The Place of the WTO in the International Legal Order

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by PASCAL LAMY (15 June 2008)

I am glad to be with you today and to be involved in this series of lectures on international law for the Audio Visual Library of the United Nations. I am a great believer in the importance of the work of the United Nations for the maintenance of peace among all nations, rich and poor, large and small, and for the construction of a better planet based on the equality of all states and the respect of human rights and freedoms of all women and men. I believe that learning and education are fundamental pieces of these construction efforts.

Today, I will try to highlight four aspects of the role of the WTO in today's international legal order. First, I will describe why and how the WTO is both a very classical yet modern organisation. Secondly, I will show that although the WTO is a powerful organisation focusing on international trade, it recognizes the importance of non-trade concerns and that opening trade markets for the benefit of all does not mean that trade trumps other concerns or values. Thirdly, I will argue that the WTO is in constant dialogue with many other international organisations and indeed gives legal weight to norms developed by them. Finally, I will conclude by discussing how the WTO seeks to work with the United Nations on several fronts in its efforts to address the troubles of humanity and in particular those relating to trade. In so doing, the WTO contributes to improving coherence in the international legal system.

1. The WTO is both a traditional and modern institution

The WTO is an international organization. This may seem obvious, and yet it took over 50 years to achieve that result! This protracted effort to acquire a legal existence has left its marks. This may explain why today it remains a very traditional and classical international organisation while, at the same time, it has developed very modern features.

The General Agreement on Tariffs and Trade, which was replaced by the WTO in 1994, was a provisional agreement that entered into force in January 1948 and which was to disappear with the treaty creating the International Trade Organization (ITO). Since that treaty creating the ITO was never ratified, the GATT remained, for a half a century, an agreement in simplified form which, in principle, did not provide for any institutional framework. Thus, the GATT did not have “members” but “contracting parties”, a term which highlighted the purely contractual nature of the arrangement.

It was only with the creation, some 50 years later, of the Marrakech Agreement establishing the WTO that a true international organization was finally created possessing its own international legal personality. To avoid any ambiguity, the Agreement Establishing the World Trade Organization (WTO) states in Article VIII that the “Organization shall have international legal personality”. No other international organization needs to repeat in its constitution that it is an international organization but the WTO members felt they had to do so — and I believe they were proud to do so.

The implications of this status are numerous. As with all international organizations, the competencies of the WTO are limited by the principle of speciality. The WTO is concerned with trade and it does not seek to go beyond this although, of course, it recognizes that WTO members must deal with policies and international obligations that go beyond trade.

As a true international organization, the WTO now comprises an integrated and distinctive legal order: it produces a body of legal rules that govern the actions of its members. The WTO legislative basis is important. It has the institutional capacity to produce new rules, amendments and implementing instruments. The WTO is a treaty of some 500 pages of text with more than 2000 pages of scheduled commitments. In addition, 50 years of GATT practice and decisions —known as the "GATT acquis" — are now included as part of the new WTO treaty. But in the WTO the trade rules are always being negotiated. The Doha Development Agenda, the DDA, represents the latest "round" of negotiations. In these negotiations, a broad range of issues are open simultaneously to negotiation and lead eventually to the adoption of new legal obligations.

These legal rules form an integrated system. Indeed, the WTO agreements are integrated in a "single undertaking", which forms a single coherent entity. A number of provisions recall this fact, and in particular Article II:2, which states that the multilateral trade agreements "are integral parts" of the Agreement Establishing the WTO and are "binding on all Members". This is why they appear in an annex to the Agreement Establishing the WTO. On several occasions, the Dispute Settlement Body (DSB) has reaffirmed that Members must comply with all of the WTO provisions, which must be interpreted harmoniously and applied cumulatively and simultaneously. Thus, the WTO treaty is in fact a "single agreement" which has established an "organized legal order".

The WTO rests largely on the principle of the sovereign equality of states. But this does not mean that it is incapable of showing the kind of pragmatism that befits trade in applying the principles of traditional international law. Equality is especially obvious in decision-making for instance. Formally, the WTO rule is "one country, one vote" (unlike decision-making in other international economic organisations, such as the World Bank or the International Monetary Fund). But the practice of taking decisions by consensus is now broadly accepted in all stages of the WTO decision-making process. While it is true that this need for consensus is responsible for a certain sluggishness in the negotiations, it does enable all states, whatever their share in international trade, to express their views and to participate on an equal footing.

Indeed, as recalled by the UN Secretary-General before the General Assembly in 2004, equality is a fundamental requirement: "At the international level, all States — strong and weak, big and small — need a framework of fair rules, which each can be confident that others will obey. Fortunately, such a framework exists. From trade to terrorism, from the law of the sea to weapons of mass destruction, States have created an impressive body of norms and laws."

But as Kofi Annan points out, these rules must also be fair — which is why the WTO goes beyond formal equality and seeks to establish real equality. True equality can only exist between equals. When it comes to trade, some of the less developed countries require certain flexibilities if trade and development are to continue to exist side by side. In the WTO, developing countries can enjoy a series of non-reciprocal benefits, in particular special and differential treatment provisions.

The WTO is a classical organisation in that its sphere of competence is limited, it works with consensus, and it is member driven. The WTO deals with trade and only trade. Yet as I will develop further later on, it has important exceptions that recognize the right of states to give priority to policies other than trade. It even allows trade obligations to be disregarded when this is done in good faith and without any protectionist intent.

WTO is a modern organisation ………………

So the WTO is a classical organisation but the WTO also has very modern features.

The WTO provides a permanent forum for negotiations among its members concerning their multilateral trade relations. In today's world, states need permanent forums for discussions and negotiations and, in that perspective, the institutional structure of the WTO is well developed. We have various levels and forms of decision-making that have to be followed. This ensures that issues brought to the WTO cannot simply be swept away.

The WTO is also unusual in that the totality of its members participate, as a matter of law, in all of its bodies, from the Ministerial Conference, which meets at least once every two years, to the General Council, which functions as the main decision-making body between these ministerial meetings, not to mention each of the councils and committees. Although the consensus is a demanding requirement, it has ensured that the new powers evolving in today's world find room in the decision-making process. For example, some 10 years ago the QUAD (US, EC, Japan, Canada) was seen as the core group where draft decisions had to be tested first. Now the QUAD is dead and we talk about the G-4 (US, EC, India, Brazil). Moreover, it is not possible to propose any new rule without testing the waters with countries like China, South Africa and Indonesia just to name a few of them.

More importantly perhaps, the WTO has developed strong and modern enforcement mechanisms. By enforcement mechanisms, I mean both our transparency-surveillance-monitoring mechanisms and our binding dispute settlement systems. Let's look first at the potentially innovative surveillance mechanisms that we have in place.

The WTO Agreement contains multiple notification and legislation review exercises by the entire membership as well as possibilities for cross-notification, whereby a member notifies the WTO of a measure not notified by an originating member. All notifications and cross-notifications are reviewed and commented by members in relevant committees/councils. There is a collective monitoring process, such as the Trade Policy Review Mechanism (TPRM), which is a “Peers' Review Process” covering the full range of individual members' trade policies and practices and their impact on the functioning of the multilateral trading system. The aim is to achieve a collective appreciation and evaluation of these policies and practices. The Trade Policy Review Report also examines the impact on the multilateral trading system of such policies and practices. The reviews are set against the background of each country's wider economic and developmental needs, policies, objectives, and of its external economic environment. This is again a very innovative process that is evidence of the level of legal and institutional sophistication of the WTO. It explains why states, weak and strong, make great use of this forum.

The WTO's formal adjudication of disputes between members is said to be “the jewel in the Crown” and is definitely modern and until now unique. It is a compulsory jurisdiction that is broadly accessible to members. No member may oppose the initiation of a dispute settlement procedure by another member. Contrary to what may happen in other international forums, for example the International Court of Justice, all WTO members have, by definition, accepted the compulsory and exclusive jurisdiction of the Dispute Settlement Body for all matters relating to the WTO agreements.

An important, and in many ways innovative feature of this system, is the presumption of legal and economic interest in bringing proceedings. Any member, large or small, trading or not with the

other challenged member, can initiate a dispute settlement process. In the long and famous world dispute on bananas, the Appellate Body confirmed that the United States had sufficient interest to bring proceedings against the European Community, even though, in practical terms, the Americans did not export bananas to the EC. In other words, any Member may initiate dispute settlement procedures on the basis of a claim that another member is not complying with its obligations under WTO law. Therefore, the responsibility is generated by an objective "fact" where all members are guardians of the system.

The system can be triggered easily and quickly. Allegations that trade is affected generally suffices to formally trigger the regular WTO dispute settlement process through a simple request for consultations in writing. Procedural steps happen automatically, within pre-determined time-limits. Panels (the jurisdiction of first instance) and the Appellate Body (the appeal stage) are expected to make rapid rulings on any WTO-related grief; they decide according to law, and rulings are made by independent persons. Moreover, the Appellate Body functions more or less like a court, which hears only matters of law. This confirms the essentially legal nature of the system.

After adjudication, the implementation of dispute rulings is subject to continuous multilateral monitoring until full satisfaction of the complainant in cases where a violation has been found. If rulings are not implemented, the membership must authorize retaliatory actions — i.e. counter-measures, the level and application of which remain under WTO multilateral surveillance.

Another unique provision of the DSU is that it rules out all unilateral measures. Only the WTO can decide whether members' measures or actions are consistent with WTO rules. In that sense, the WTO is a rare system that has managed to regulate counter-measures from powerful states by subjecting such action to prior approval by the collective membership.

So, the WTO is a sophisticated system for rule making and for ensuring enforcement of these rules. But this does not mean that the WTO is hegemonic and does not take into account other international norms and other international organisations. On the contrary, the WTO is not more important than other international organisations, and WTO norms do not necessarily supersede other international norms. On occasions, the WTO even gives legal value to norms developed by others and this is recognized in the WTO treaty itself.

2. The WTO is about trade but it recognizes the importance of non-trade concerns

The WTO is of course a "trade" organisation; it comprises provisions that favour trade opening and discipline trade restrictions. The basic philosophy of the WTO is that trade opening is good, and even necessary, to increase people's standards of living and well-being. But at the same time the GATT, and now the WTO Agreement, contains "exceptions" to market access obligations. Article XX of the GATT provides that nothing prevents a member from setting aside market access obligations when that member decides that considerations other than those of trade must prevail. This can happen when, for instance, a member has made commitments in other areas, for example on an environmental issue, when such an environmental commitment may lead to market access restrictions.

Moreover, the preamble of the WTO Agreement, contrary to that of the GATT, explicitly refers to sustainable development as an objective of the WTO. While it is not yet clear whether sustainable development has crystallized into a general principle of law, the reference to such an important non-trade principle shows that the signatories of the WTO Agreement were, in 1994, fully aware of

the importance and legitimacy of environmental protection as a goal of national and international policy.

Based on this new preamble, the evolution brought about by WTO jurisprudence resulted in a new interpretation of the WTO that recognizes the place of trade in the overall scheme of states' actions. The WTO now recognizes explicitly that trade is not the only policy consideration that members can favour and respects the necessary balance that ought to be maintained between all such policies. Our Appellate Body has thus managed to put these exception provisions into operation so as to provide members with the necessary policy space to ensure that their actions take account of various commitments. The Appellate Body has done so in establishing a number of principles including the following ones:

First, WTO members are entitled to determine their own level of protection for the environment, health and morality, even if such national standards are above existing international standards.

Secondly, in the WTO, exceptions referring to such non-trade concerns are not to be interpreted narrowly; exceptions should be interpreted according to the ordinary meaning of the non-trade policy invoked. In this context our Appellate Body has insisted that exceptions cannot be interpreted and applied so narrowly that they have no relevant or effective application. There must always be a balance between WTO market access obligations and the rights of government to favour policies other than trade.

Thirdly, the Appellate Body has extended the availability of WTO exceptions that refer to non-WTO concerns in insisting on the importance of the value protected by this measure and in insisting that when a measure materially contributes to a legitimate policy goal a member is entitled to give priority to this other policy over trade so long as it is acting coherently and consistently and so long as there is no evidence of protectionism.

So to put it shortly WTO members' trade restrictions that have been imposed to implement non-trade considerations will be able to prevail over WTO market access obligations so long as they are not protectionist.

In other words, the WTO provisions themselves recognize the existence of non-WTO norms and other legal systems, thereby nourishing sustainable coherence within the international legal order. Moreover, I believe that in leaving members with the necessary policy space to favour non-WTO concerns, the WTO also recognizes the expertise and importance of other international organizations. In summary, the WTO is well aware of the existence of other systems of norms and that it is not acting alone in the international sphere. And the WTO does more: in some circumstances it explicitly gives legal value and weight to such norms.

3. The WTO is open and active with other actors in the international legal system

How does the WTO relate to norms of other legal systems and what is the nature and quality of its relationships with other international organisations? In order to answer these questions, I will briefly discuss how the WTO's provisions operate and treat other legal norms, including norms developed by other international organisations. The WTO recognizes the limits of its jurisdiction and the specialization of other international organizations. In this sense the WTO helps to build a unified international approach and reinforces international legal order. Let me give you a few examples of how our system is not “clinically isolated” from the rest of international law and how

the WTO has been pro-active in stimulating efforts of international coherence.

The WTO legal relationship with other intergovernmental institutions …………….

An additional feature of the WTO that confirms its integration into the international legal order is the legal value and status it provides to international standards and norms developed in other fora. For instance, the WTO's Sanitary and Phytosanitary (SPS) Agreement states that members' measures based on standards developed in Codex Alimentarius, which is operated jointly by the World Health Organisation (the WHO) and the Food and Agriculture Organisation (the FAO) the International Office of Epizootics and the International Plant Protection Convention are presumed to be compatible with the WTO's agreement. So, while Codex and others do not by any means legislate in the normal or full sense, the norms that they produce have a certain authority in creating a presumption of WTO compatibility when such international standards are respected. The SPS Agreement thus provides important incentives for states to base their national standards on, or conform their national standards to, international standards. Therefore, WTO members have no choice but to be directly concerned with the work of Codex! Therefore the WTO encourages members to negotiate norms in other international fora which they will then implement in the context of the WTO.

The Technical Barriers to Trade Agreement states that when a member's national measure is consistent with an existing international standard, that national measure is presumed not to be more restrictive than necessary and thus consistent with WTO rules.

We have thus established, in a manner which I hope will convince you, that the WTO is neither a power-hungry merchant ogre nor a Geneva gnome cowering in his lair, and that its place in current international governance is that of an open-minded participant ready for dialogue and by now fully integrated in a network of administrative, legal and political solidarity that is frequently overlooked.

Political relations of the WTO with other intergovernmental organisations …………

Let me describe how in the WTO we have been politically sensitive to working with other international organisations and how we actually collaborate with other international organisations.

First, there are a few references to specific international organisations in the WTO Agreement itself. For instance, the WTO Agreement calls for improved cooperation between the WTO, the IMF and the World Bank. In this context, the WTO's DG has a specific mandate to continue to work to reinforce cooperation between these specific international organisations.

We have formal cooperation agreements with UNCTAD and together we have set up the International Trade Centre — the ITC which helps developing countries with export diversification. In the area of standards setting, we now have a mechanism — The Standards and Trade Development Facility — which involves the WTO, World Bank, FAO, World Health Organization and the World Organization for Animal Health. Its purpose is to assist developing countries establish and implement Sanitary and Phytosanitary PS standards to ensure health protection and facilitate trade expansion.

In addition, a notable programme of interagency cooperation on technical assistance and capacity building is the Integrated Framework for LDCs, which involves the WTO, International Monetary Fund, World Bank, UNCTAD, ITC and UNDP (the United Nations Development programme). This

interagency cooperation is expanding with the ongoing work on Aid-for-Trade programme, which brings these organisations together with regional development banks with whom we also have formal cooperation agreements. In the area of trade and environment, the WTO and UNEP have entered into a cooperation arrangement and will soon issue a joint study on Trade and Climate Change. The WTO has also undertaken research on trade and employment with the International Labour Organisation (the ILO) with which it has published its first joint study last year.

Through the work of its Councils and Committees, the WTO also maintains extensive institutional relations with several other international organisations. There are some 75 international organisations that have obtained formal or ad hoc observer status in WTO bodies. The WTO is also participating as an observer in many international organisations. Although the extent of such cooperation varies, coordination between the work of the WTO and that of other international organisations continues to evolve in a pragmatic manner.

For example, although there is no formal agreement between the World Health Organization and the WTO, the WTO has observer status in the WHO and the WHO has observer status in the SPS and TBT Committees. The FAO/WHO Joint Codex Alimentarius Commission, International Plant Protection Convention and the World Organization for Animal Health have observer status in the SPS Committee, and the WTO participates as an observer in the meetings of these bodies.

These are just a few examples of our interactions with other international organisations. But, in practice, there are many more exchanges that take place amongst secretariats of international organisations. Cooperation in global economic policy-making goes much beyond the WTO's formal and specific arrangements. Indeed, the WTO Secretariat maintains working relations with almost 200 international organisations in activities ranging from statistics, research, and standard-setting to technical assistance and training.

But we also know that we need the other international actors. There are limits to what trade can do so we all need to work together.

Recognition that trade opening does not in itself address the distributional effects between those better off and worse off resulting from trade

The setting up of an "Aid for Trade" programme which I just mentioned as a good example of our active collaboration with other intergovernmental organizations is also about admitting the limitations of trade and the fact that the WTO alone cannot ensure that benefits of more open trade will indeed reach the people.

I remain convinced that the WTO's mandate regarding the opening up of markets constitutes an essential contribution to development and to the improvement of collective well-being. It is nevertheless true that the opening up of trade can deliver real benefits only if it is accompanied by other policies, which allow for flexibility and job security: education policy, employment policy, research and innovation policy. Some of these must be implemented at national level while others are effective only if applied internationally through the action of specialized agencies: ILO, UNESCO, WHO … Coherence between the various international public policies — and they are eminently complementary — is therefore essential.

Harnessing globalization which in my view we need to do presupposes balanced international cooperation across the board. The best trade policy cannot alone promote growth and development. Premature market opening can even destabilize a country's economy in the absence

of certain accompanying policies. This is why sound macro-economic policies must be supplemented by structural policies.

Among the structural policies, I will refer first to good governance practices at national level, without which corruption and a lack of transparency maximize social inequalities rather than optimizing collective welfare. A number of international organizations work towards promoting good governance, including the IMF, the World Bank, the OECD … But these are domestic policies for which the WTO has no mandate.

Such action must also be supplemented by investment policies in order to develop local infrastructure. Here too, the World Bank, the IMF, the regional development banks and the UN Economic Commission are there to provide the developing countries with financial and technical support to promote their production and export capacities. As to the WTO, it must contribute its own particular know-how in the area of commercial infrastructure, but we have no rules on issues like domestic investment policies.

We recognize that the WTO should not cannot and is not be the centre of the world: its dispute settlement system is not to enforce non-trade disputes ……………………

As I noted earlier, many actors emphasize the power of the WTO dispute settlement system. But this system itself recognizes its limitations.

Recently in the context of a dispute between the US and Mexico related to their disagreements in NAFTA, the Appellate Body decided that the WTO dispute settlement system cannot be used to deal with "non-WTO disputes" (this was the Mexico — Soft Drinks). That dispute was concerned with a complaint by the US that Mexico was imposing discriminatory taxes against imports of US soft drinks, in reaction to the US refusal to comply with the dispute settlement procedures of NAFTA. Mexico attempted to invoke exception provisions of the GATT. But in fact there was no exception that referred to the actions or the policy goals pursued by Mexico: Mexico's discriminatory taxes that were WTO inconsistent were in fact "countermeasures" to force the United States to respect NAFTA. To do otherwise, said the Appellate Body, "*WTO panels and the Appellate Body would thus become adjudicators of non-WTO disputes. As we noted earlier, this is not the function of panels and the Appellate Body as intended by the Dispute Settlement Understanding of the WTO*".

So the WTO recognizes the right of the WTO members to set aside some of the WTO obligations for policies listed in its Article XX but the WTO court and the WTO system will not become the World judge of the disagreements between states in treaties other than WTO agreements!

4. The WTO is working with the United Nations system

As I wrote in 2004 in a book about "international democracy", I am a firm advocate of international cooperation. I wouldn't dare to say that this is a general principle of international law! But I recall that international cooperation is one of the United Nations objectives as stated in Article 1 of the UN Charter. I believe that efforts of international cooperation are the only way to ensure the peaceful evolution of international relations and of our international legal system. But international cooperation is also crucial to ensuring the legitimacy of the WTO and the effectiveness of trade rules.

But there are many reasons why the WTO needs to continue to work with the United Nations. As I mentioned, the WTO's mantra in favour of trade openness plays a vital role in members' growth and development, but it's not a panacea for all the challenges of development, neither is it necessarily easy to accomplish, nor in many circumstances can it be effective unless it is embedded in a supportive economic, social and political context and in a coherent multi-faceted policy framework. Trade opening can only be politically and economically sustainable if it is complemented by policies which address, at the same time, capacity problems (whether human, bureaucratic or structural); the challenges of distribution of the benefits created by freer trade; the need for sustainable development; the respect of public morals, etc. This is also about international legal coherence and this is also where the WTO recognizes that it must work with the UN system.

I am, as WTO DG, personally also quite active in the CEB — the Chief Executive Board — where heads of all agencies meet and collaborate under the direction of the Secretary General of the United Nations, to try to increase the efficiency of their respective work. We are also very active in the new Food Crisis Task Force set up by UN Secretary General Ban Ki-Moon because our actions on agriculture subsidies and tariffs are part of the medium and long term solution to food shortage. We know that we need to increase agriculture production in developing countries and one of the reasons why their production and exports have been discouraged is because of the importance of distorting subsidies and high tariffs in rich countries. Protectionism in agriculture is at the core of the current Doha Round of negotiations which I hope we can complete soon.

As I mentioned before, the WTO makes full use of its international legal personality and is now collaborating actively with other international organizations within the UN family. But there is more and I've said it many times. In setting up a system whereby good faith norms developed in other fora are presumed to be WTO consistent, the WTO not only gives due deference to other legal systems but it also stimulates negotiations in other specialized fora and reinforces the coherence of our legal order. In this sense, the WTO is an engine, a motor energizing the international legal order. This is, in my view, the place and the role of the WTO in the international legal order: a catalyst for international mutual respect and international cooperation and also for even more global governance, which I believe is needed if we want the world we live in to become less violent, be it social, political, economic or environmental violence.

Conclusion

The WTO has evolved from the GATT's closure. State signatories to the GATT wanted to reinforce the status of the international trading system and provided it with a formal international organization: the WTO. This international organization is now fully operational. The legal value and enforcement of those norms adopted by WTO bodies are matters for debate but the role of the WTO, including as a forum for negotiations and its powerful dispute settlement mechanism, confirms the distinctive nature of its legal order.

Today's international legal order will be able to evolve peacefully only if existing laws evolve through mutual respect. There is no exception to this rule and the WTO is well aware of its importance.

Thus, the WTO acts as a vehicle for the evolution of international law and with other international organisation works for the creation of a better ordered international community.