

**PRIVATE RIGHTS VS PUBLIC STANDARDS IN THE WTO**

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### **A. REGULATING THE GLOBAL ECONOMY**

The recent debates about globalization show that it is a contested concept, reflecting very real conflicts about the nature and desirable trajectory of changes in the international political economy. Since the mid-1990s, the neo-liberal view, which prioritized deregulation and the removal of barriers to market access, has been increasingly challenged. It is now more generally accepted that globalization in reality involves complex processes of re-regulation. Far from entailing a shift to a 'free' world market, the global economy operates within a framework of multi-level governance.

Nowhere is this seen more clearly than in relation to the World Trade Organisation (WTO). The package of agreements negotiated through the 'bargain-linkage diplomacy' of the Uruguay Round established the WTO as a central institutional framework for the international coordination of economic regulation. This completes the organizational triptych designed at Bretton Woods, with the WTO complementing the IMF's role in monetary management and that of the World Bank in development finance. However, the WTO is a different animal from the still-born International Trade Organization (ITO) proposed in 1946. The ITO envisaged an institutional framework through which a managed relaxation of trade barriers would go hand in hand with measures to stabilize primary commodity prices, control business monopolies and restrictive practices, and ensure respect for internationally agreed labour standards (Dell 1990, Drache 2000).<sup>1</sup>

In contrast, the imperative that drives the WTO is to remove barriers to market access, usually described as 'negative integration'. The complex and comprehensive set of agreements to which all WTO members must subscribe are almost entirely concerned with setting limits, or in WTO language 'disciplines', on national state regulation. With the major and significant exception of intellectual property rights, it generally leaves to other organizations the task of developing international standards. Thus, as an institution, it is riven by the contradiction between the neo-liberal ideology of liberalization and deregulation which dominated its period of gestation in the 1980s, and the realization that markets depend on regulation. This is partially expressed in the tension between free trade and fair trade, which has been preoccupying economists and lawyers concerned with the future of the trade regime (Bhagwati and Hudec 1996). The free trade perspective rests on the assumption that optimal economic welfare will result from exchange under conditions of equality in competition. Competitive equality is expressed in the principles of non-discrimination which are the foundation of the General Agreement on Tariffs and Trade (GATT), and permeate the many complex provisions of the WTO agreements.

However, it is a delusion to think that issues of fairness in competition can be adequately resolved simply by applying the principle of equal treatment. In practice, equality cannot be divorced from substantive issues which involve value-judgements. Equal treatment requires evaluation of whether the products (or, for that matter, people) concerned should be considered 'like', or whether they have significant differences which may justify differences in treatment. Should a tomato which has been genetically modified be treated like other tomatoes (some of which may have been bred by traditional selection techniques)? Is beef or milk from cows which have been fed growth-promoting hormones like the beef or milk from other cows? Are building products made from asbestos fibre like those made from other materials? Is a doctor, a nurse, an accountant, or a software engineer trained in India or China like one who has qualifications from Canada or the UK?<sup>2</sup> Is a pharmaceutical product produced by a patent-holder like one manufactured under a compulsory licence? In practice, rules which are facially neutral may be said to be based on an invidious distinction; while conversely, differences in treatment may be justified by relevant distinctions depending on the purposes of the rules.

Hence, it is often impossible to determine whether regulatory requirements or standards are based on equal treatment without having regard to the purposes or objectives of those requirements. Issues of equal treatment are inseparable from fair treatment, so they entail the evaluation of public policies establishing regulatory standards, for the protection of consumers, producers, and the natural environment (Cottier and Mavroidis 2000). This generates inevitable potential conflicts, and therefore linkages, between the free-trade, market-opening obligations of the WTO and a wide variety of regulatory arrangements. The broad non-discrimination rules of the WTO continually raise questions about the validity of many economic regulations which inevitably involve making distinctions between different products or services, including those concerning how and by whom they are produced.

These tensions present a dilemma about the nature and future of the WTO which confronts both the advocates and critics of market-driven globalization. If the liberalization of international trade is inevitably entangled with a much wider range of economic regulatory arrangements, does this make the WTO the super-regulator of the world economy? On the other hand, if the WTO confines itself to ensuring that markets are open to 'free trade', it would simply be a scythe cutting down the regulatory standards established by states and even international bodies.

Thus, a central question for the WTO is how to accommodate its functions and powers to those of other public bodies in the complex system of multi-level governance of the contemporary global economy. This paper explores proposals for ensuring greater sensitivity in the application of WTO obligations to its own proper limits as a trade organization, and to the specific competences and roles of other public bodies, especially national states and international organizations. This institutional question lies behind the conflicting views which portray the WTO either as a tool of the US or a bulwark for smaller states, a protector of the consumer or of transnational corporations (TNCs).

This institutional question has been debated through the concept of the 'constitutionalization' of the WTO. However, as I will show below, this has been pressed

most strongly from a particular, ultra-liberal perspective. This seeks to build on the attempts to legitimize the WTO purely in terms of the rule of law, which relies on a formalist conception of law, and emphasizes the role of the WTO's Dispute-Settlement (DS) system. In this optic, the importance of the WTO agreements is precisely that they constrain national policy choices. Thus, defenders of the WTO argue that national state regulation tends to be protectionist because it is the product of the 'capture' of states by special interests. For example:

'Free trade and democratic government face a common obstacle - the influence of concentrated interest groups. ... The WTO and the trade agreements it administers act to restrain protectionist interest groups, thereby promoting free trade and democracy.' (McGinnis and Movesian 2000: 515).

State power must be confined, in this view, in order to safeguard the rights and liberties of individuals.

However, this view conveniently ignores the converse process: the deployment of the economic power of some sections of big business to secure the capture of the WTO by sectional interests, and thus to restrict the regulatory powers of states, which generally have at least some form of democracy. This pattern originated in US trade policy, with the establishment of the office of US Trade Representative (USTR), and the development of its powers and duties to open foreign markets for US firms under the provisions of the now-notorious Section 301 of the Trade Act. The well-known history of the TRIPS agreement demonstrates that it was the capture of US trade policy by the pharmaceutical and media firms, and the deployment of s.301 of the Trade Act in support of strong intellectual property protection, that enabled these special interests to obtain a stranglehold on the WTO (Ryan 1998, Drahos and Braithwaite 2002). In 1984 the EU adopted its version of s.301, the New Commercial Policy Instrument, which was replaced from 1995 by the Trade Barriers Regulation (TBR: Eeckhaute 1999; EC 2000; Shaffer 2002). These procedures give business interests an indirect right to bring complaints to the WTO, so it is hardly surprising that the EU and the US have been by far the biggest users of the DS system, and have been embroiled in damaging disputes verging on economic warfare.

Of course, big business also wields considerable power in national policy arenas. However, TNCs have a special advantage in their ability to move strategically between national and international forums. Certainly, social movements and civil society organizations have also developed forms of international mobilization. My point in this paper is to consider the implications for this multi-level process of the way in which rights and interests are institutionalized. The WTO's central principle is the right to market access, which in practice mainly protects the interests of TNCs. Some authors, partly in response to the widespread criticisms of and attacks on the WTO, have argued that rights of free trade should be complemented by human rights. However, this has been expressed from an ordo-liberal perspective that would reinforce the market-opening priorities of the WTO, and entail strengthening the powers of the WTO's Dispute Settlement procedures to override national laws.

A different approach begins from the appreciation that a central element in the WTO's crisis of legitimacy has been the interpretation of obligations under the WTO agreements in ways which are widely seen as overriding national sovereignty, and in particular undermining the powers and duties of states to set standards of social and environmental protection appropriate for them. This suggests that appropriate 'constitutional' principles for the WTO should aim to define the reasonable scope of a state's power to choose appropriate levels of national protection, compatible with its trading commitments to other states. Thus, rather than merely providing a court of appeal for those disaffected with national standards, it should be made explicit that the function of the WTO's Dispute Settlement is the more limited one of reviewing the compatibility of national measures with international standards. This may be articulated in terms of the principle of the 'margin of appreciation', developed in European human rights law, which accepts that a certain scope or margin should be allowed for national states to make public policy choices within the range of what is permissible under an international standard. The principle, as discussed in more detail in the third section of this paper, can be shown to be incipient in many of the WTO provisions, and in some of the approaches adopted towards their interpretation. Making it explicit requires no major political step, but would do much to restore some of the credibility the WTO has lost.

This proposal can be also seen as part of the more general need for the WTO to develop greater sensitivity to the limits of its own role, and an appreciation of the importance of that of other public bodies within the international system. The organization's founding treaty enjoins it to make arrangements to develop effective cooperation with related intergovernmental organizations.<sup>3</sup> Such links have now begun to develop, but may simply reinforce a dominant technocratic bias in global governance mechanisms, unless political mobilizations around issues of global concern can succeed in significantly democratizing their practices. Acceptance that liberalization as pursued by the WTO must be complemented by the work of other organizations in setting and improving global standards might help establish the WTO's relationship with those organizations on a basis that is more cooperative, rather than assuming the necessary dominance of the WTO and its liberalization agenda.

## **B. THE CONSTITUTION OF THE WTO**

Several factors combine to make the WTO the dominant institution in the regulation of global economic activity. The perceived economic importance of access to export markets makes it difficult for any state to stand aside from membership of the WTO. Following the success of the GATT in reducing border barriers (tariffs and quotas) during the period of economic growth from 1954 to 1974, it began to focus on the ways in which internal regulations might act as 'non-tariff barriers'. From the point of view of those seeking access to a market, national regulatory differences create market barriers.<sup>4</sup> Yet global harmonization of the entire range of regulatory standards affecting goods and services would be an immense task. At the regional level the European Community, with its more developed institutional structure, struggled long and hard to develop a system of regulatory coordination, involving a combination of mutual recognition and harmonization of standards (Dehousse 1989; Bratton et al. 1996: 29-43), and the EU has

been described a `regulatory state' (Majone 1993), or a `network state' (Castells 1998 vol.III, ch.5).

In contrast, the WTO remains a trade organization. It is not equipped to harmonize product standards, let alone standards for intellectual property, environmental protection, professional and technical services, or employment conditions, nor should it see its task in such terms. In the GATT era, these were matters for national states, and the GATT agreement resulted from a series of compromises between free trade aims and the need for national autonomy in setting domestic regulations (Goldstein 1993). This explains the structure of the GATT text, in which the broad obligations of non-discrimination in articles I and III, as well as the prohibition of quantitative restrictions in article XI, are counterbalanced by a series of exclusions and exceptions. In particular, the General Exceptions of article XX left states free to set their own standards (and to exclude goods which did not comply with those standards) in key areas such as the protection of human, animal or plant life or health, and intellectual property rights. The right to set national standards was subject only to the important proviso that such national regulations should not be applied in an arbitrarily discriminatory manner or constitute a disguised trade restriction.

The WTO builds upon but goes well beyond this, and establishes a complex, multi-layered system for the evaluation of national regulatory standards. It reincorporates the original GATT text, but adds a series of important new agreements which establish additional and more complex validity requirements for national regulations. These go well beyond core trade rules, such as anti-dumping. They now apply to any type of product regulation, whether for consumer or environmental protection or any other purpose; through to business or investment regulations that affect trade (such as local-content rules for foreign-owned firms) under the agreement on trade-related investment measures (TRIMS); and extend, through the Services agreement (GATS), to the regulation of all kinds of economic activity involving international trade or investment.

### *Legalization*

The balance between international liberalization and the maintenance of national standards of protection (described as `embedded liberalism': Ruggie 1982) became harder to maintain in the era of `deep integration' of the world market. At the same time, heightened public concern over matters such as product safety and environmental protection led to an exponential growth of regulatory requirements. This greatly sharpened the conflicts between market access obligations and the right of states to set regulatory standards. The management of these conflicts has resulted in a far-reaching legalization of the trade regime, beginning from the Tokyo Round of the late 1970s, and culminating in the establishment of the WTO (Reich 1996-97). This has had two aspects: the creation of a binding judicial procedure to resolve disputes, and the development of a complex system to manage the process of re-regulation of international markets.

Most visible has been the judicialization of the Dispute-Settlement system. Initially an institutionalized system of political-diplomatic mediation, it became transformed in the later period of the GATT into a form of arbitration (Dam 1970; Hudec 1975, Trebilcock

and Howse 1999, ch. 15; Hudec et al. 1993). Under the WTO, the Panels and Appellate Body (AB) constitute a full-blown trade court in all but name, although its institutional and political history ensures a continuing tension between diplomatic and judicial approaches (Weiler 2000). Certainly, the breadth of the WTO agreements gives its Dispute Settlement system an extremely broad jurisdiction, so that it has the power to decide whether national regulation complies with a wide variety of international standards. This involves not only product technical and safety requirements, but many other areas too, such as intellectual property rights, support for domestic industry and treatment of foreign investors,<sup>5</sup> and even corporate taxation.<sup>6</sup> This power is backed by its speedy procedures, the virtually automatic adoption as binding of its decisions, and especially the right of the winning parties to apply trade sanctions (described as 'compensation') if the losing states do not fall into line.<sup>7</sup>

Secondly, however, it is important to recognise that the WTO's adjudication procedures are only the visible tip of a much larger iceberg of procedures and rules, through which international markets are being re-regulated. The package of WTO Agreements now includes a series of detailed statutes amplifying, but also going far beyond, the sparsely-drafted articles of the original GATT. Aside from those which are primarily trade-related (e.g. the Anti-Dumping and Safeguards codes), perhaps the most important are those relating to product technical and safety standards, the TBT and SPS,<sup>8</sup> as well as the TRIPS and the GATS, which open up whole new areas of international regulation. These agreements impose wide-ranging obligations which severely constrain, or in global-speak 'discipline', the power of states to set national regulatory requirements and standards. These international rules have been used to challenge a variety of national regulations governing for example the shelf-life of perishables such as long-life milk, the pre-trial remedies available in intellectual property litigation, and the technical specifications used in a government procurement tender.

These disciplines are both substantive and procedural. The substantive obligations are of a dual character. They require states to ensure that national regulations in many fields comply with relevant international standards, where they exist or are imminent.<sup>9</sup> Basing a national regulation on an international standard provides a 'safe harbour', protecting the regulation from potential challenge under trade law. However, these are also additional obligations independent of those in the GATT itself, and the requirement to base national regulations on relevant international standards where they exist applies regardless of whether the national regulations are discriminatory or protectionist in intent.<sup>10</sup> For products, international standards are not laid down by the WTO itself, but by the relevant international bodies. The SPS agreement specifies the three main organizations setting standards within its purview, in particular for food safety the Codex Alimentarius Commission; others may be recognized by the SPS Committee. Under the TBT, standards may be set by any body or system whose membership is open to the relevant bodies of all Member states of the WTO. It is important to note that these bodies generally establish standards that are non-binding - states are free to adopt them if they wish. However, the effect of the WTO agreements is to convert these standards into mandatory requirements, if they are to be applied to foreign producers.

The TRIPS and Services agreements also impose obligations to comply with international standards. The TRIPS contains two kinds of obligations requiring national intellectual property laws to comply with international standards. First, it requires WTO members to apply the main provisions of several multilateral IP treaties, in particular the Berne Copyright Convention and the Paris Industrial Property convention. This applies regardless of whether the WTO member is also a member of WIPO or has ratified those agreements. In effect, a large body of international law which states could previously choose whether to accept has now become binding on all states desiring to be part of the world trading system. In addition, the TRIPS agreement itself contains a large number of minimum requirements for IP protection, in relation both to substantive IP laws but also, very importantly, their enforcement procedures. Due to the breadth of the activities it covers, the GATS establishes generic requirements for national regulations affecting service provision (article 6). However, the GATS Council is mandated to develop 'disciplines' for 'measures relating to qualification requirements and procedures, technical standards and licensing requirements' (art. 6.4). Already, sectoral agreements concluded under the GATS are incorporating by reference internationally-agreed regulatory standards relevant to the sector.<sup>11</sup>

In addition to these obligations to adopt international standards, the WTO agreements establish a number of criteria which national regulations must satisfy, either where no international standard exists, or where a state wishes to deviate from or go beyond an international standard. To depart from an international standard for technical regulations, the state must show that it 'would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems' (TBT art. 2.4).<sup>12</sup> For safety and health under the SPS,<sup>13</sup> a state is permitted to adopt a higher level of protection than that provided by an internationally-agreed standard, but only if it complies with the requirements of articles 3.3 and 5 of the SPS, in particular by basing its standard on a scientific risk assessment carried out according to relevant internationally-approved techniques.

The WTO agreements apply several general criteria of the validity of national standards, which are based on GATT principles and practice but go well beyond the equal treatment concept. The most stringent is the 'least-trade-restrictive' test, which can be applied to invalidate a regulatory requirement, even one which is facially non-discriminatory and adopted for a valid purpose, if a less trade-restrictive means of attaining the same purpose can be shown to exist.<sup>14</sup>

In addition to these substantive 'disciplines' on states' powers to regulate, the WTO imposes wide-ranging procedural requirements. First there are *notification and consultation* obligations: generally where a state proposes to adopt regulations not based on an international standard and/or if they may significantly affect foreign access to its market, such proposals must be reported to the organization.<sup>15</sup> This normally must be prior to adoption, to allow sufficient time for other states to comment on them, and for consultations to take place. Secondly, throughout the agreements there are 'transparency' obligations. These go beyond the obligation to publish regulations, and require the establishment of enquiry points to answer questions and receive comments from

interested persons in other states, and even provide translations of relevant texts into English, French or Spanish.<sup>16</sup> As with substantive regulations, regulatory procedures are often required to comply with international standards, or with standards laid down in the WTO agreements. Thus, the TBT lays down criteria for conformity assessment procedures (art.5), including the requirement to base any procedures requiring positive conformity assessment on international standards where they exist (5.4).<sup>17</sup> Finally, the agreements include some obligations for mutual recognition of procedures and standards, and encourage the negotiation of bilateral or plurilateral agreements to facilitate this (TBT art.6).

Thus, the WTO has become the main focus of extensive processes of re-regulation of global economic activity, often referred to as 'regulatory reform' (OECD 1994). No-one who has any sort of direct experience of how public bodies operate can doubt that regulatory reform is very desirable. Many bureaucratic restrictions may be hard to justify, or could be greatly simplified. However, domination of this process by the WTO creates some serious risks. The WTO rests on market-access obligations, the tendency of which is to treat regulatory differences as undesirable obstacles. Thus, its 'disciplines' or regulatory reform obligations (T. Weiler 2000; Kawamoto 1999) tend to require the removal of existing national state regulations, and create significant constraints for states' national regulatory processes. This seemed desirable from the 1980s neo-liberal perspective, which preferred no regulation and 'free markets' to a world where national states retained the autonomy to set their own standards. The post-Washington Consensus (Drache 2001) now recognises that stable markets require firm normative foundations, to ensure the security, safety and trust on which economic production and exchange depend. This creates a new pressure, for states to adopt globally-approved regulations. It is clear, however, that a one-size-fits-all approach is undesirable and impossible. Thus, the challenge for the post-Washington consensus is to find a framework for re-regulation that can strike a balance between global minimum standards and those needed to accommodate the diversity of local needs, conditions and values.

### *Enhancing the WTO's Legitimacy through Law?*

This extensive legalization of the WTO is both its strength and an indication of its weakness as an organization. Certainly, it is central to the legitimacy of the WTO, as is demonstrated by the great stress placed on the WTO as embodying the Rule of Law in world trade, not least in public statements from the organization. Thus, in a speech delivered shortly after the establishment of the WTO, its first Director-General Renato Ruggiero stated:

That is why we need to keep the multilateral system, with its reliable framework of principles and rules in good repair; it is a firm foothold in a shifting world. Liberalization within the multilateral system means that this unstoppable process can be implemented within internationally agreed rules and disciplines. This is the opposite of a chaotic and unchecked process - without the security of the multilateral system, change would indeed be a leap in the dark. (Ruggiero 1995).

Five years later, after the organization was shaken by the debacle at Seattle, his successor Mike Moore delivering a speech on 'The Backlash against Globalization?' concluded as follows:

The WTO is a powerful force for good in the world. Yet we are too often misunderstood, sometimes genuinely, often wilfully. We are not a world government in any shape or form. People do not want a world government, and we do not aspire to be one. At the WTO, governments decide, not us.

But people do want global rules. If the WTO did not exist, people would be crying out for a forum where governments could negotiate rules, ratified by national parliaments, that promote freer trade and provide a transparent and predictable framework for business. And they would be crying out for a mechanism that helps governments avoid coming to blows over trade disputes. That is what the WTO is. We do not lay down the law. We uphold the rule of law. The alternative is the law of the jungle, where might makes right and the little guy doesn't get a look in. (Moore 2000).

This can be summarised as legitimizing globalization through law.

This theme has been debated among academic commentators under the rubric of the 'constitutionalization' of international economic law. The term was applied to the GATT by the doyen of trade lawyers, John Jackson, who defined the 'trade constitution' as follows:

It is a very complex mix of economic and governmental policies, political constraints, and above all ... an intricate set of constraints imposed by a variety of 'rules' or legal norms in a particular institutional setting. ...

This 'constitution' imposes different levels of constraint on the policy options available to public or private leaders.<sup>18</sup>

### *Constitutionalization and Human Rights*

There are, however, some very different views about how to 'constitutionalize' this system. An ordo-liberal version, put forward by Ernst-Ulrich Petersmann,<sup>19</sup> espouses a constitutionalism which would enshrine the 'freedom to trade' as a fundamental right of individuals, legally entrenched in national constitutions and enforceable through national courts (Petersmann 1993, 2002a and 2002b). In this perspective, 'equal rights of the citizens may offer the most effective strategy for compensating the 'democratic deficit' of international organizations' (Petersmann 1998, 28). Petersmann puts forward an explicitly neo-Kantian liberal view, in which a new era of world peace and prosperity can best be assured through the unrestricted pursuit of economic benefits through trade, under an umbrella of principles embodying individual cosmopolitan rights. This ultra-liberalism assumes that the pursuit of individual self-interest, especially through economic exchange, is ultimately beneficial to all. Hence, the development of principles embodying individual rights, and the adjudication of conflicting rights-claims, would be sufficient to ensure universal consent and legitimacy.

This version of 'constitutionalization' of the WTO has two aspects. First, it would require the entrenchment of WTO rules as part of national law so as to override national parliamentary supremacy, to secure the 'effective judicial protection of the transnational exercise of individual rights' (Petersmann 1998, 26). This could occur as a matter of domestic constitutional law of any member state, if the WTO agreements could be considered as 'self-executing' or having direct effect, by creating rights enforceable by private parties through domestic courts. The anti-democratic implications of this view are justified by its roots in a particular concept of liberal democracy, in which state power must be confined, in order to safeguard individual rights and liberties.<sup>20</sup>

Secondly, Petersmann responded to the challenge of Seattle by accepting that freedom of trade, which from his perspective should be entrenched as a right directly enforceable by private parties, should also be accompanied by other human rights, which should all be enshrined in the WTO 'constitution' (Petersmann 2000), or indeed in the UN system as a whole (Petersmann 2002a, 2002b). In his view, however, 'Most human rights guarantees are about individual freedom, non-discrimination, equal opportunities, and rule of law', and a difficulty of applying them in trade law is their neglect of 'economic liberties'. His emphasis, therefore, is on rights of private property and market freedoms. Thus, he points to the protection of intellectual property rights in the TRIPS agreement (although, to his regret, it does not refer to human rights law), and advocates the protection of competition and of the rights of 'the general citizen in maximizing consumer welfare through liberal trade' (Petersmann 2000, 21-23), which he extends also to all transnational economic transactions, including the free movement of workers (Petersmann 2002a).

Petersmann has advanced his arguments with rather more enthusiasm, or indeed vehemence, than intellectual rigour, leaving him open to criticism both on factual and theoretical grounds (Howse and Nicolaidis 2001, Howse 2002, Alston 2002).<sup>21</sup> Nevertheless, the application of WTO rules in the light of international human rights norms is also advocated by some other WTO insiders and enthusiasts (Marceau 2002, Cottier 2002). It is also put forward by some NGOs and others in the human rights community (Mehra, 2000). Indeed, a serious effort is being made to counterbalance neo-liberal globalization by the assertion of universal human rights norms. Thus, the UN High Commissioner on Human Rights has produced several reports on human rights globalization, focusing especially on trade and the WTO,<sup>22</sup> which are being used to bring human rights concerns to the attention of relevant WTO bodies. Clearly, these initiatives come from a very different institutional and ideological perspective than Petersmann's.

This demonstrates that human rights are contestable, not immutable concepts. Typically, also, they entail striking a balance between various rights and prioritizing them. In fact, human rights, as they have developed historically, have been most strongly articulated in the 'first generation' civil and political rights, while the 'second generation' economic, social and cultural rights are often considered to be aspirations at best; and 'third generation' collective rights such as self-determination and sustainable development cannot be cast as legally enforceable rights. It is significant that the right to property has been considered a civil rather than an economic right, and that this is the only positive economic right usually recognized, the remainder are individual liberties, or more broadly social or public interests. Thus, the rather fundamental economic questions of

access to land and natural resources, shelter, food, work, and health, let alone cultural rights are generally treated as aspirational or unenforceable rights.

Human rights, therefore, at best may open up space for debate about conflicting values underlying different rights-claims. For example, intellectual property rights may be evaluated in relation to their impact on cultural rights, expressed as:

‘the right of everyone: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’<sup>23</sup>

This clearly entails striking a balance between the more ‘public’ interests in the enjoyment of cultural life and the benefits of science, and private interests which can be legally enforceable as rights in property. All too often, however, private rights tend to prevail over public interests, especially when claims take a legal form.<sup>24</sup> The key issue is how to define the scope of the individual’s rights according to public welfare criteria. This is recognized in all intellectual property regimes, and indeed the TRIPS agreement itself states as its Objectives (article 7) that:

‘The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.’

The problem is that the TRIPS agreement is aimed at specifying the minimum property rights which states must grant and protect, and says little or nothing about the conditions or obligations, necessary in the public interest, which should be attendant on such protections (UN-CHR 2001, para. 23).

Thus, a recourse to human rights does not resolve issues about the substantive content of international economic rules, it merely shifts the debate to a different ground. Indeed, if human rights norms are limited to liberal concepts of protection of private property and individual liberty, they may inhibit important public policy concerns such as the alleviation of poverty, disease and hunger. This is well illustrated by the constitutional challenge brought by pharmaceutical firms against South Africa’s new medicines laws. Strikingly, this case was based on claims of human rights violations, especially the deprivation of property without compensation.<sup>25</sup> Certainly, strong counter-arguments could be made,<sup>26</sup> especially since the South African constitution is in some respects post-liberal, and recognises rights to housing (article 26), as well as health care, food, water and social security (article 27). These provisions place an obligation on the government to take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights’. Few other constitutions provide such a basis to balance vested property rights against the rights of the dispossessed. However, the collapse of the case was due to the global attention attracted by the access to medicines campaign, which was able to build international support

around the issue of HIV-AIDS, and gave a new impetus to the political debates around the TRIPS agreement (Drahos and Mayne 2002, 248-250). In the absence of this political debate, the South African courts might easily have upheld the pharmaceutical companies' rights to their patents.<sup>27</sup>

Ultimately, how the balance is struck between different conflicting rights-claims must be decided by democratic political means. For a supra-national adjudicative body to evaluate the validity of regulations adopted by national democratic states, on the basis of its perception of the proper balance of private rights of individuals, gives insufficient emphasis to democratic decision-making.

### *Law and Democracy*

Other analysts, including some of the leading trade lawyers, have been rather more cautious towards the proposals to constitutionalize international economic law through enforceable individual rights. They have raised the question of the relation between law and democracy. In the words of John Jackson (a strong supporter of trade liberalization), the proposal to entrench a legal right to trade 'advances liberal trade by imposing this approach as a matter of constitutional law rather than by persuading the democratic constituencies of the value of this approach'.<sup>28</sup>

Jackson's own criticisms of the shortcomings of the 'Trade Constitution' focused on the weaknesses of the GATT (Jackson 1989: 302), which he is happy to report have largely been corrected or at least improved with the establishment of the WTO, although he concedes that not a few problems remain (Jackson 1997: 342). It is interesting, however, that his discussion of 'Some Fundamental Policy Questions' remains virtually identical after the creation of the WTO. Here he analyses the techniques which may be deployed to 'manage interdependence', which he identifies as:

- \* Harmonization - inducing states towards uniform approaches to economic regulation;
- \* Reciprocity - 'a system of continuous 'trades' or 'swaps' of measures to liberalize (or reduce) trade';
- \* Interface - 'which recognizes that different economic systems will always exist in the world and tries to create the institutional means to ameliorate international tensions caused by those differences, perhaps through buffering or escape-clause mechanisms' (Jackson 1997: 345).

He links this to what might be described as the central 'constitutional' question of international economic governance, 'the appropriate allocation of decision-making authority at different levels'.

Indeed, far from helping resolve this question, the establishment of the WTO has greatly exacerbated it. As the previous discussion has shown, the WTO agreements have prioritized 'harmonization' and have greatly demoted 'reciprocity' and 'interface' in the management of regulatory interdependence. This pressure towards global homogeneity

tends to override local preferences as embodied in national laws, policies and regulations, yet it takes place through a network of technocratic governance institutions that seem to operate beyond the realm of democratic debate. It is this contradiction that has made the WTO the focus of anti-globalization protests around the world and is the central issue in the WTO's crisis of legitimacy.

### **C. EVALUATING THE PUBLIC INTEREST UNDER MULTI-LEVEL GLOBAL GOVERNANCE**

The key issue is therefore how to accommodate the WTO's decision-making processes to the appropriate roles of other public bodies in the global governance system. Here I will focus on proposals which aim to ensure that WTO rules allow national states sufficient scope to make their own judgements about the public interest.<sup>29</sup>

This question is brought sharply into focus by the little-noticed proposal for the adoption of the principle of the 'margin of appreciation' in WTO practice and jurisprudence (Helfer 1998). I will consider here the relevance of this principle to restoring a better balance between the local/national and global/international levels of governance.

#### *The Margin of Appreciation Principle and its Relevance to the WTO*

It is the European Court of Human Rights that has developed the principle that national states should be given a 'margin of appreciation' in the Court's evaluation of whether their publicly-taken decisions conform to human rights standards. It has been explained as an expression of the 'appropriate scope of supervisory review' when the task of a court is 'to review public decisions for their conformity to certain standards and to grant a remedy if it finds that there has been an unjustifiable breach of those standards' (Macdonald 1993: 84).

More broadly, it has been justified as an expression of certain elements, which could be described as basic to international institutions engaged in the tasks of 'managed interdependence':<sup>30</sup>

\* *Interpretation of International Standards*: international agreements between states, especially those establishing standards for the regulation of individuals, are necessarily formulated in general terms, leaving considerable leeway for interpretive choices which may involve important issues of values;

\* *Subsidiarity and Diversity*: as far as possible, internationally-agreed standards should be interpreted and applied to give the primary responsibility for choices involving values to the national or local levels of government, which are closest and most responsive to the people affected;

\* *Democracy*: decisions taken by public bodies which are democratically accountable should not lightly be overturned by less accountable bodies such as tribunals or committees of experts.

The principle has, however, been criticized by human rights lawyers. Thus, Lord Lester, a prominent human rights advocate, has denounced it as:

the source of a pernicious 'variable geometry' of human rights, eroding the 'acquis' of existing jurisprudence and giving undue deference to local conditions, traditions and practices.<sup>31</sup>

It has been seen as introducing a moral relativism which undermines the universalism of human rights, and could seriously compromise the promise of international enforcement of such rights, justifying states in their belief that they are the better judges and hence the final arbiters of the conflicting rights of individuals and minority groups (Benvenisti 1999). It would certainly be undesirable if the principle became a justification for unexplained deference to national states and an abnegation of the responsibilities of international-level decision-makers. There are also dangers if it is seen as a pragmatic adaptation to the needs for gradualism and flexibility in moving towards an eventual goal of uniformity (Macdonald 1993: 123).

It may be said, however, that the principle is especially appropriate for the WTO, and that some of the problems with it in the human rights context do not apply in the context of economic regulation. Human rights are classically seen as the rights of individuals to be protected from the state, or at least against what are considered to be arbitrary or unjustified state actions. It is therefore paradoxical for an international body whose task is to evaluate the justification for a state action to defer to that state's judgement of the necessity or desirability of its actions. Where this occurs, it is on the basis that the state has to balance or evaluate competing considerations or interests, such as the tension between individual liberty and community interests in order or security. To justify deference to the state's judgement requires an explicit evaluation that this balance has been struck within the range, or 'margin of appreciation', acceptable under the international standard. This should clearly be applied very cautiously when it concerns coercive state actions against individuals, such as imprisonment without trial during a state of emergency. However, in the context of economic regulation, standards set by public bodies inevitably restrict the opportunities of some producers or consumers, to safeguard general confidence in and the security of the general conditions of production and exchange. This context more clearly calls for a principle allowing some leeway to public authorities at the local or national level to determine standards appropriate to specific conditions.

#### *Relevance to WTO Adjudication*

The principle is of immediate relevance to the operation of the WTO's Dispute-Settlement system and of its legitimacy. It could, indeed, be seen as implicit in some of the reasoning of the reports of the Appellate Body, which have held it back from plunging into complete disrepute. This danger was evident in the formalistic and insensitive reasoning adopted by many GATT panels in the 1980s, and is still prevalent in the WTO panel reports and some of those of the Appellate Body (AB). The explicit articulation by the AB of the margin of appreciation principle could be done without any formal amendment to the WTO agreements, and would be welcomed both by governments and many of the WTO's civil society critics. It should be stressed that the principle is aimed at the interpretation and implementation of rules by technical bodies and adjudicators, and not in their formulation by political processes. Thus, by introducing

some flexibility in the interpretation of WTO obligations regarding international standards, it could make it easier to reach agreement on such standards, and for those standards to be more clearly defined, especially when they refer to public interest concerns.<sup>32</sup>

Robert Howse has pointed to the limitations of legal formalism in the adjudication of issues involving competing values which have become increasingly prominent since at least the *Tuna-Dolphin* dispute (Howse 2000). He argues for a stronger basis of social legitimacy for adjudicative processes, and puts forward proposals grouped around three elements: fair procedures, coherence and integrity in legal interpretation, and institutional sensitivity. It is the third of these points that is of most relevance here. He calls for an awareness in the WTO, and especially in the Panels and Appellate Body, that in scrutinising and interpreting the wide range of laws and policies that come within their purview, they should be 'sensitive to their institutional strengths and weaknesses in relation to other actors who may have a particular expertise or a particular stake in these laws and policies' (ibid. p.62).

Howse helpfully articulates the principle as going beyond one of 'deference' to national states, and entailing rather a sensitivity to the role of the WTO in relation both to national/local and to other international public bodies. Thus, it does not mean simply ceding to the specific competence of another body, but ensuring that its decisions take proper account of evaluations or decisions made by another public body within its area of competence or jurisdiction (Howse 2000: 62-3). He cites as examples of insensitivity in Panel reports the 'summary dismissal of environmental information from other organizations in the *Tuna-Dolphin* case', and the even more egregious rejection of the views of the World Health Organization in the *Thai Cigarettes* case. He also gives some examples from Appellate Body Reports of an emerging sensitivity, notably in *Hormones*,<sup>33</sup> and argues that counter-examples of insensitivity (e.g. in *Salmon*, *Bananas*, and *Indian Patents*) could be explained by an unwillingness simply to defer.

The principle is especially appropriate where the WTO agreements themselves establish substantive standards, or where compliance with internationally agreed standards provides a safe harbour from challenge under the WTO. These are not to be regarded as international legislation, to be simply transposed into national law. This is indicated by many of the formulations in the agreements. Thus, the TBT and SPS require states to use international standards, where they exist, as a basis for their national standards.<sup>34</sup> The Appellate Body itself, in the *Hormones* case, rejected the view of the Panel that 'based on' means 'conform to', and explained:

To read Article 3.1 as requiring Members to harmonize their SPS measures *by conforming those measures with international standards*, guidelines and recommendations, *in the here and now*, is, in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex *recommendatory* in form and nature) with *obligatory* force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the *SPS Agreement* itself sets out no indication of any intent on the part of the Members

to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations. (report section X(A)).

The TRIPS agreement also provides an important example of the relevance of the margin of appreciation principle. TRIPS provides a comprehensive template for the basic standards that national intellectual property laws should meet from the WTO's perspective. It should nevertheless not be regarded as an instrument for harmonizing intellectual property laws. This would require a far more detailed agreement, which it would be neither feasible nor desirable to attempt on a global scale. IP rights grant state-backed monopolies, in order to stimulate the production and facilitate the diffusion of technological innovation and cultural creativity; but the scope and degree of protection must be carefully balanced against public interests in low-cost dissemination. Striking this balance requires a range of detailed arrangements and decisions, often responding to the particular social and economic contexts (Drahos and Mayne 2002).

Significantly, however, TRIPS has stringent standards defining the private rights which must be granted and the means for their enforcement, but is non-prescriptive on the conditions for the granting of those rights and on the limits necessary to safeguard the public interest. This is particularly important in relation to patents. The basic provisions on patentability in TRIPS article 27 owe much to the draft Patent Harmonization Treaty, which was abandoned in 1991 after six years' work in WIPO.<sup>35</sup> However, the TRIPS drafters essentially selected those provisions favouring patent-owners, many of which were actually strengthened compared to the 1991 WIPO draft. Thus, TRIPS chose the more stringent options in the WIPO draft on the 20-year minimum term, the requirement of product patents, and the reversal of the burden of proof for process patents; and the power for states to limit patentability was drawn more narrowly, in particular by specifying that it does not extend to micro-organisms or to non-biological or micro-biological processes. On the other hand, although TRIPS specifies the three basic conditions of patentability (novelty, inventive step, and industrial applicability/utility), these are not defined. Nor does TRIPS make any attempt to clarify the all-important distinction between a discovery and an invention. It is this laxity that has allowed patent offices in some countries, notably the USA, to grant 'patents on life', and to encourage bio-piracy and the privatization and commodification of community knowledge and techniques. In this respect, there is a need for greater specificity and less flexibility in the TRIPS.<sup>36</sup> As presently worded, the failure by a state to allow patenting of micro-organisms and microbiological processes could result in a complaint under TRIPS, whereas there is no basis for complaint about over-broad protection due to lax interpretation of patentability requirements. In this way, the structure of the TRIPS agreement favours private rights over public interests.

Where flexibility is important is in the interpretation of the limits on the protection of private property rights, to safeguard the public interest in access to new technologies and knowledge. The difficulty is that, while the criteria for granting private rights are widely drawn, the scope for states to limit these rights for public purposes is defined quite specifically in the TRIPS. This empowers WTO Panels or the Appellate Body to review

any public interest limits on IPRs enacted at national level. Indeed, in the first two decisions on the substantive provisions of the TRIPS they have done precisely that. In the complaint by the EC against Canada on *Pharmaceuticals* (WT/DS114/1), the Panel ruled that the 'limited' exceptions allowed under article 30 did not justify the 'stockpiling' provisions which allowed generic drugs manufacturers to begin production before the end of the 20-year patent term, although the 'regulatory review' exception is permissible. Similarly, in relation to copyright, the Panel struck down the US provisions allowing music broadcasting without payment by small businesses, although it accepted that the 'homestyle' exception could be regarded as one of the 'special cases which do not conflict with a normal exploitation of the work' permitted by TRIPS article 13.<sup>37</sup>

It is important that the WTO's DS bodies should clarify their proper role in these situations. It would be inappropriate for the WTO DS system to become in effect an appeals court against decisions by national bodies, whether legislatures, courts, or officials such as patent examiners. Its task is to review the adequacy of national rules for compatibility with the principles of WTO agreements such as TRIPS. Thus, in interpreting whether national provisions adopted in the public interest 'do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights-holder', it should not substitute its view of the public interest for that of accountable national public bodies. Its task rather is to review whether national provisions fall within a range of possibilities that can be considered 'normal' or 'reasonable'. In so doing, it is vital to be sensitive to the role of national bodies in striking the appropriate balance between protection of rights-holders and the public interest in free diffusion. In practice, it could be said that the decisions in the *US Copyright* and *Canada Pharmaceuticals* cases did offer a pragmatic compromise, in permitting some and invalidating other exceptions.

However, neither Panels nor the Appellate Body have explicitly addressed the development of a standard of review against which to evaluate standards adopted by states, except those of the trade regime itself (notably, the 'least trade restrictive' standard). This is perhaps the main reason why trade considerations tend to dominate other concerns in their decisions. The articulation of an explicit principle of 'margin of appreciation' could help to develop a greater sensitivity to other issues and the appropriate role of other institutions. In so doing, it could help the WTO's Dispute-Settlement system identify the specific role appropriate to it within the wider networks of 'managed interdependence'.

#### *Importance to WTO as an Institution*

An important advantage of this proposal is that it entails an evolutionary expression of a principle that could be seen as implicit in many of the WTO's agreements and practices. The explicit articulation and subsequent development of the principle could help put the organization on the right track, and divert it from the cul-de-sac towards which it has been steered by a blinkered neo-liberalism. The principle could also help to overcome the tension in the WTO agreements between their primary concern with market-access, and the issues of regulatory harmonization which this inevitably raises.

Finally, adoption of the principle may help the DS bodies avoid the narrow legal formalism which pretends that they merely apply the text of the agreements, while the Ministerial Conference and the General Council have the 'exclusive authority to adopt interpretations' of them (WTO Agreement, article IX(2)). In practice, a number of key provisions leave significant scope for interpretation, which is an inevitable part of adjudication. Indeed, a significant feature of the important 'Declaration on the TRIPS Agreement and Public Health' adopted at the Doha Ministerial Conference was its affirmation that the TRIPS Agreement 'can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all'.<sup>38</sup> This could be seen as clear encouragement not only to states to use the flexibility in the public purpose provisions of the TRIPS, but also to the DS bodies to ensure that their interpretations of these provisions support this approach.

The spread of the WTO's tentacles into all aspects of economic regulation, coupled with the free-trade regime's suspicion of regulatory differences, raises the spectre of the WTO as a global juggernaut, enforcing either deregulation or regulatory uniformity. The principle of margin of appreciation could help avert this, if it brought the WTO to acknowledge its proper role within a broader multi-level system of governance of international economic relations. This would provide a better basis for the administration of the existing WTO agreements, and for achieving the necessary consensus on the institutional changes which are an essential step to restoring its international credibility.

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<sup>1</sup> The Havana Charter's provisions on international investment were in outline only, but envisaged it as a process of international mobilization of 'capital funds, materials, modern equipment and technology and technical and managerial skills', and thus entailing state measures both to assure just and equitable treatment for such assets and to regulate their use in the public interest: see Havana Charter arts. 11 and 12 (in UNCTAD 1996 vol I, p. 3).

<sup>2</sup> Although the GATT deals only with trade in goods, the WTO now also governs international provision of services (including professional services) through the General Agreement on Trade in Services (GATS), which is also based on non-discrimination obligations.

<sup>3</sup> The WTO Agreement requires it to cooperate, as appropriate, with the IMF and World Bank to achieve 'greater coherence in global economic policy-making' (article 3.5); and to develop 'appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO' (article 5.2).

<sup>4</sup> The very term 'non-tariff barrier' carries the assumption that the real motivation for a regulatory requirement is protectionism. This is often explicitly stated in writings on trade rules. To take two examples from many: 'As tariff barriers have been reduced under regional and multilateral trade agreements, recourse has increasingly been made to non-tariff measures to protect local business from foreign competition' (Todd Weiler 2000: 74); 'Consider, for example, the issue of product-standards, which was often used as a convenient mechanism through which to implement a protectionist policy under the pretext of safeguarding consumer safety and product quality.' (Reich 1996-97: 787). No evidence is provided to support these assertions. More persuasively, Jackson (1997: 214) argues: 'The temptation of legislators and other government officials to shape regulatory or tax measures to favor domestic products seems to be very great, and proposals to do this are constantly suggested.' The examples usually put forward (e.g. *ibid.*: 222 and

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fn28) generally indicate that standards result from public concerns, which become formulated in regulations appropriate to the socio-economic conditions of the country concerned, and that national legislative procedures make it easier for domestic industry lobbies to ensure that regulations suit local conditions. It is hardly surprising if the resulting standards are sometimes inappropriate for foreign producers. This is a far cry from statements alleging that standards are adopted for protectionist reasons. A pertinent example is the EU ban on hormone-treated beef, which has been cited to illustrate the way in which protectionist groups resort to spurious safety concerns due to the GATT's success at reducing tariffs and overt discrimination (McGinnis and Movesian 2000, 549). This appears to ignore the facts that European concerns about meat safety are long-standing, that the hormone ban was introduced in response to consumer concerns dating from the 1970s (Kramer 1989), and was imposed on local production and only consequentially to imported beef. Certainly, in the context of European over-production of beef, the restriction seems a small price to pay to avert what is by any judgement a small risk; while to north American producers, it seems an unreasonable requirement acting as a market barrier to them, but this hardly substantiates accusations of covert protectionism. For a knowledgeable and subtle evaluation (which nevertheless favours free trade) see Vogel 1995.

<sup>5</sup> See for example Indonesia - Certain Measures Affecting the Automobile Industry, complaints by the United States, the European Communities and Japan (WT/DS54, 55, 59 & 64).

<sup>6</sup> Notably, United States - Tax Treatment for 'Foreign Sales Corporations' (WT/DS108/1).

<sup>7</sup> This includes the important right of 'cross-retaliation', i.e. to apply trade sanctions even for breach of non-trade rules, which despite the provisos in the Dispute-Settlement Understanding (DSU, art.22.3) are easy to circumvent or are readily approved. Thus, in the *Bananas* dispute, the US complaint was mainly under the Services agreement in respect of the wholesaling by US firms of bananas imported from other states into the EU, but when the EU failed to comply the US was able to apply sanctions entirely to imports of goods, without the need for 'cross-retaliation' approval, on the grounds that its 'expectations' of potential banana exports were infringed by the EU measures. ('The United States has the right to request the suspension of concessions in either of these two sectors, or in both, up to the overall level of nullification or impairment suffered', para. 3.10 of the Decision of the Arbitrators in the Recourse by the European Communities to Arbitration under DSU art.22.6, WT/DS27/ARB, 9 April 1999).

<sup>8</sup> The Agreement on Technical Barriers to Trade (TBT), and the Agreement on Sanitary and Phytosanitary Measures (SPS).

<sup>9</sup> TBT Article 2(4), and SPS article 3(1). Under the Definition in Annex 1 of the TBT, a technical regulation is any mandatory requirement laying down 'product characteristics or their related processes and production methods', including packaging and labelling. The AB has adopted a broad definition of 'technical regulations' in *EC-Asbestos*

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(WT/DS135/AB/R, 12 March 2001), deciding that "product characteristics' include, not only features and qualities intrinsic to the product itself, but also related 'characteristics", such as the means of identification, the presentation and the appearance of a product' (para. 67), including terminology, packaging and labelling requirements, and therefore that the French ban on products containing asbestos was a technical regulation.

<sup>10</sup> Thus, in *EC - Hormones* (WT/DS26/AB/R, WT/DS48/AB/R, 13<sup>th</sup> February 1998), the EU was obliged to justify its ban on hormone-treated beef under the SPS agreement, regardless of whether it could be justified as non-discriminatory under the GATT.

<sup>11</sup> For example, in relation to Telecommunications, the Annex to GATS lays down some requirements, including access to public networks, and the Basic Telecomms Agreement (Fourth Protocol to GATS) entailed individual country commitments which included the 'Reference Paper' on Regulatory Principles, notably covering rules on interconnection and competition. However, regulation of services and their providers is often more extensive than that of goods, and has far-reaching economic and social ramifications. Thus the Working Party on Domestic Regulation has found it difficult to make substantial progress in elaborating general principles of GATS article 6. For specific sectors, although the GATS Council approved Disciplines on Domestic Regulation in the Accountancy Sector (14 December 1998), they are in fairly general terms, and as regards acceptance of international standards merely state (para. 26) that 'account shall be taken of internationally recognized standards of relevant international organizations' in deciding the validity of national measures (for a comparison with the SPS and TBT, see Trachtman 2002).

<sup>12</sup> Under the TBT, it is therefore very important whether the international standard can be considered 'relevant', and whether it would be an 'ineffective or inappropriate means'; and in *EC - Sardines* the AB held that the burden is initially on the complaining state to prove these points (WT/DS231/AB/R, 26 September 2002, esp. para. 282). However, it had no difficulty in deciding that Peru had shown that an existing Codex labelling standard for sardines was relevant as well as effective and appropriate for the consumer protection aims of the EC regulations.

<sup>13</sup> The SPS governs any more specific measures applied to protect human, animal or plant life or health from pests or diseases, and human or animal life or health from risks arising from additives, toxins, contaminants or disease-causing organisms in foods, beverages or foodstuffs.

<sup>14</sup> Spelled out in TBT art. 2.2 and SPS art. 5.6. Thus, in the *Thai Cigarettes* case (DS10/R - 37S/200 Report of 7 Nov. 1990), although Thailand's taxes on imported cigarettes were shown by evidence from the World Health Organization to be important for health protection, the GATT Panel took the view that Thailand could adopt less trade-restrictive means, such as controls on advertising.

<sup>15</sup> SPS Annex B; TBT art. 2.9; GATS art. 3.3.

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<sup>16</sup> For developed country members: see TBT art. 10; SPS art 7 and Annex B; TRIPS art. 63; GATS art. 3.

<sup>17</sup> The SPS is less stringent, for example in its criteria for Control, Inspection and Approval procedures (Annex C); in particular, where an importing country prohibits importation of foods with non-approved additives, it is merely urged to 'consider the use of a relevant international standard as the basis for access until a final determination is made'. Similarly, scientific risk assessment procedures which a state must use under SPS art.5 are to be designed 'taking into account' risk assessment techniques adopted by the relevant international organizations (5.1).

<sup>18</sup> I cite this statement from the first edition of his text (Jackson 1989: 299), where the word 'constitution' is put in inverted commas; the wording remains very similar in the second edition (1997), but the inverted commas have gone.

<sup>19</sup> Petersmann's views appear to be rooted in German ordoliberalism, especially the liberalism 'from below' of Röpke, and the 'democratic constitutionalism' of Jan Tumlir, who advocated entrenchment of the MFN clause as a private right in national constitutions: see Sally 1998, chs. 6-8, esp. p.164.

<sup>20</sup> Until now this has not generally been the case, in particular in the EU where the European Court of Justice has over the years rejected claims that either GATT or the WTO agreements have direct effect in EC law: see most recently *Portugal v. EC*, Case C-149/96, European Court Reports [1999] I-8395. However, in a recent case involving an alleged trademark violation, the ECJ's Advocate General accepted the claimant's argument that article 50 of the TRIPS (specifying provisional measures for IPR enforcement) should be regarded as having direct effect within national law, thus overriding any conflicting provision (in this case, in Dutch law). The ECJ itself refused to go so far, although it did suggest that national laws should as far as possible be interpreted to comply with WTO obligations. *Hermès International v FHT Marketing Choice BV*. Case C-53/96, *European Court Reports* [1998] page I-3603. However, in *Portugal v. EC*, para. 49, the Court limited this to the interpretation of EC measures intended to implement WTO obligations. For a critique see Griller (2000) and the response by Eeckhout (2002).

<sup>21</sup> The last led to a furious debate on the website of the *European Journal of International Law* ([www.ejil.org](http://www.ejil.org)).

<sup>22</sup> On TRIPS (UN-CHR 2001), on Globalization with special reference to the Agriculture Agreement (UN-CHR 2002a) and on the Services Agreement (UN-CHR 2002b).

<sup>23</sup> Article 15 of the International Covenant on Economic, Social and Cultural Rights. See UN-CHR 2001, paras. 10ff.

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<sup>24</sup> Thus, the Court of Appeal in the UK has held that, since copyright protects only the form of expression and not information itself, it is only in comparatively rare circumstances that human rights in respect of dissemination of knowledge or information would trump copyright: Ashdown v. Telegraph Group Ltd [2001] EMLR 44.

<sup>25</sup> See Notice of Motion in the High Court of South Africa, Case number: 4183/98 , 42 applicants, against the Government of South Africa (10 respondents). Article 25 of the constitution prohibits the taking of property except in terms of a law of general application, for a public purpose and with the provision of compensation.

<sup>26</sup> For example, as formulated in the Amicus Curiae brief by the Treatment Action Campaign, available from <http://www/tac/org/za>, accessed 10<sup>th</sup> June 2001.

<sup>27</sup> Thus it is hard to understand Petersmann's assertion that the withdrawal of the pharmaceutical companies' claim `demonstrated the importance of civil society support and of judicial remedies for reconciling national and international economic law ... with social human rights' (Petersmann 2002a). His suggestion that the withdrawal by the USA of its WTO complaint against Brazil's local working requirement for patents also demonstrates the responsiveness of WTO procedures to social human rights concerns (ibid., footnote 70) is equally fanciful. It was the civil society campaign around access to medicines that persuaded the companies to withdraw their legal claims based on their human rights, and made the US challenge against Brazil politically inopportune.

<sup>28</sup> In Hilf and Petersmann 1993: 575. Deborah Cass argues that the WTO's Appellate Body (AB), in drawing on a variety of judicial techniques, is `constitutionalizing' the WTO `wittingly or not' (Cass 2001: 7). However, much of this is done covertly, as the Appellate Body's approach is generally very formalistic, emphasizing textual interpretation, which is generally regarded as a virtue by lawyers (Lennard 2002). Although the AB has shown more sensitivity than the Panels to the importance of not intervening unnecessarily in the sphere of national sovereignty, it has not articulated this in terms of an explicit principle such as the margin of appreciation.

<sup>29</sup> The larger and in my view more important issue of democratizing global governance networks themselves is discussed e.g. in Picciotto 2001.

<sup>30</sup> My version is adapted from Mahoney 1998: 2. A similar argument has been put forward in terms of the principle of `global subsidiarity' (Howse and Nicolaidis 2001).

<sup>31</sup> Cited in Mahoney 1998: 1.

<sup>32</sup> Thus, I am not arguing for greater indeterminacy in the politically-agreed rules, but that they should define as clearly as possible the standards on which state regulations should be based; as I argue below, the TRIPS agreement is one-sided in requiring strong protection of private rights, while leaving vague the standards to be applied in granting those rights (e.g. originality, inventive step) or exceptions to them, a clearer definition of

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which would make it easier for states to circumscribe private IP rights in terms which preserve the public interest (Picciotto and Campbell 2003)

<sup>33</sup> To which can now be added *Asbestos*, especially the approach adopted by the AB to the 'necessity' test in deciding whether France could reasonably be expected to adopt 'controlled use' as an alternative to a ban on asbestos products (Report of the Appellate Body in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/AB/R, 12 March 2001, paras. 169-175).

<sup>34</sup> For the text of the relevant sections see footnote 9 above.

<sup>35</sup> The draft text as presented to a Diplomatic Conference at The Hague in June 1991 has recently been republished as WIPO document SCP/4/3. Following the successful conclusion in 2000 of the Patent Law Treaty, which mainly governs procedural matters, WIPO's Standing Committee on Patents has renewed work on harmonizing substantive aspects of patent law. In preparation, the WIPO Bureau identified six 'basic issues underlying the grant of patents which are of particular importance to the further development of the patent system', viz 'the definitions of prior art, novelty, inventive step (non-obviousness), and industrial applicability (utility); sufficiency of disclosure; and the structure and interpretation of claims': WIPO 2000, para. 9.

<sup>36</sup> As suggested in the Communication from Kenya on behalf of the African group, 6 August 1999, WT/GC/W/302, paras. 19-21.

<sup>37</sup> Interestingly, the likelihood of a WTO review was raised during the debates in the US Congress on the Fairness in Music Licensing Act: see McCluggage 2000.

<sup>38</sup> WT/MIN(01)/DEC/2, 20 November 2001, para.4.