

NEWSLETTER

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First Annual Conference and Science Foundation Site Visit: Project at Cruising Speed after Nine Months in Operation

During the week of 12 June 2006, the twelve NCCR Trade Regulation research teams met en masse in Berne for a very successful first annual conference (12–13 June) and an evaluation by the Swiss National Science Foundation (14–15 June). Two eminent representatives from our Scientific Advisory Board, Professor John Jackson and Dr Gary Hufbauer, were present throughout the week as well.

The conference offered a first opportunity for us to debate and discuss our work across the NCCR as a whole, and with a selected group of external experts (a programme is available at: www.nccr-trade.ch/index.html?contentURL=http://www.nccr-trade.ch/events/conferences.html). Dr. Didier Chambovey, Deputy Head of the Swiss WTO Mission in Geneva, analysed underlying systematic problems in the current Doha Trade Agenda, offering practical insights for the researchers. Inspiring, cross-sectoral discussions, held in parallel, focused on the problem of special and differential treatment, and the future relationships between trade regulation and managed migration on the one hand, and trade regulation and the rule of law on the other. Professor Jackson and the well-known trade economist, Dr Ronald Jones subsequently presented stimulating keynote addresses. Each of the research groups then presented salient problems for discussion with their peers. In sum, it was an opportunity to listen and build linkages (the importance of which is highlighted in the editorial that follows). Everyone benefited from informal interaction, too, equally important in building the network within the NCCR.

The purpose of the two-day Science Foundation evaluation was to assess the work of the first year and to offer advice on the future evolution of the project. It was conducted by a distinguished group consisting of Professors Anthony McGrew, John

Odell, Claudia Opitz-Belakhal, Thomas Probst, H el ene Ruiz Fabri, Debra Steger, Christian Tietje and Geetru van Overwalle, supported by Urs Christ and Thomas Griessen from the SNF.

Considering that our research started only nine months ago, a key objective of both the evaluation and the conference was to move towards conclusions from the stock-taking, or literature review exercises that we have been conducting during the first months. Some of our projects have already completed what the Science Foundation's panel termed "impressive over-views of the existing work in their areas". In the months to come, we will be finalising this work and starting to examine the problem areas identified and/or hypotheses that have been formulated in the context of our various individual projects.

Overall, the panel complimented us on the "comprehensiveness" of our research agenda, both with respect to the "research topics as well as the layers and actors that are under research". They also encouraged us not to delay in making active efforts to "strengthen interdisciplinary exchange and collaboration between the projects". Such early collaboration will facilitate timely production of the collaborative outputs expected during the later stages of the projects. As is explored in more detail in the editorial paragraphs that follow, it will require careful listening, accompanied by a strong interest in what others are doing. Cultivating this will undoubtedly present one of the greatest challenges that we face in the management of our NCCR.

At the end of the week, it was fair to say that the project has reached its cruising speed. The second year will be critical.

Thomas Cottier

Editorial

Listening: a *sine qua non* for communication

The first edition of our newsletter described the challenges that the scientific community faces in learning to communicate with the public. The academic community has an important contribution to make to the multilateral rule-making process, but this contribution must be made in consultation with the system's stakeholders. A valuable lesson that emerged from our recent annual conference and Swiss National Science Foundation site visit is that our external communication efforts are intimately related to our internal ones. That is to say, after we'd had an opportunity to compare our own ways of scientific interaction with those of the members of our Scientific Advisory Board, we realised that our researchers probably wouldn't be able to communicate effectively with the public until they had figured out better approaches for communicating amongst themselves.

Academics like to talk. We tend to forget that communication is a two-way process; it involves listening as well as talking. During our conference and site visit, we were privileged to have Professor John Jackson and Dr Gary Hufbauer, two of the most eminent scholars working in our field today who are also members of our Scientific Advisory Board, commenting on our research. In observing them at work over the four days, one could not help but be struck by how attentively they listened. Indeed, both took detailed notes throughout the presentations, referring to them at length in their subsequent interventions. John Jackson even enlisted the assistance of his wife in covering events that he was unable to attend!

We know that the extra-disciplinary insights and cross-references that will eventually prove critical to the success of our research will not be gleaned from talk alone. We are also aware that the debate is still wide open with respect to how to extract such insights. We thank Professor Jackson and Dr Hufbauer for offering us what we suspect is a fundamental lesson for our research.

Susan Brown, Scientific Coordinator



Professor John H. Jackson of Georgetown University, Washington, DC, addresses the NCCR Annual Conference

Genetically modified organisms and WTO law: the debate is still open

Although the final report of the Panel in the case brought by Argentina, Canada and the US against the EC on the alleged moratorium on the approval of genetically modified organisms (GMOs) has not yet been circulated, comments on its expected content have already appeared worldwide. These comments are based on the confidential draft report, a document that is only released to the parties concerned (but commonly leaked), and may differ from the final report. In this unprecedented case, the information has been made publicly available over the Internet.

That the EC appears to have "lost" the case will come as no surprise to the legal experts. But more important are the individual findings of the Panel. One of the main questions the Panel had to answer, was whether the fact that no GMOs were approved in the EC between 1998 and 2003 constituted a deliberate suspension of approvals as alleged by the claimants. The Panel found that a number of EC Member States had deliberately delayed the procedures in order to suspend approvals. Nevertheless, the Panel found that the suspension in itself did not constitute the actual EC policy on GMOs (the "measure" in WTO-terms), but merely a limited aspect of its application. According to the Panel, the EC legislation establishing the approval procedures for GMOs in its entirety was the actual measure.

The crux of the argument is that the claimants had explicitly excluded the EC legislation as such from their applications. Yet, only the approval procedures underlying the suspension would have had to conform fully to the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). The suspension of approvals was no more than a procedural error in the application of EC legislation. As a result, the Panel came out with a limited finding of undue delay, as prohibited by Annex C of the SPS Agreement, in EC GMO approvals. Even the EC acknowledged that there had been delays. Grounds for disagreement between the parties boiled down to whether these delays were undue.

The Panel did not have to answer the question of whether a moratorium imposed by a WTO Member adopted as its general GMO policy violated WTO law. Neither did it have to include any findings on whether WTO Members are allowed to establish a special and more burdensome approval regime for GMOs. Consequently, the Panel could avoid the "big" questions: Is there "sufficient scientific evidence" (Art. 2.2 SPS Agreement) for imposing a general moratorium on GMOs? Can the EC refer to a precautionary measure (Art. 5.7 SPS Agreement) to justify a ban on GMOs? Nothing was said about the contentious relationship between the Cartagena Protocol or the precautionary principle and WTO law either.

As a consequence no definitive guidance is available to countries like Switzerland as to the legality of the moratorium on GMOs which they have adopted as their general policy. The Panel, in a wise decision, found a way to decide the case without encroaching upon the political debate on GMOs. The debate is still open. Any contributions are welcome!

Daniel Wüger, Senior Research Fellow WTI / Lecturer UNIBE

World Trade Forum 2006



Trade in services: opportunities for growth

In recent years an increasing body of empirical evidence has documented the huge potential benefits of services trade reform. In virtually every country, the performance of the service sector can make the difference between rapid and sluggish growth. An inefficient service sector acts like a prohibitive tax on a national economy. Because services are critical inputs into all economic activity and of ever-increasing importance in their own right, the pay-off from services liberalisation can easily dwarf that flowing from liberalised trade in agricultural or industrial goods.

A vibrant and sound services sector is a core component of economic development. Sound regulatory regimes and the timely availability of reasonably priced, good-quality services are increasingly critical to a country's competitiveness. In particular, effective and competitive services in areas such as telecommunications, finance, computer-related services, distribution, energy and logistics are the essential backbone of an economy and are integral to growing and competitive markets for primary commodities, including agriculture, manufactured products and other services.

For all the above reasons, opening up global trade and investment in services across all key sectors and modes of supply should be a cornerstone of any successfully completed Doha Development Agenda (DDA). Managing the process of market opening in services is not an easy task, and requires concurrent efforts at strengthening regulatory regimes and institutions. This challenge is greatest in developing countries. An approach that combines aid for trade with additional trade and investment liberalization commitments can help.

International Trade in Services: New perspectives on liberalizations, regulation & development

The World Trade Forum is celebrating its tenth annual meeting since it was founded by Thomas Cottier in 1996. This year, at the World Trade Institute in Berne on 8 and 9 September, the Forum's participants will discuss new perspectives on why to liberalise, when to regulate and how to address development concerns of international trade in services.

The Forum's anniversary coincides with the first reference in WTO case law by the Panels and the Appellate Body to the General Agreement on Trade in Services (GATS). This decade of application and interpretation of multilateral trade rules in services provides an excellent framework for this World Trade Forum.

Pursuing market openness in services is somewhat similar to trying to square a circle. It concerns a group of industries for which the domestic regulatory system in many countries is still evolving, for which no international consensus yet exists on what the regulatory system should consist of, but whose importance as driving forces of growth and development has become so great that the costs of protectionism in services trade and of inefficient regulatory regimes and institutions can no longer be ignored.

Some 20 papers will be presented at the Forum with the aim of addressing a range of issues in services trade that are not sector-specific but concern general concepts and strategies of liberalisation, regulation and development.

Consistent with the tradition of the World Trade Forum, the two-day conference brings together leading scholars and practitioners from the international, governmental and private sphere to discuss in an open, candid and off-the record environment some of the key economic, regulatory, legal and policy challenges of pursuing market openness in services trade. The Forum is jointly organised by Thomas Cottier and Nicole Pohl of the WTI and Pierre Sauvé and Marion Panizzon of NCCR Trade Regulation's IP8. The programme and abstracts of papers related to the Forum can be found on the homepages of the World Trade Institute (www.wti.org) and the NCCR Trade Regulation (www.nccr-trade.org).

NCCR/WTI news

Biotechnology Law and Regulation:

The ASEAN Perspective

by Sufian Jusoh

Cameron May, published June 2006
<http://lexmercatoria.org/>



Biotechnology Law and Regulation looks at laws and regulations on biotechnology in 10 member countries of the Association of Southeast Asian Nations (ASEAN). The book covers biotechnology policies, access to genetic resources and benefit sharing, food biosafety laws, protection of plant varieties, patent, pharmaceuticals, labelling, religious laws and cloning. Topics are approached from the perspective of common ASEAN policies and of relevant international treaties.

The Swiss Federal Court and foreign affairs

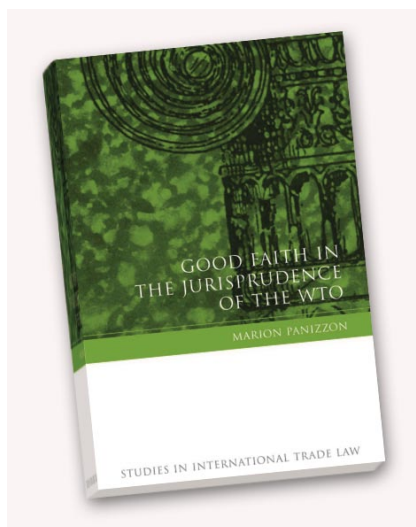
The conduct of foreign policy, which includes the conclusion of international treaties, has traditionally been the prerogative of the executive branch of government. The subject of a brown bag seminar organized by the NCCR (IP1) on 27 March was the respect for this arrangement that has so far led the Swiss Federal Court not to bring its full weight to bear on cases involving, for example, WTO law. The special guest was Federal Judge Arthur Aeschlimann from Lausanne.

Good Faith in the Jurisprudence of the WTO

The Protection of Legitimate Expectations, Good Faith Interpretation, and Fair Dispute Settlement

by Marion Panizzon

Hart Publishing Ltd.
 forthcoming September 2006
<http://www.hartpub.co.uk/books/details.asp?sc=1-84113-620-4>



Good faith is a general principle of law operating alongside treaties and customary rules. WTO adjudicators use it to balance the obligation to liberalise trade against the right to invoke an exception from trade liberalisation to protect the environment, culture, public morals, human life or health. Thus good faith safeguards the gains of trade liberalisation against disguised protectionism.

Upcoming NCCR/WTI events

25 July

Brown bag lunch. Martti Koskenniemi on the ILC's Study Group on the Fragmentation of International Law. WTI Berne, at 12:15.

25 and 26 September

Decision-making in the WTO: medieval or up-to-date? A panel discussion that forms part of the WTO Secretariat's annual Public Forum.

December 2006

International Annual Conference of the European International Business Academy – EIBA, University of Fribourg, Switzerland.

Seminar on the Economics and Law of Energy Markets – Challenges for Sustainability



Energy is high on the agenda of governments and regional and international organisations. A careful balancing of interests and trade-offs is needed to secure affordable energy, develop safe production methods and ensure environment-friendly consumption, in increasingly liberalised markets. The challenges for regulators and the dynamics of international trade in energy products were discussed at a seminar at the WTI on 19 and 27 April.