affecting food safety and plant and animal health, which are covered by the Sanitary and Phytosanitary (SPS) Agreement, which is more proscriptive than most WTO agreements.²¹ It encourages governments to adopt a science-based approach and to harmonize standards based on those developed by international standards organizations, such as the Codex Alimentarius Commission. The SPS Agreement permits governments to maintain or introduce measures that establish stricter levels of protection than those provided by international standards so long as the national measures are based on a risk assessment, take account of available scientific evidence, demonstrate a consistent approach to the level of protection that the government deems appropriate, are proportionate and are not more trade restrictive than necessary.²²

During the Uruguay Round trade-related environmental issues were addressed in the General Agreement on Trade in Services, and in the Agreements on Agriculture, SPS, Subsidies and Countervailing Measures and Trade Related Intellectual Property Rights.²³ More significantly, the Uruguay Round also tightened the disciplines on national regulations that affect trade, the Technical Barriers to Trade (TBT) Agreement. Although broadly similar to the disciplines of the SPS Agreement, the TBT is less strict in its scrutiny of domestic regulation, as, for example, it lacks an explicit requirement that a risk assessment be conducted.²⁴

In particular, the Uruguay Round made the new and existing rules, particularly Article III of the General Agreement on Tariffs and Trade, which prohibits discrimination against foreign goods, more constraining through the introduction of binding dispute settlement. In the WTO agreements the participating governments effectively delegated the binding adjudication of disputes to a third-party body.²⁵ They also formalized a system in which an aggrieved party can punish non-compliance with a Dispute Settlement Body (DSB) judgment by imposing trade sanctions. These changes mean that the multilateral rules now have teeth.

The creation of the WTO is thus a prominent example of the increasing legalization of international relations.²⁶ Increased legalization enhances compliance by others by providing

²¹. Charnovitz 1999, 173; and Marceau and Trachtman 2002, 863.

²². Marceau and Trachtman 2002.

²³. WTO Secretariat 2004b, 2.

²⁴. Marceau and Trachtman 2002.

²⁵. Disputes are heard first by a "panel" of trade experts, who can be drawn from a list of candidates or from elsewhere. Either party may appeal the panel's decision to the Appellate Body, which is made up of seven members. Decisions of the panel or, in the event of an appeal, the Appellate Body are formally adopted by the Dispute Settlement Body, which is composed of all of the member governments of the WTO. Because the DSB can block the adoption of a panel or Appellate Body report only by a unanimous vote against, dispute adjudication is effectively delegated to the panels and Appellate Body.

²⁶. Goldstein, Kahler, Keohane, and Slaughter 2000.

information about violations, defining compliance and providing mechanisms for enforcing commitments. Greater compliance provides greater legal certainty for economic actors, which encourages them to take advantage of new market openings, which, in turn, increases the economic value of the agreement.²⁷ In exchange for greater compliance by others, however, governments also face stricter disciplines on their own policy autonomy, as the international rules apply equally to them.²⁸ This is a trade off that governments do not accept lightly,²⁹ as I shall explore below.

Any compromise of domestic autonomy is objectionable in principle to those environmental and consumer groups most concerned about the WTO,³⁰ but all seem to consider the development of the WTO to be extremely worrying for two related, but distinct, reasons: 1) a selective reading of the agreements, which assumes that the interests of free trade will prevail over other considerations;³¹ 2) an assumption that governments are simply the agents of big business.³² The assumption that governments are agents of big business supports the view that the multilateral rules have been negotiated to the benefit of free trade above all other considerations and anticipates that governments will aggressively prosecute all foreign regulatory measures that impede trade.

Environmental and consumer groups' concern about the WTO is based on an often selective reading of the WTO agreements. This involves both interpreting the agreements' provisions in an extremely constraining way and ignoring or discounting the exception clauses, which are intended to permit governments to pursue public policy objectives. The West Coast Environmental Law's guide to the WTO for environmentalists, for example, describes the TBT Agreement as "an international regime for environmental standards that effectively creates a ceiling but no floor for environmental regulation and a detailed procedural code for environmental law making and regulatory initiative that would be difficult for even the wealthiest nations to meet."³³ The Earthjustice Legal Defense Fund, which is relatively rare in acknowledging that the WTO agreements contains exceptions for measures to conserve exhaustible natural resources or to protect human or animal health, claims that these exceptions "are riddled with so many conditions that it is extremely difficult for domestic regulations to pass muster."³⁴ To the extent that these claims are believed by policy makers, policy makers will be less likely to pursue environmental and public health regulation, and to the extent that they are accepted by citizens, the WTO will provide a more credible scapegoat for government inaction.

It is worth noting, however, that both the TBT and SPS Agreements explicitly state that governments have the right to regulate to protect human, animal and plant life and health (see Box 1). The TBT Agreement, which is broader in scope, also recognizes governments' right to protect the environment and prevent deceptive practices. Further, the GATT contains a general exception clause Article XX, which expressly permits governments to pursue measures to protect the environment and human health so long as they are not arbitrary, unjustified or are a disguised restriction on international trade. These exceptions reveal that the governments that negotiated the multilateral trade rules have sought to strike a balance between permitting protection of consumers and the environment while prosecuting disguised protectionism.³⁵

Box 1

²⁷. Smith 2000.

²⁸. Smith 2000, 144-145.

²⁹. Smith 2000, 145.

³⁰. Said and Desai 2003. See, for example, Wallach and Woodall 2004.

³¹. Williams 2001, 3.

³². Shrybman 1999, Part 1, p. 3

³³. Shrybman 1999, Section 1, p. 8.

³⁴. Wagner and Goldman 1999, 1.

³⁵. Marceau and Trachtman 2002, 811.

The Recognized Right to Regulate

Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health.... [SPS Agreement, Article 2.1]

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate.... [TBT Agreement, preamble, paragraph 6]

The environmental and consumer groups' dire interpretations of the WTO's rules is supported by a refrain of cases in which states' environmental or consumer protection measures have been found to be incompatible with WTO rules. This list is rehearsed with little variation in each attack on the WTO (see Table 1 and the Appendix for details).

INSERT TABLE 1 ABOUT HERE

Those environmental and consumer groups that are worried about the WTO tend to exaggerate the extent to which WTO rules impinge upon national regulation.³⁶ They tend to take a ruling in favor of the complainant(s) as proof that the WTO's rules are stacked against regulation, while only fairly technical aspects of the measures have usually been found to be incompatible with WTO rules, while important principles have been up-held.³⁷ The EU's ban on hormone-treated beef, for example, was found to be incompatible with the EU's multilateral obligations because it was not based on an adequate risk assessment and it was permanent (not temporary, so the precautionary clause of the SPS Agreement did not apply). The WTO's Appellate Body, however, upheld the important principle that a polity may set what level of risk it finds acceptable:

Under Article 3.3 of the *SPS Agreement*, a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not 'based on' the international standard. The Member's appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right.³⁸

Further, the Appellate Body in its ruling on US refinery standards went out of its way to stress:

[This judgment] does not mean, or imply, that the ability of any WTO member to take measures to control air pollution, or more generally, to protect the environment is at issue... WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement.³⁹

The anti-WTO activists also tend to neglect or discount contradictory cases. While environmentalists made much of the WTO's ruling against the US government's ban on shrimp caught without turtle-excluding nets (DS58, 61), they were largely silent on the WTO ruling up-holding the US government's relatively minor adjustments to the measure.⁴⁰ The case against the WTO also tends to ignore, or dismiss as a fluke,⁴¹ the Asbestos case (DS135)

³⁶. Hoberg 2001, 207; Kelly 2003, 132; and Neumayer 2004, 1-3.

³⁷. Davey 2005; Esserman and Howse 2003; Kelemen 2001; and Kelly 2003, 136.

³⁸. WTO Appellate Body 1998, para. 172.

³⁹. WTO Appellate Body 1996, 30.

⁴⁰. DeSombre and Barkin 2002; and Neumayer 2004, 3.

⁴¹. Wallach and Woodall 2004.

in which a French ban on asbestos products was upheld by the WTO even though it impeded trade, because it was justified under Article XX.

A note of caution, however, is warranted. To date, all of the successful complaints against public, animal and plant health measures - *Beef Hormones*, *Australian Salmon*, *Japan-Apples* and *Japan-Agricultural Products* - have hinged on the inadequacy of the risk assessments on which they were based,⁴² which creates at least a suspicion that other concerns motivated the policy. The Appellate Body, however, has allowed a significant degree of discretion with the management of identified potential risk - what level of risk is acceptable and how that level is realized - even when there is uncertainty about the scientific evidence or the risk involved.⁴³ There are two potential problems, however. One concerns measures adopted in response to public fear of a health risk while all the scientific evidence appears to show a product is safe. This is arguably becoming a more significant problem, at least in Europe, where a number of recent food scares have undermined public trust in scientific approaches and government regulators.⁴⁴ The second, and compounding problem, is that in the hurly burly of legislative politics rules may depart significantly from what is required to address the risks identified.⁴⁵ It is under such circumstances that the WTO is most likely to challenge even well motivated environmental and public health measures.

Environmental and Public Health Complaints in Context

Significantly, the anti-WTO activists' refrain of cases is virtually the sum total of serious complaints involving animal, plant or human health or environmental protection regulations. In more than ten years in an organization with (currently) 148 members only seven such measures have been the subject of WTO rulings (see Appendix). A further 25 complaints have been initiated under the SPS and TBT Agreements against 20 national measures. The vast majority of these complaints have not progressed beyond the consultation phase for years, an indication that the dispute is effectively dormant.

Arguably, the high success rate of challenges to environmental and public health protection measures (six out of seven), has less to do with an imbalance in the WTO in favor of free trade, as the anti-WTO activists contend, than to do with case selection. Arguably, WTO members have challenged only poor regulations, which are either disguised protectionism or use inappropriate tools to achieve their intended objective.⁴⁶ Governments being selective about which national rules to challenge would help to account for the relatively small number of complaints and smaller number of adjudications concerning consumer and environmental regulations.

Considering the vast range of regulations that have *not* been challenged supports this contention. For example, the European Commission recently identified 121 European Union rules that affect imports of animals and animal products.⁴⁷ Such measures are, to some extent, barriers to trade. In contrast to these 121 rules affecting imports of animals and animal products, only 29 EU measures concerning all aspects of food safety, animal and plant health (a broader category) have been raised by the EU's trading partners in the SPS Committee,⁴⁸ a forum for exchanging information and negotiating solutions, and formal WTO complaints

⁴². Kelly 2003, 138.

⁴³. PIU 2000, 94; and Skogstad 2001, 494-495.

⁴⁴. Bohanes 2000, 329; and Consumers International 2002, 1 and 4.

⁴⁵. Both of these problems would arguably be addressed if the "precautionary principle" were incorporated into WTO law. There is no agreed precise meaning of the precautionary principle, however. The WTO's Appellate Body has ruled that the precautionary principle is embodied in the SPS Agreement (in the preamble, Article 3.3 and Article 5.7) and acknowledged that Article 5.7 does not cover the entire scope of the precautionary principle. The Appellate Body has, however, avoided defining the precautionary principle or ruling on its status in international law (Bohanes 2002, 336-337).

⁴⁶. DeSombre and Barkin 2002, 18; and Kelly 2003, 136 and 138.

⁴⁷. European Commission 2003.

⁴⁸. WTO Secretariat 2004a.

have been initiated against only two such measures (beef hormones and genetically modified crops).⁴⁹ Thus the overwhelming majority of EU measures protecting consumer safety and plant and animal health, even of those that impede trade, have not even been questioned by the EU's trading partners, let alone challenged before the WTO.

The EU's experience is not unique. As of November 2003, 183 national food safety and animal and plant health measures had been raised in the SPS Committee, surely a tiny fraction of such measures adopted by all 148 WTO members over more than 10 years. As of mid 2005, which allows ample time for these disputes to have escalated, there had been formal WTO complaints involving only 19 such measures (the relevant complaints appear in bold in the Appendix).⁵⁰ Disputes concerning 12 of those measures had been settled or were effectively dormant. As of the time of writing (June 2005), only four SPS measures have been the subject of Appellate Body rulings, while one (Genetically modified crops) was before an active panel. Panels have been requested against two other measures (Quarantine of pig meat and poultry meat imports and Measures affecting imports of fresh fruit and vegetables) but they have not been constituted more than eighteen months after the requests were filed. Thus only 10 percent of measures raised in the SPS Committee have become formal disputes, and only a fifth of those had resulted in WTO rulings by mid-2005 (see Table 2).

INSERT TABLE 2 ABOUT HERE

Examining measures that fall under the SPS Agreement is a particularly appropriate test of the threat posed by WTO rules to domestic regulation. First, the Agreement covers issues at the heart of consumer and environmental protection - human, animal and plant life. Second, the SPS Agreement establishes stricter disciplines than the TBT Agreement, the other specific multilateral discipline on regulatory policy. If WTO rules should bite on regulation anywhere, it should be here. Consequently, this analysis suggests that the vast majority of food safety issues, and by extension other social regulations that impede trade, are not challenged under WTO rules.

The conclusion that public health and environmental protection measures are only challenged exceptionally, suggests that the common assumption that governments are simply the agents of big business is flawed. If they were, we should expect to see many more trade disputes challenging the many national rules that impede trade.⁵¹

That governments are not simply the agents of business is crucial because the enforcement of WTO rules is decentralized. Members bring complaints against other members - only the adjudication is centralized and delegated to third parties. This means that why governments decide to pursue particular disputes through the WTO is crucial to understanding the extent to which WTO rules constrain national regulatory autonomy.

The “Gatekeeping” Roles of Government⁵²

⁴⁹. WTO complaints have also been initiated against French labelling requirements for scallops (DS7, DS12 and DS14); EU labelling requirements for sardines (DS231); and EU wine-making requirements (DS263), which concern either product description or product quality, not safety. The UK Consumers' Association even assisted the Peruvian government's complaint against the EU's regulation on labelling sardines, claiming that it “clearly acts against the economic and information interests of European consumers’ and serves as “base protectionism in favour of a particular industry within the EU.” (*Bridges* 6 (7) October 2002: 15).

⁵⁰. The *Asbestos* complaint (DS135) also cited the SPS Agreement, but it was ruled not to apply, so it is not included here.

⁵¹. Although there are a number of reasons why firms might not want to pursue particular trade barriers - including not wanting their rivals to benefit from their efforts and fearing consumer backlash - firms raise many more trade barriers with governments than governments pursue.

⁵². The phrase “gatekeeper” is used by Keohane, Moravcsik, and Slaughter 2000, 469, but only with reference to initiating disputes.

Although there is a substantial literature on trade disputes, it does not provide much purchase on why governments choose to prosecute particular trade disputes. The few political science studies of the initiation of trade disputes focus on business demand for action.⁵³ Even if governments let business set the broad outlines of the agenda by identifying the range of measures that impede trade, governments still decide which measures to pursue and, crucially, through which channels and how aggressively.⁵⁴

Why governments decide to initiate trade disputes thus remains a pressing area for research.⁵⁵ A rare exception to the neglect of governments' decisions to initiate trade disputes is Todd Allee, who argues persuasively that governments take to the WTO those trade disputes that they expect to win, as well as those disputes that promise sizeable economic and domestic rewards.⁵⁶ Central to his argument is that governments do not perceive initiating disputes as costless, and therefore in order for them to initiate a complaint the expected benefits of winning must outweigh the resource and political costs of initiating a complaint.

This article makes a similar point; it stresses the crucial role of the government as a "gatekeeper" between domestic business demand for action and international redress, and elaborates on the concerns influencing governments' decisions to pursue particular trade disputes. It also goes a step further by highlighting the pivotal role governments have in translating international obligations, such as adverse WTO judgments, into domestic policies. I shall argue that these dual "gatekeeping" roles mitigate the negative implications for national regulatory autonomy of WTO law.

The Government Considerations when Initiating a WTO Dispute

The preceding discussion has demonstrated that governments often do not pursue foreign trade barriers through the WTO, even if business interests have complained about them. One possible reason for this is that other business interests might oppose such action. Such opposition, however, is rare, as initiating a trade dispute only very occasionally imposes costs on other domestic actors; the costs of adjustment normally fall only on the other country. Consequently, the concerns of governments themselves are the key to understanding why some complaints are pursued and others are not.

Interviews with British, US and European Commission trade officials and representatives of European trade associations have suggested a number of considerations that encourage governments to be cautious when pursuing WTO complaints, especially when regulatory measures are at issue. These include: not wanting to jeopardize other foreign policy objectives, wanting to win, and wanting to avoid inadvertently constraining their own policy autonomy.⁵⁷

The principal participants in WTO dispute settlement have extensive and often intense political relationships with other countries in the world. Initiating a trade dispute may disrupt those relationships. For this reason many export-oriented firms dislike trade disputes because they sour the economic environment.⁵⁸ Governments likewise may wish to avoid antagonizing important partners. The European Commission, for example, has been disinclined to initiate complaints against key members of the G20+ group of developing countries because of their prominent role in the Doha round of multilateral trade negotiations.⁵⁹ In the spring of 2003 the Bush Administration postponed challenging the EU's rules on genetically modified food before the WTO because it did not want to impede its efforts to build a coalition to invade

⁵³. Milner and Yoffie 1989; and Noland 1997.

⁵⁴. Hocking and McGuire 2002; and Shaffer 2003.

⁵⁵. Busch Reinhardt 2002; and Elhermann 2003.

⁵⁶. Allee 2003.

⁵⁷. Shaffer 2003; and Young 2004.

⁵⁸. Author's interviews with representatives of a British trade association, London, May 2003 and a European trade association, Brussels, March 2004.

⁵⁹. Author's interviews with European Commission trade officials, Brussels, September 2003.

Iraq.⁶⁰ Not wanting to antagonize important political or economic partners is a general consideration, although to the extent that regulatory measures tend to be particularly emotive issues and therefore especially politically sensitive, there is reason to think that such concerns might have particular bearing on the decision to initiate a WTO complaint concerning a regulatory measure.

Wanting to win disputes is a second general consideration that may have particular bearing on the decision to pursue a regulatory barrier.⁶¹ A government is likely to stick with bilateral negotiations if it does not think that its case is strong enough to hold up before the WTO.⁶² This also contributes to a number of complaints being initiated but not pursued. There are two key aspects to the likelihood of winning a complaint: the facts of the measure in question and the clarity of the relevant WTO obligations.⁶³ The facts of the case concern how the measure affects trade and whether it is *de jure* or *de facto* discriminatory. With regard to legality, the WTO's agreements vary in terms of the specificity of their prescriptions and prohibitions; the breadth of their exceptions; and the degree of deference that is paid to national policy makers.⁶⁴ As discussed earlier, there are a number of exceptions to multilateral rules that are particularly relevant to regulatory measures. In addition, to date the Appellate Body has shown significant respect for preserving national regulatory autonomy, while challenging aspects of particular national rules.⁶⁵ This may make pursuing complaints concerning regulations that are not egregiously contrary to WTO obligations especially unappealing to policy makers.

Such considerations have shaped the US government's WTO complaint against the EU's regime for genetically modified crops.⁶⁶ The complaint is quite narrowly drawn and does not challenge the basis on which the EU takes its decisions. Rather it focuses on the EU's "moratorium" on approvals and the refusal of some member governments to accept GM crops that have been approved by the EU.⁶⁷ Thus the challenge is to the EU's failure to apply its own procedures and to enforce its own rules rather than against the substance of those procedures and decisions.

When initiating a WTO complaint a government also has to be careful that it does not end up scoring an own-goal by winning a WTO complaint that also applies to its own rules.⁶⁸ Because of the importance of precedence within the WTO's legal framework, a government needs to have an eye on whether a successful challenge to a foreign government's rule might establish a precedent that applies to its own policies. This concern is evident in the EU's practice, for example. The European Commission has not been keen to challenge other governments' rules protecting geographical indications, despite pressure from EU firms, because the EU's own rules are the subject of two WTO complaints.⁶⁹ The Commission is also reluctant to challenge other governments' rules on product labels, as the EU has adopted quite onerous labeling requirements for genetically modified foods, or on export subsidies, which are similar to those operating under the Common Agricultural Policy.⁷⁰ In addition,

⁶⁰. *New York Times*, 5 February 2003.

⁶¹. Allee 2003. Author interviews with US trade officials, Washington, D.C., January 2005 and European Commission trade officials, Brussels, March 2004.

⁶². Author's interviews with US trade officials, Washington, D.C., January 2001 and January 2005, and European Commission trade officials, Brussels September 2003 and March 2004.

⁶³. Ehlermann and Lockhart 2004.

⁶⁴. Ehlermann and Lockhart 2004.

⁶⁵. Davey 2005; DeSombre and Barkin, 2002; Ehlermann and Lockhart 2004; Esserman and Howse 2003; Hoberg 2001; Kelly 2003; and Neumann and Türk 2003.

⁶⁶. USTR 2004, 1; and Author's interview with a US trade official, Washington, D.C., January 2005.

⁶⁷. USTR 2004, 1.

⁶⁸. Shaffer 2003. Author's interviews with US regulators, Washington, D.C., January 2001; US trade officials, Washington, DC, January 2005; and European Commission trade officials, Brussels, September 2003 and March 2004; and Shaffer 2001.

⁶⁹. Author's interviews with European Commission trade officials, Brussels, September 2003.

⁷⁰. Author's interview with a British trade association representative, Edinburgh, February 2004.

before launching its challenge to the US's Foreign Sales Corporations legislation the Commission surveyed the EU's member governments to check that none of their measures would be caught by a ruling in the EU's favor.⁷¹ Thus when initiating disputes governments are alert to the potential that winning the complaint might have negative implications for their own policy autonomy.

As this discussion suggests, there are a number of reasons why members of the WTO might not pursue a regulatory measure even if they are under pressure from business interests to do so. The governments' "gatekeeping" role, therefore, significantly restricts the number of regulatory measures that are challenged before the WTO, thereby limiting the impact of multilateral obligations on national rules.

The Role of Government on Containing the Costs of Compliance

Another problem with many environmental and consumer groups' critiques of the WTO, is that they do not consider what actual policy changes have followed from the adverse WTO judgments they cite. Even if a complaint is initiated and the complainant wins, the respondent government may well be able to comply with its international obligations without fundamentally undermining the original objective of the measure.

Although most governments have complied with most adverse WTO judgments,⁷² they have tended to do so in ways that mitigate the impact of the adverse judgement. This is the case even with most of the activists' *causes célèbres*. Although the US government revised its methodology for establishing compliance with its rules on conventional gasoline in order to eliminate the discrimination against foreign producers, this did not adversely affect the measure's capacity to promote cleaner air.⁷³ Arguably the adjustments the US government made to its ban on imported shrimp not caught using turtle-excluding nets in response to the WTO's adverse ruling actually made the rule more effective at achieving its environmental objective, because it is now more focused on protecting turtles and less on protecting the US shrimping industry.⁷⁴ The WTO's adverse judgment on the EU's ban on hormone treated beef and even the subsequent imposition of sanctions by Canada and the US have had no practical effect on the ban. The EU's response has been to confirm its ban on the basis of a new risk assessment. The new rule⁷⁵ establishes a definitive ban on one hormone (oestradiol-17 β) as a growth promoter and further restricts its therapeutic use and imposes provisional bans on the other five hormones, while greater scientific understanding is sought, thus enabling it to claim protection under SPS Agreement's provisions on precautionary action in the face of incomplete information (Art. 5.7).⁷⁶ Further, the US government's victories against Japan's SPS restrictions on agricultural products (DS76 and DS245) have led only slowly to changes.⁷⁷ Thus far, in response to adverse WTO judgments, governments have largely made changes of style rather than substance.

Such limited changes to public health and environmental protection regulations, even in the face of trade sanctions, reflect that the measures originally resulted from domestic political pressures. These will not have abated, although international pressure gives those who lost the first time a second bite at the cherry and brings new players into the policy process - such as those that believe it is important to comply with international obligations

⁷¹. Author's interview with a European Commission trade official, Brussels, September 2003.

⁷². Davey 2005, 48.

⁷³. Hoberg 2001. The rules on reformulated gasoline were not changed as the discriminatory aspect lapsed after a transition period.

⁷⁴. DeSombre and Barkin 2002.

⁷⁵. European Parliament and Council of Ministers 2003.

⁷⁶. Canada and the US have refused to lift their sanctions, and the EU initiated WTO complaints against the Canadian and US sanctions (DS321 and 320 respectively) in November 2004 in order to get a WTO ruling on the compatibility of its new measures with WTO obligations.

⁷⁷. Davey 2005, 28.

and those that are adversely affected by any sanctions.⁷⁸ Consequently, there will be a domestic political contest over the extent of the reform. A WTO ruling only starts this process. It does not determine its conclusion. As the preceding discussion suggests, this domestic political process has tended to preserve the crucial public health or environmental protection objectives of the challenged measures.

No Reason to Chill

Even if the preceding argument is incorrect and the WTO is as intrusive and overbearing as its opponents claim, there is still no reason why this should provoke a regulatory “chill.” As there is no right under WTO law to damages suffered while a WTO-inconsistent measure is in place, the only cost to adopting a WTO-inconsistent measure is that of defending it before the WTO. Consequently, it makes sense for governments to adopt whatever public health and environmental protection rules they see fit. If, and only if, such a measure is challenged by others does the government need to decide whether it is worth defending, both a legal and political calculation. Even if the measure is ultimately overturned, either as the result of the government deciding to acquiesce or because of an adverse WTO judgment, in the meantime the polity has enjoyed whatever protective benefits the measure provides. Consequently, it does not make sense for a government to self censor and refuse to adopt a measure for fear that it might be challenged before the WTO.

Conclusions

The WTO is a new form of governance and it represents a new trade-off between the benefits of increased compliance by others and the disadvantages of decreased policy autonomy at home. As a result, there is good reason to regard it with circumspection.

Depicting the WTO’s rules as favoring free trade over all else, as some environmental and consumer groups are wont to do, however, is distorting, and in a dangerous way. There are three reasons why their critique is overstated. First, the rules are not as pro-free-trade as they depict. Because the governments of the advanced developed countries have duties to their citizens, on whom they rely for re-election, they were and are sensitive to the trade-off between increasing the compliance of others and reducing their own autonomy.⁷⁹ As a consequence, the WTO’s rules reflect an attempt to balance permitting protection while prosecuting protectionism. This is evident in the WTO’s judgments to date, which, while finding fault with aspects of most of the few public health and environmental protection measures brought before it, have supported their objectives and demonstrated deference for national regulators.

Second, the high proportion of successful challenges to regulatory measures before the WTO is due less to the nature of the WTO’s rules than to the careful selection of the few complaints brought. Governments have tended to challenge only poorly developed regulations. This is because governments weigh carefully the decision to initiate trade disputes, because doing so incurs costs beyond simply the resources required. Not least among these considerations when it comes to regulatory measures is a desire to avoid establishing a precedent against a foreign rule that may affect their own policies.

Third, when confronted with an adverse WTO judgment, governments have tended to seek to comply without fundamentally altering the objectives of the policy in question. This reflects the underlying political process that produced the measure in the first place. Although an adverse WTO judgment alters the domestic political balance, it does not wholly transform it. As a consequence, compliance with adverse WTO judgments against public health and environmental regulations has been more of style than of substance. The interaction of WTO

⁷⁸. Princen 2002; Putnam 1988; and Schoppa 1993.

⁷⁹. Vogel 2002, 20.

deference in adjudication, (foreign) government caution in dispute initiation and (domestic) government perseverance in compliance means that the WTO poses much less of a threat to national public health and environmental regulations than its opponents claim.

By exaggerating the extent to which the WTO constrains national regulatory autonomy, environmental and consumer activists risk contributing to the regulatory chill that they claim the WTO causes. They are feeding the myth that action to protect consumers or the environment is futile because it will ultimately be undone by the WTO. This only aids the opponents of regulation. Rather than demonizing the WTO, consumer and environmental advocates should concentrate on winning the debate for regulation at home.

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Table 1
WTO Complaints Cited by Environmental and Consumer Groups Hostile to the WTO

<i>NGO</i>	WTO complaint							<i>Genetically modified crops (DS291, 292, 293)</i>
	<i>Reformulated gasoline (DS2, 4)</i>	<i>Australian salmon (DS18, 21)</i>	<i>Beef hormones (DS26, 48)</i>	<i>Shrimp-turtle (DS58, 61)</i>	<i>Japan agricultural products (DS76)</i>	<i>Asbestos (DS135)</i>	<i>Japan apples (DS245)</i>	
WCEL	X		X	X		(under way)		
EJLDF	X		X	X		(under way)		
FoE	X		X	X				
Public Citizen	X	X	X	X	X	X	X	(under way)

Notes and Sources

1. WCEL - West Coast Environmental Law (Shrybman 1999)
2. EJLDF - Earthjustice Legal Defense Fund (1999)
3. FoE - Friends of the Earth 'WTO Scorecard: WTO and Free Trade vs Environment and Public Health,' No Date. Available at www.foe.org/camps/intl/greentrade/index.html. Accessed 9 April 2004. Friends of the Earth also included the ruling against the EU's banana trade regime, which did not have an environmental purpose although the ruling is claimed to have an adverse environmental effect.
4. Public Citizen - Wallach and Woodall 2004.
5. "Under way" denotes that the case is mentioned, but was not concluded at the time.

Table 2
SPS Measures in WTO Dispute Settlement (as of mid-2005)

Issues raised in SPS Committee (to Nov. 2003)	Measures subject to WTO complaints	Measures for which complaints have been pending for more than 1 year	Measures for which the dispute has been settled	Measures for which panels have been requested (pending more than 18 months)	Measures subject to active panels	Measures subject to rulings	Measures subject to rulings in favour of complainant
183	19	10	2	2	1	4	4

Note: The *Asbestos* complaint (DS135) cited the SPS Agreement, but it was ruled not to apply, so that complaint is excluded.
Sources: WTO Secretariat 2004a and summary of Appendix.

Appendix
Ten Years of WTO Complaints about Regulations (1995-2005)

<i>Complaint</i>	<i>Date initiated</i>	<i>"Name"</i>	<i>Type of issue</i>	<i>Complainant(s)</i>	<i>Respondent</i>	<i>WTO Agreement(s) cited in the complaint</i>	<i>Status (as of 07.06.2005)</i>
DS2 DS4	24.01.1995 10.04.1995	Gasoline standards	Environment	Venezuela Brazil	United States	GATT Art. I, III TBT	WTO ruling: measure incompatible
DS18 DS21	05.10.1995 17.11.1995	Australian Salmon	Animal health	Canada United States	Australia	GATT Art. XI, XIII SPS	WTO ruling: measure incompatible
DS26 DS48	26.01.1996 28.06.1996	Beef hormones	Human health	United States Canada	European Union	GATT Art. III, XI SPS TBT Agriculture	WTO ruling: measure incompatible
DS58 DS61	08.10.1996 25.10.1996	Shrimp-Turtle	Environment	India Malaysia Pakistan Thailand Philippines	United States	GATT Art. I, XI, XIII	WTO ruling: measure incompatible
DS245	01.03.2002	Japan apples	Plant health	United States	Japan	GATT Art. XI SPS Agriculture	WTO ruling: measure incompatible
DS76	07.04.1997	Japan agricultural products	Plant health	US	Japan	SPS GATT Art. XI Agriculture	WTO ruling: measure incompatible
DS231	20.03.2001	Trade description of sardines	Product description	Peru	European Union	TBT GATT Art. XI, I, III	WTO ruling: measure incompatible

DS135	28.05.1998	Ban on asbestos products	Human health	Canada	European Union	SPS TBT GATT Art. III, XI, XIII	WTO ruling: measure compatible
DS291 DS292 DS293	13.05.2003 13.05.2003 14.05.2003	Genetically modified crops	Environment and human health	United States Canada Argentina	European Union	SPS Agriculture GATT Art. I, III, X, XII TBT	Active panel
DS287	03.04.2003	Quarantine of pig meat and poultry meat imports	Animal health	European Union	Australia	SPS	Panel requested 14 October 2003
DS270	18.10.2002	Measures affecting imports of fresh fruit and vegetables	Plant health	Philippines	Australia	GATT Art. XI, XIII SPS ILP	Panel requested 7 July 2003
DS5	03.05.1995	Shelf-life of products	Human health	United States	South Korea	GATT Art. III, XI SPS TBT Agriculture	Mutually agreed solution
DS7 DS12 DS14	03.05.1995 18.07.1995 31.07.1995	Description of scallops	Product description	Canada Peru Chile	European Union (France)	GATT Art. I, III TBT	Mutually agreed solution
DS20	08.11.1995	Measures concerning bottled water	Human health	Canada	South Korea	GATT Art. III, XI SPS TBT	Mutually agreed solution
DS3	04.04.1995	Inspection of agricultural products	Testing	United States	South Korea	GATT Art. III, XI SPS TBT Agriculture	Pending consultations for more than 1 year

DS41	24.05.1996	Inspection of agricultural products	Testing	US	South Korea	GATT Art. III, XI SPS TBT Agriculture	Pending consultations for more than 1 year
DS100	18.08.1997	Measures affecting imports of poultry products	Human health	European Union	United States	GATT Art. I, III, X, XI SPS TBT	Pending consultations for more than 1 year
DS133	07.05.1998	Import of cattle and dairy products	Not specified	Switzerland	Slovak Republic	GATT Art. I, III, V, X, XI SPS ILP	Pending consultations for more than 1 year
DS137	17.06.1998	Ban on conifer wood	Plant health	Canada	European Union	GATT Art. I, III, XI SPS TBT	Pending consultations for more than 1 year
DS205	22.09.2000	Ban on canned tuna with soybean oil	Human health	Thailand	Egypt	GATT Art. I, XI, XIII SPS	Pending consultations for more than 1 year
DS232	17.05.2001	Importation of matches	Human health	Chile	Mexico	TBT GATT Art. III ILP	Pending consultations for more than 1 year
DS256	03.05.2002	Import ban on pet food	Animal health	Hungary	Turkey	GATT Art. XI SPS Agriculture	Pending consultations for more than 1 year
DS263	04.09.2002	Measures affecting imports of wine	Quality	Argentina	European Union	TBT GATT Art. I, III WTO XVI	Pending consultations for more than 1 year
DS271	18.10.2002	Measures affecting imports of fresh pineapple	Plant health	Philippines	Australia	GATT Art. XI, XIII SPS	Pending consultations for more than 1 year

DS279	23.12.2002	Import restrictions maintained under the export and import policy, 2002-07	Not specified	European Union	India	GATT Art. III, X, XI Agriculture ILP SPS TBT	Pending consultations for more than 1 year
DS297	09.07.2003	Measures affecting imports of animals and meat products	Animal health	Hungary	Croatia	GATT Art. XI, XX SPS	Pending consultations for more than 1 year
DS240	18.10.2001	Quality requirements on wheat and wheat flour	Quality	Hungary	Romania	GATT Art. XI, III	Withdrawn

Notes

1. Shading highlights the complaints most frequently cited by anti-WTO campaigners.
2. Complaints listed in bold cited the SPS Agreement.
3. A measure is listed as incompatible if any aspect of the measure was found incompatible with WTO rules.
4. WTO agreements are listed in the order that they appear in the complaint.
5. Agriculture - Agreement on Agriculture
6. GATT - General Agreement on Tariffs and Trade; Article I = most favored nation treatment; Article III = national treatment; Article V = freedom of transit; Article X = transparency; Article XI = elimination of quantitative restrictions; Article XIII = non-discriminatory administration of quantitative restrictions; Article XX = general exceptions
7. ILP - Agreement on Import Licensing Procedures
8. TBT - Technical Barriers to Trade Agreement
9. SPS - Sanitary and Phytosanitary Agreement.

Source: WTO dispute settlement gateway.