Has the WTO gone too far?

National regulatory autonomy and market access

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The issues

The next WTO Ministerial meeting is Qatar towards the end of this year will once again the focus of debate on the scope of the World Trade Organisation. As at the WTO Ministerial in Seattle in December 1999, the European Union appears likely to press for the launch of a new ambitious round of multilateral negotiations. The EU continues to favour an ambitious round covering investment, competition, environmental regulation, labour standards but also food safety and possibly animal welfare under the topic of multifunctionality in the agricultural negotiations. Others, such as the Cairns group of agricultural exporting countries see this attempt to promote an ambitious agenda as a means of deflecting attention from agriculture, on which the EU will be under pressure to make more concessions.

The Qatar Ministerial comes two years after the debacle of Seattle when the WTO member countries failed to launch a new round. The Seattle failure was due to differences between the WTO member countries over the scope of the agenda for any new round and thus the scope of the WTO. Having shaped the trade agenda for much of the post war period, if not the outcome of negotiations, the United States, influenced by the continued scepticism in Congress and business about the utility of multilateral rounds, was notably cool on the idea of launching a comprehensive multilateral round. Opinion in Congress is also influenced by the general opposition to new trade and investment negotiations among a number of powerful US civil society NGOs (environment, labour and consumer organisations). Rather than signifying a belief that the WTO has gone too far, the Clinton US Administration’s reticence about a new round appears to reflect a doubt that it would have been able to build a coalition for a new round. In an attempt to form such a coalition the US pressed for inclusion of labour standards on the agenda for a millennium round, just as it had pressed for the inclusion of intellectual property, services and investment on the agenda of the previous Uruguay Round. In other words US views on the trade agenda can equally be put down to domestic interests. As will
be shown below, these US interests have been a major contributing factor to the shape of the trade agenda and its inconsistencies.

Developing countries were sceptical or opposed to the inclusion of yet more ‘new issues’, such as labour, trade and the environment, investment and competition. Many developing countries argued that they had not yet been able to implement the results of the last comprehensive round (the Uruguay Round) or simply saw the inclusion of these new issues as a new ‘blue (blue collar) or green’ protectionism. Despite efforts to be inclusive, the leading WTO countries resorted to the restricted ‘green room’ process, in which a restricted number of major WTO members seek to reconcile divergent positions. This resulted in the alienation of many smaller and developing country members of the WTO.

Outside the conference hall street protests, both peaceful and violent illustrated a wider opposition to the launching of a new round among civil society NGOs (labour, environmental groups, development NGOs and US consumer groups). Although one may debate the legitimacy of many of the NGOs involved in the anti WTO protests, there can be little doubt that the more articulate NGOs have been successful in reaching the ear of public opinion. In Europe consumer groups are critical of the impact of WTO rules on the scope for national food safety provisions (hormones in beef and the application of agricultural biotechnology), environmental groups in Europe have also followed their US partners in opposing WTO trade rules that they associate with international business interests and that they see as trumping environmental policy.

In short there is a lack of consensus among WTO member countries of the future scope of the WTO and domestically within the major WTO countries that have to date shaped the evolution of the international trading system. Developing country governments, civil society groups, consumers, and trade economists and even some trade diplomats, believe that the WTO has gone too far. Others, such as the EU, environmental interests, organised labour and those who believe that the WTO must keep pace with the internationalisation of production of goods and services and investment, believe the WTO must go further. But how far should the WTO go or perhaps more importantly what criteria should one use to determine the scope of the WTO.

Has the WTO gone too far?
On the specific question of whether the WTO has gone too far the issues are, in summary, as follows.

Those who argue the WTO has gone too far might cite the following grounds:

- the WTO as become too intrusive into national policy autonomy, for example, in limiting national policy choices on food safety, or in requiring national laws to support harmonised international standards for the protection of intellectual property
- harmonisation of rules covering ‘non-trade’ issues, such as domestic regulation is likely to result in inappropriate regulation in many countries;
- the WTO is becoming overburdened with ever more new issues thus undermining its effectiveness in addressing the central aim of a trade regime, open markets;
- the proposals for further new issues is simply a means of deflecting attention from the existing protectionist measures in conventional trade policy (i.e. agriculture and textiles etc.);
- the WTO has become too rigid in the more rules-base approach of the WTO compared to the GATT, as reflected in the WTO’s tighter dispute settlement provisions.

Those who would argue that the WTO has not gone too far, and indeed needs to go further might make the following points:

- the WTO must keep pace with the progressively integrating international markets if it is to remain relevant and an effective force;
- the main barriers to market access are now in the field of regulatory measures, so if the WTO does not address these potential barriers to trade and investment markets will close over a period of time as national regulatory policies discriminate against imports of goods and services;
- if the WTO does not develop multilateral rules regional agreements will fill the vacuum, as illustrated by the apparent renewed interest in regional agreements after the collapse of the Seattle talks;
- the default option of policy making through dispute settlement risks fundamentally undermining the legitimacy of the trading system. In other words, the existing rules are full of (constructive) ambiguities produced by negotiators seeking to paper over important policy differences. There is therefore a need for further negotiations to resolve these policy differences.
There is no correlation between views on the scope of the WTO and protectionism or liberalism. Some liberals argue that the WTO has gone too far in encroaching onto national policy autonomy. Liberals certainly argue against further negotiations on environment or labour standards and tend to believe that markets, or regulatory competition between countries, make rules on investment unnecessary. On the other hand, some protectionist groups, such as Public Citizen in the United States also argues that the WTO has gone too far. Developing countries tend to line up with those opposing further negotiations, whilst developed country governments tend to seek further negotiations in response to pressures from business (investment and intellectual property) of civil society NGOs (labour and the environment).

Problems of success
The dilemma facing policy makers over the WTO is a product of success. Over the years the trading system has evolved to cover more and more policy issues and, in the post Cold War environment, is now about to assume the nature of a truly global organisation. Whilst the international monetary institutions have become weaker as financial markets have become more global, the GATT/WTO has become stronger.

This process can be equated to the widening and deepening process of European integration. Membership of the trading system has grown from 32 in 1948 to 144 today. The initial widening included the addition of countries like Germany (1949) and Japan (1955), which had little impact on the initial compromises reached by the British, French and Americans in the GATT negotiations of 1947. During the 1960s and early 1970s a large number of newly independent countries joined, but these were mostly small or developing countries. In order to avoid what they saw as the onerous obligations of the GATT, these countries opted for special and differential treatment under Part IV of the GATT, and thus effectively sidelined themselves in any debate over the scope of the GATT rules.

Tensions over the addition of new issues is by no means new to the trading system. During the 1970s the issues were subsidies, technical barriers to trade and government procurement. Defined against the original agenda of the GATT with its concentration on border measures (tariffs and quotas), these were ‘non-trade’ issues, or non-tariff issues as they were termed at the time. But defining GATT rules in these areas clearly limited national policy autonomy. TBTs was in particular the first major intrusion into regulatory policy (health and safety regulation). The approach used to deal with this tension was to negotiate qualified MFN
codes, so that only the signatories of the codes were subject to the obligations and benefited from the harmonised rules.

Another way in which the Contracting Parties of the GATT dealt with the intrusiveness of GATT rules was to have a flexible implementation system. Although GATT rules were generally complied with, there remained considerable scope for Contracting Parties to evade compliance when it caused real political difficulties. This was possible because the GATT dispute settlement procedures enabled individual countries to effectively veto enforcement of a provision if it was politically damaging at home.

During the 1980s the new issues were services, investment and intellectual property. Equally, non-trade issues that had a considerable impact on national regulatory policy autonomy. The negotiation of the Sanitary and Phytosanitary Agreement during the Uruguay Round is another example of how GATT/WTO rules became more intrusive.

A survey of the evolution of the trading system will show that:

• there was a progressive widening and deepening of the trading system over the 50 years of the GATT. In other words the rules have always evolved with the trends in trade and investment;
• the definition of what is ‘trade policy’ has also evolved over time. In 1948 it was essentially tariffs and other border measures, at least in the GATT as opposed to the broader scope of the ITO. In the 1950s it excluded agriculture. In the 1960s it included agriculture and anti-dumping. In the 1970s it included national subsidy programmes, technical barriers to trade and government procurement. In the 1980s it included services, investment and intellectual property. So there is no single constant definition of what is trade and what is a ‘non-trade’ issue;
• a survey of the evolution of the GATT, also shows that the scope of the GATT rules is determined not by any rational legal or economic criterion, but by the interests of powerful lobbies. In the 1970s US industry competing with subsidies European and Japanese manufacturing companies pressed for the inclusion of subsidies in GATT rules. US exporters of telecommunications and power equipment pushed public procurement onto the agenda in an attempt to gain access to the public utility markets in Europe and Japan. In the 1980s US financial services companies got services onto the GATT agenda, a
coalition of pharmaceutical companies got intellectual property rights onto the Uruguay Round agenda. Finally, US agricultural exporters, frustrated with the inability to use the TBT agreement to check the use of food safety measures in Europe pressed for tougher rules for food products in the SPS agreement;

- the trade agenda has been set not just in the GATT/WTO but in a range of other fora, most notably the OECD, which has been the forum for discussions on ‘new issues’ from the early 1960s through to the late 1990s including TBTs, procurement, services, IPR and investment.

**The Broad Policy Options**

In simplistic terms and working from first principles, one can envisage a spectrum of policy options between retaining national policy autonomy and policy harmonisation.

The approach of GATT 1948 was one based on national treatment and most favoured nation status. This provided for considerable national *policy autonomy* whilst prohibited discriminatory trade practices. Perhaps more importantly in the current debate, the GATT also required respect for the national policy autonomy of other countries. In other words national governments could do more or less what they wished in terms of taxation and market regulation including environmental regulation, provided they treated foreign *like products* the same as they treated national products. GATT also precludes discrimination between like products according to the policies adopted by other countries. (Hence the GATT Tuna Dolphin case).

This approach served the GATT well and is still applicable in many areas of trade in goods. But providing maximum scope for national policy autonomy unsurprisingly comes at the cost of market access. Different national regulatory regimes, have in practice, discriminated against foreign suppliers by setting standards or regulatory norms in such a fashion as to make it harder for foreign suppliers. This was, of course, discovered by the EU at an early stage, hence the efforts to harmonise Member State regulations and standards under the old approach. The GATT therefore sought more effective disciplines over technical regulations from the 1970s in the shape of agreements on Technical Barriers to Trade.

National treatment is also of limited use when it comes to services markets. For example, in the 1980s telecommunications services were provided by national monopoly suppliers.
National treatment under these conditions simply meant that potential foreign competitors were treated the same as potential national competitors and excluded from the market. In other words governments could comply with national treatment and MFN principles without opening their market. In general some approximation of the competitive market conditions is needed to facilitate enhanced market access in services. In the Uruguay Round as in the European Single Market, this meant going beyond national treatment.

Despite these shortcomings in the application of national treatment there is a body of literature which argues retaining it as the basis for the ‘trading’ system.  

AT the opposite end of the spectrum one has harmonisation of policies. When there are divergent national regulations, there will always be some degree of protection for national suppliers. For example, different The aim of harmonisation is therefore to remove this and create the famous ‘level playing field’ much favoured by business lobbyists and much maligned by economists brought up on comparative advantage. Guaranteed market access comes at some cost in terms of the end to policy autonomy, with the result that national policies can not only no longer reflect different policy preferences but policies may be introduced which are inappropriate for the level of development of the economy or the local climatic or geographical conditions.

Full policy harmonisation proved to be impossible at the EU level, and is, of course, out of the question as a general policy at a global level where policy preferences and economic conditions are very much more divergent. But harmonisation has been introduced in the GATT/WTO in various sectors or sub-sectors.

**Status quo, extension or reform?**

Another general policy option is not to seek to extend the WTO further, but live with the status quo. This would perhaps reflect the broad lack of consensus in favour of further liberalisation, but there are some doubts as to whether it is a feasible option in the longer term for three reasons:

- the existing agreements are full of ambiguities (constructive or otherwise). Given the automatic nature of dispute settlement procedures ambiguities will lead to dispute

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1 See for example Frieder Roessler ‘Diverging Domestic Policies and Multilateral Trade Integration’ in J Bhawatti and R Hudec *Fair Trade and Harmonization* 1996.
settlement cases and to WTO Panel and Appellate Body rulings. Policy differences could then be resolved through a quasi legal process, which is likely to further erode support for the legitimacy of the WTO:

- there will be no standstill in national policies which will respond to developments in markets. New national regulatory regimes will be introduced. In the absence of multilateral rules, these will at best make trade and investment less transparent and at worse progressively erode open markets;
- as the recent revived interest in regional agreements suggests, any vacuum in multilateral rules is also likely to be filled by regional agreements. It is not clear what impact regional agreements have in terms of traditional trade creation and diversion, let alone their impact in the ‘new regulatory issues’ (services, environment, investment etc). But for the WTO to mark time would probably result in a greater role for regional and bilateral agreements.

Reform or extension of the WTO
Debate on the scope of the trading system has invariably occurred within the context of a round of multilateral trade liberalisation, ie. Extension of the trading rules. This is the case today with the debate on a millennium round and whether this should include further new issues and which ‘old’ issues should be included. This means that the WTO’s acquis is taken as a given. There is no logical reason why this should be the case. Indeed, studies of EU con-federal and US federal systems suggests that political support for the union requires some scope for returning competencies to national or state government. The difficulty with the current practice is that there are no real mechanisms for reducing the scope for the WTO in any areas, outside of general re-negotiation. If the aim is to establish a credible and balanced WTO there is a case for reform which reduces the scope. The only real mechanism that can currently be used is to defer implementation or indeed to refuse to comply with WTO rules and then pay compensation, see below. But the danger with such an approach is that is the rules are flouted too often the credibility of the rules based system would be undermined.

The existing methods used to determine the scope of WTO rules: global subsidiarity in practice

(a) National treatment. Some areas of trade policy are close to the national treatment end of the spectrum. This is the case for much trade in goods still. In these areas national policies are national policy autonomy remains unaffected. Indeed, the WTO rules provide a
considerable defence for national policy autonomy as illustrated by the Tuna-Dolphin and Shrimp-Turtle cases, in which the US sought to encroach upon the national policy autonomy of Mexico and Malaysia through the application of American environmental policies. This defence of national autonomy has been seen as ‘trade trumping the environment’ by environmental lobbies, because it is not possible under the existing rules to discriminate between like products on the basis of how they are produced. Similarly, footballs made by exploited child labour must be treated the same as footballs made by well paid workers who belong to trade unions.

(b) Harmonisation

At the other end of the spectrum there has been considerable harmonisation in some policy areas, such as intellectual property and sanitary and phytosanitary regulation. The adoption of the SPS Agreement during the Uruguay Round represented a considerable step towards harmonisation of food safety regulation. Under the old GATT, Article XX provided a general exemption from the GATT rules concerning non-discrimination and national treatment for the protection of human, animal and plant health. Under article XX the EU was able to ban the use of growth hormones in beef without infringing GATT rules. The SPS agreement significantly reduces national policy autonomy in food safety. Although there is wording favouring high standards of food safety, national food regulations cannot diverge indefinitely from internationally agreed standards adopted in the Codex Alementarius Committee of the World Health Organisation. The SPS Agreement includes some scope for use of the precautionary principle but only when there is uncertainty surrounding whether a particular additive is safe. If there is scientific evidence that an additive or process is safe then the temporary ban of a product based on precaution is unlikely to be in conformance with the WTO rules.

Another policy area in which there has been a considerable degree of harmonisation is intellectual property (trade mark and patent protection). In this area the Uruguay Round agreement also provided a link between trade and international standards. In this case the body of international standards was that laid down in the Bern and Paris Conventions on the protection on intellectual property. These standards have been administered by the Geneva based World Intellectual Property Organisation (WIPO). But a number of leading pharmaceuticals companies, with the support of other business interests argued that the WIPO was ineffective. The TRIPs agreement therefore integrated trade and intellectual
property rights. Henceforth cases of non-compliance with the basic standards of protection for intellectual property would open the guilty party to trade sanctions. Developing countries were to comply with the TRIPs agreement by the end of 1999 and least developed country members of the WTO have a further five years. At the moment, however, a number of major developing country, such as India, are having considerable difficulty complying and have sought a further transition period.

Another area in which there has been a considerable degree of policy harmonisation is that of services. Whilst the General Agreement on Trade in Services (GATS) provides considerable scope for national policy autonomy in general, sector negotiations in financial services and telecommunications have resulted in guidelines or ‘reference papers’ which represent a considerable degree of policy approximation. As with food safety and IPR, trade sanctions can be used to enforce these provisions.

The WTO therefore requires compliance with common standards governing food safety and intellectual property and certain service sectors. Non-compliance with these harmonised standards opens the transgressor to the threat of trade sanctions. But compliance with general industrial or health and safety standards as laid down in the International Standards Organisation (ISO) or International Electrotechnical Commission (IEC) are not enforced by the WTO. Nor does the WTO provide for enforcement of any of the 176 International Labour Organisation (ILO) Conventions or even the six Conventions covering core labour standards, such as right of association and free collective bargaining. Organised labour rightly questions why it is possible for the WTO to protect the intellectual property rights of companies but not even basic core labour rights. At present the use of trade sanctions to enforce the international environmental standards laid down in Multilateral Environment Agreements are also likely to be contrary to WTO rules on MFN. Environmental groups are therefore argue that the WTO protects business interests but not environmental interests. In short there is harmonisation in some sectors but not others. As noted at the beginning of the paper, and without going into the history of each negotiation, the choice of sector to harmonise is not based on any legal or economic rationale, but determined by powerful sector interests favouring a level playing field.

(c) Policy designation
Policy designation means selecting the level (private sector, national, regional, plurilateral or multilateral) at which decisions concerning regulation of markets in that area will be decided. This is the kind of approach used in the EU in the debate on subsidiarity. Much of the current debate on the WTO agenda is also couched in these terms. For example, commentators or negotiators will argue for or against the inclusion of labour standards, environment, investment and competition.

In past negotiations policy designation has gone hand in hand with negotiations on market access. For example, developing country Contracting Parties to the GATT agreed to include intellectual property rights in the Uruguay Round, in part because of concessions made on market access for textiles and clothing and other sectors by made the developed GATT Contracting Parties. This combination of policy designation issues with market access in multilateral rounds has contributed to the somewhat arbitrary nature of decisions on the scope of the WTO. Horse trading between issues cannot be expected to result in a coherent approach to the coverage of the trade regime. On the other hand, of course, multilateral rounds have been seen as essential if progress is to be made. Often progress is only possible on a broad front and the horse trading and deals are needed in order to prevent protectionist forces from creating blockages in the process.

In the future there may be less scope for such multilateral packages. The engagement of a wide range of constituencies, including civil society NGOs suggests that there will be more resistance to trade offs. For example, it will not be possible to buy off environmental lobbies by getting enhanced market access for exports.

The policy designation approach is also problematic in the sense that there are seldom clear dividing lines between issue areas. For example, those elements of the GATS agreement which deal with the right of establishment are in fact concerned with investment, even though investment as such is not a topic on the WTO agenda. Likewise, aspects of the sector agreements on services constitute agreements on competition policy, but again competition policy is not on the WTO agenda.

(d) Transparency open decision making
Transparency is used in many agreements in the WTO to ensure that national regulatory policies are subject to scrutiny. At the very least transparency ensures that foreign supplies
of a good or service know the regulatory requirements they must comply with. If there is no transparency national policy makers, whether in government or a regulatory agency could use discretionary powers to discriminate against foreign suppliers. In many respects transparency also requires codification of the procedures to be followed by a national regulatory or certification agency.

(e) Proportionality, necessity tests and least trade distortion
A more general approach to defining the scope of trade rules is to limit national policy autonomy to measures that needed in order to satisfy national policy objectives, but prevent the abuse of national regulation as a protectionist device. The difficulty here is, of course, deciding what is really needed and what is not.

Proportionality is the principle according to which the costs of national regulation should be proportionate to the regulatory benefit. In other words national regulations are permitted on the condition that they are proportionate and do not represent an unjustifiable barrier to market access.

Necessity tests may also be used to determine when regulation is necessary to pursue legitimate public policy objectives and when it is not.

Least trade distortive measures are those which restrict trade the least. The use of this concept assumes that there are alternative policy instruments that can be used to achieve any given policy objective.¹

These types of criteria exist within both the dormant commerce clause of the United States and the Treaty of Rome (Arts 30 -36). But in both cases, of course, there are courts that have been able to develop legal precedent on what is proportionate or what is necessary.¹ Various WTO agreements include proportionality criteria. For example, both the Technical Barriers to Trade Agreement (and its Tokyo round predecessor) as well as the GATS Art 6 include such tests. The GATS agreement goes further by suggesting that regulation is necessary if it is use din the pursuit of legitimate national policy objectives, and lists consumer protection and protection of the environment as legitimate policy objectives. The difficulty with this approach at the WTO level is that the WTO has no court. WTO dispute settlement
includes Panel Reports and the Appellate Board of the WTO is beginning to interpret some procedural aspects of the WTO. But to use the dispute settlement procedures to define the limits of national policy autonomy under WTO rules is a high risk option. Although some lawyers are sanguine about the prospects and argue that reasonable people can come to reasonable decisions (Hudec) the WTO is likely to suffer a greater legitimacy crisis if general concepts of proportionality are defined in the WTO’s quasi legal procedures. There is already considerable criticism of the power of the unaccountable WTO procedures. Private sector interest would probably also not be served due to the uncertainly surrounding such an approach.

In the current debate on further liberalisation of trade in services the Article 6 option, of using general criteria based on proportionality, appears to have been down played in favour of further liberalisation on a sector by sector approach.

(f) Mutual recognition

Faced with a similar dilemma, the European Union, opted for the so called new approach. Under the new approach there was to be no more wide scale harmonisation and different national regulatory policies were to be accommodated within a single open market, by the mutual recognition of other countries’ regulatory decisions. Mutual recognition clearly provides for a degree of national policy autonomy, because it allows for a measure of regulatory competition. It provides therefore a model for maintaining open markets whilst retaining national policy autonomy.

In addition to the mutual recognition of regulatory decisions, there is also the option of recognising other countries certification or test results. This is the mutual recognition of test results, or the once tested accepted everywhere approach used in the Canada US Free Trade Agreement and NAFTA. This is less effective in terms of removing regulatory barriers to trade because it only entails recognition of conformance assessment measures overseas. The standards against which products are tested remain the national standards. For example, the US will recognise that a Canadian product tested in Canadian laboratories and found to be in conformance with US standards. Full mutual recognition, as applied in the EU, means that a product approved in one country can be sold throughout the EU without requiring any further approval from national regulators in the other member states.
Mutual recognition and recognition of conformance assessment has attracted some attention in WTO agreements. The TBT agreement provides for and indeed encourages mutual recognition of technical regulations between WTO Members. The GATS Agreement also provides for mutual recognition under its ‘additional commitments provisions’. As noted above regional agreements have made use of this technique. The EU, Australia New Zealand Closer Economic Relations Free Trade Area (Anzcerta) makes extensive use of mutual recognition and Mercosur is planning to use it.

In practice, however, there are problems when it comes to applying mutual recognition within the WTO. These can be summarised as follows:

- as European experience has shown, there is a need for policy objectives to be equivalent. There is therefore a need for a broad measure of policy approximation before mutual recognition can be successfully applied. So mutual recognition implies a reduction of national policy autonomy;
- mutual recognition is unlikely to work between developed and developing countries because of the general lack of policy approximation;
- the existing mutual recognition agreements that have been concluded have not been very successful so far. In particular the EU - US mutual recognition agreement has been limited to a number of fairly small sectors, due, in part to a reluctance on the part of the US Congress to cede regulatory sovereignty; and
- mutual recognition undermines the MFN principle. Although the WTO provisions that facilitate mutual recognition seek to protect the interests of third parties, such as through ensuring that MR agreements are open to countries that can meet the prerequisites, in practice few are likely to be able to satisfy the level of policy approximation required by the developed countries.

\textbf{(g) Plurilateral agreements}

Difficulties resulting for the different levels of development of the GATT Contracting Parties were resolved by having different rules for different countries; a two speed GATT. This took the form of the introduction of Part IV of the GATT, which provided the developing countries with special and differential treatment. Effectively relieving them of the need to comply with
the more intrusive GATT provisions. During the Tokyo Round, qualified MFN Codes were negotiated for the ‘deeper integration issues’ of TBTs, procurement and subsidies and countervailing duties. These also constituted a two speed approach in that only developed countries, and in some cases not all OECD countries signed up. At the end of the Uruguay Round a Single Undertaking was signed, requiring all WTO members to conform with the same rules. Special and differential treatment then took the form of longer transition periods for developing countries when is came to implementation. There remain, however, a number of plurilateral agreements, such as the Government Purchasing Agreement, which has only developed countries as signatories (as well as Hong Kong).

During the 1980s the pressure was for the more developed developing countries and newly industrialising countries to graduate, and accept full WTO obligations as well as benefiting from the more secure market access offered by the WTO’s rules based system. Forcing all WTO members into the same single undertaking has however created tensions and could limit the ability of the WTO to include new issues. There remains an option of pursuing plurilateral agreements under the WTO, however. Annex IV of the WTO provides for plurilateral agreements signed by a limited number of countries. The use of such an approach would enable the developed economies to move ahead on issues like competition.

As with the other options, there are, however, a number of difficulties:

• plurilateral agreements under annex IV still require the approval of the WTO members. So developing countries could block such an approach if they felt that it would prejudice their options in any further negotiations on the topic;

• there is no guarantee that it would be possible to negotiate plurilateral agreements, given the continued differences between some of the major WTO members.

(h) Institutional specialisation

In response to the pressure for more issues to be added to the WTO agenda it has been argued, by those who are concerned about an overburdening of the WTO, that the new issues should be dealt with in specialist institutions. Opponents of new issues also argue that existing specialist institutions should be responsible for rules in their respective areas. Thus it has been argued by developing countries and other that the ILO should deal with labour
standards. The ‘trade community’ in the trade and environment debate have argued that environment should be covered by UNEP.

The case for promotion of institutional specialisation is that the WTO, with a fairly small secretariat cannot possibly cope with new policy competences. It might be argued that what is needed to further more effective enforcement of labour standards is not to link them to the WTO but to strengthen the ILO. Indeed, there have been some efforts in this direction in recent years. But if the specialist organisations are weak there will continue to be pressure to use trade sanctions as an ultimate means of enforcing standards. The tripartite organisational structure of the ILO means that it is perhaps especially difficult to reform ILO procedures.

Although institutional specialisation appears at first sight a fairly tidy option there are a number of other weaknesses:

- whilst some environmental issues could be amenable to specialist multilateral agreements, many are not. For example, issues concerning production and processing methods cannot easily be separated from trade in goods or agriculture. For example, the environmental impact of genetically modified crops cannot be separated from the trade in agriculture and thus the WTO. The Biodiversity Convention may offer a model for a multilateral agreement covering aspects of agricultural biotechnology, but it has done nothing to limit countries rights under the WTO. Thus a ban on the importation of GM crops for environmental grounds could still be challenged under WTO rules;
- the WTO would still prohibit discrimination between like products according to how they were produced. Environmental interests would therefore argue that the WTO stands in the way of effective environmental regulation.
- to be consistent it would also be necessary to ‘de-link’ the WIPO and WTO and the Codex and WTO. If institutional specialisation makes sense then why should the WIPO and WTO be effectively integrated.

(i) market oriented approaches/ labelling schemes

Market oriented approaches are those which make use of market forces rather than relying on public intervention through regulation. Foremost among these instruments is labelling. In areas such as the environment, food safety of even labour standards, labelling could be used
to empower consumers to make informed choices between products and services. For example, rather than obliging to ensure that products sold are produced in an environmental sustainable fashion, environmental labelling can provide consumers with the option of choosing the environmentally sustainable product. Voluntary labelling schemes have been developed in many countries. They operate through the market because there is a market premium for products that carry the label. For example, the Swedish White Swan eco-label. Such approaches allow consumers to choose those products that are environmentally sustainable. As the eco-labelling schemes cover the whole life cycle of a product they are also provide a means of addressing the PPM issue. Labelling could also be used to identify products that have not been produced using exploitative child labour.

On the surface such an approach offers a number of attractions. It provides an opportunity to pursue national policy preferences without any direct regulatory intervention in markets. It also reflects the ‘subsidiarity’ concept in providing the individual consumer with choices.

In practice it is a little more complicated for the following reasons:

- there are differences over how the criteria for awarding labels are arrived at. In the EU there is a preference for public, although not government, bodies drawing up criteria for deciding whether a product qualified for a single label, such as the Swedish White Swan or German Blue Angle label. In North America there is an expectation that the consumer should be given information and left to decide for themselves;
- there are important differences over who should certify that a product or service meets certain criteria. The EU favours independent third party certification, the US favours self certification by producers;
- there is pressure from developing countries and to some extent from the United States to bring voluntary labelling schemes under WTO disciplines (i.e. the TBT Agreement).
- more generally, there is a need for some common standards on labelling, otherwise there will be a proliferation of labels, which would undermine their effectiveness; and finally
- voluntary labels are unlikely to be considered sufficient by consumers on many issues. For example, the scepticism of consumers on food standards in Europe more or less precludes any scheme which is based on producer declarations.

(j) Flexible implementation
The GATT was more flexible than the WTO because of the relative weakness of the dispute settlement/enforcement provisions meant that although GATT rules were strict it was possible to avoid complying with them when they created considerable difficulties for governments. The major Contracting Parties of the GATT tended not to abuse this flexibility under the GATT because the credibility of the system ultimately relied on the willingness of countries to comply with the rules. But when compliance with GATT rules was considered to be an unacceptable intrusion into national policy autonomy, governments could always avoid it. Under the GATT there was also more scope for trade diplomats to find a negotiated settlement which satisfied both sides in any dispute.

The creation of the WTO with its unified dispute settlement procedure, more or less automatic creation of dispute settlement panels and the removal of the veto over the adoption of panel reports, means that there is less flexibility. Governments are being forced into positions in which they must accept decisions which are seen to be an unacceptable intrusion into national policy competence.

In these circumstances the only way of avoiding compliance with politically unacceptable WTO rules is to pay compensation, as the EU is doing in the case of the hormones in beef decision of the WTO. In the 1995 US Congressional debate on the ratification of the Uruguay Round Agreement and the creation of the WTO, the US administration argued that the WTO’s encroachment on US sovereignty could be limited, because the US could always opt not to comply with a WTO ruling and pay compensation. (Jackson, ) The difficulties with this approach are as follows:

- excessive use of a strategy of non-compliance would undermine the rule-based system of the WTO;
- paying compensation is an economically expensive alternative to compliance;
- whilst compensation may be an alternative for large wealthy WTO members it is unlikely to be an option for smaller countries, so that the excessive use of compensation would introduce a further discrimination against the interests of the developing countries in the WTO. In some cases, even wealthy WTO members would have to think twice about such a strategy. In the Foreign Sales Corporation tax issue, the EU estimates of the benefits going to US exporters as a result of what was found to be a WTO illegal scheme, was in the order of $4bn.
Conclusions

This paper has argued that the distinction between ‘trade’ and non-trade issues has varied over time. There is no unequivocal line between trade and non-trade issues and no criterion or set of criteria that can provide unequivocal guidance for policy makers when seeking to decide on the scope of the WTO.

The well established GATT/WTO legal principles and concepts, such as national treatment, can help to provide a general orientation in debates over the scope of WTO rules, but these are no longer sufficient. General concepts, such as proportionality and necessity ultimately require some judgement on what is proportional in any given case. The ‘legal’ option of allowing WTO Panels and the Appellate Body to define proportionality and such concepts risks further undermining the WTO’s credibility and legitimacy. The evolution of WTO ‘case law’ in the shape of Appellate Body decisions can only assist the political process of defining the scope of the WTO, not replace political decisions in negotiations.

Economic principles, such as the existence of externalities or even comparative advantage have been deployed in debate, but these have not been decisive in determining the agenda. The decisive factor in setting the WTO agenda has been the relative influence of the main actors, whether these are state actors, such as the United States and the European Union, or non-state actors. Agendas are often shaped by coalitions of interests, which sometimes include important WTO governments and non-state actors.

The WTO agenda is not (only) shaped in WTO Ministerial meetings or in the various formal and informal WTO bodies, such as the General Council, the ‘Green Room’ or the de la Paix group. The scope of the WTO is effectively defined over a long period in multi-fora or multilevel negotiations. In order to understand why an issue has reached the multilateral agenda and the shape of proposals for multilateral rules it is therefore necessary to consider the factors shaping decisions in such bodies as the OECD, the Quad (USA, EU, Canada and Japan), as well as in regional negotiations. Precedents set at one level are often carried over into other levels. For example, the principles governing international investment were developed in the OECD. These principles were applied and elaborated at a regional level in NAFTA. The NAFTA model then became the model for the Multilateral Agreement on Investment (MAI).
The discussion of the various approaches used to define the scope of the trade regime shows that ‘subsidiarity’ in the global trading system is defined by means of a wide range of concepts. None of these is likely to be adequate in itself. As the paper shows different approaches have been used in different sectors.

Defining the WTO agenda is therefore inevitably a political process. The paper argues that it is important to recognise this. Much of the current debate is focused on the optimum allocation of policy issues between levels of policy making or rule-making (i.e. national versus multilateral). If ‘subsidiarity’ in the global context, as in the European context, cannot be defined once for all time, but must be continuously redefined, what is needed is an optimum policy process to ensure decisions can be reached in a balanced, inclusive and transparent fashion.

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1 Kalypso Nicholaidis and Carry Coglionese ‘Securing subsidiarity: mechanisms for allocating authority in tiered regimes’, paper for the LSE conference on subsidiarity in the governance of the global economy May 1996.

1 See for example R Hudec in Bhagwati and Hudec 1996.
This was possible because Contracting Parties to the GATT had an effective veto over GATT Panel reports.