

FOREWORD

THE WORLD TRADE ORGANIZATION AT A CROSSROADS CONFERENCE AT BAR ILAN UNIVERSITY, ISRAEL DECEMBER 12-14, 2004

ARIE REICH & OREN PEREZ

In December of 2004, scholars of international law, economics, and political science from four different continents gathered at Bar Ilan University in Israel to discuss the future of the World Trade Organization (“WTO”). The title of the conference—“The World Trade Organization at a Crossroads”—is just as relevant today as it was then. We chose the title in early 2004, immediately following the total failure of the Cancun Ministerial and amidst an atmosphere of crisis in the entire multilateral trading system. This atmosphere was slightly relieved the following summer, when news of the compromises achieved in Geneva between the developed and developing member states’ delegations reached us. This compromise settled some of the more burning disagreements that had led to the Cancun collapse, but did so at the expense of one of the organization’s most ambitious and celebrated goals—to broaden its mandate into new frontiers, such as regulation of competition and investment, and liberalization of government procurement. It was hoped that other disagreements could be resolved by the next ministerial summit, scheduled for late 2005. Now, however, with the Hong Kong Ministerial only a few weeks away, the sense of crisis is back as the main components of a breakthrough deal that could guarantee the successful progress of the Doha Development Agenda are still subject to deep disagreement between member states.

It is perhaps ironic that in the 21st century it is still the agricul-

tural sector—not e-commerce, trade in services or intellectual property protection—that is at the very center of the world's trade negotiations and drives the stalemate that is holding up any progress in all the other more "modern" sectors. On the other hand, perhaps this is a reminder of the harsh reality of our times—food and food production is still a serious issue and the gap between the economies and living conditions of rich and poor nations has not narrowed at all, despite all the technological progress of the twentieth century. If developing countries are prevented from exporting most of their agricultural products because of the unwillingness of developed countries to lower their high tariffs and farm subsidies, how can we expect this gap to be bridged? If developing countries' manufactured products continue to face high tariffs in the developed world and uneven competitive terms with other exporters who enjoy the benefits of regional trade agreements or other trade preferences—how can developing countries be expected to build developed industrialized economies? Maintaining these barriers will strengthen the case of the anti-WTO movement, which argues that the WTO framework crystallizes (rather than breaks) the historical cleavages between Northern and Southern countries.

These and other eminent issues in connection with the Doha Development Agenda were discussed at this three day conference. The conference also included a visit to Jerusalem's Old City and the Supreme Court of Israel. Justice Elyakim Rubinstein of the Supreme Court, formerly Attorney-General of Israel, met with the conference participants and spoke of the many challenges confronting a court in an ethnically, religiously, and culturally pluralistic society. This talk, set against the diverse cultural and religious atmosphere of Jerusalem, was a fit setting for the conference's discussions on how to bridge the deep economic, political, and cultural differences that underlie the current negotiations at the WTO.

The need for protection of cultural diversity is discussed by Tomer Broude in his article *Taking 'Trade and Culture' Seriously: Geographical Indications and Cultural Protection in WTO Law*, published in this issue. Dr. Broude reaches the conclusion that while protection of genuine cultural expressions is important and should be taken seriously, the WTO's protection of Geographical Indications in fact fails to make any significant contribution to the protection and promotion of local culture and to the safeguarding of cultural diversity, and may, in fact, do just the opposite. Thus, proposals for similar *sui generis* trade or intellectual property disci-

plines that rely on a cultural protection justification, such as traditional knowledge, should be treated with caution and accepted only after a rigorous cultural (not only legal and economic) analysis, in order to discern their real effects on both trade and culture.

The question of the WTO's role in furthering non-trade concerns is also taken up by Oren Perez, albeit from a different perspective. In his article, *Multiple Regimes, Issue Linkage and International Cooperation: Exploring the Role of the WTO*, Dr. Perez questions the validity of the emerging "linkage narrative." The notion of linkage seeks to replace the themes of conflict and animosity, which have dominated the "trade and —" debate, with a tale of synergy and mutual-support. This narrative was recently adopted by WTO Director General Pascal Lamy in his message to the participants of a WTO symposium on Trade and Sustainable Development, when he declared: "Trade can be a friend, and not a foe, of conservation."¹ While the idea that linking distinct regimes, such as the WTO and Multilateral Environmental Agreements, may yield synergistic benefits is intuitively compelling, it also suffers, Perez argues, from various blind spots which make its actual feasibility doubtful. The article uncovers these blind spots by situating the "linkage" hypothesis in a richer theoretical framework which recognizes the institutional complexities and ideological divergences that characterize the contemporary international system. Perez argues that realizing the synergistic potential of cross-regime linkage requires policy makers to develop pragmatic responses to these blind spots. The article then moves from the theoretical plane into the muddy waters of WTO jurisprudence, discussing how the idea of linkage—in the context of the trade and environment debate—is dealt with under the WTO rulebook and the Doha negotiation process. The article concludes by outlining several institutional mechanisms which should facilitate the creation of stable and mutually reinforcing links between the trade and environment domains. While Perez's article focuses on the trade-environment nexus, its theoretical insights are relevant to other domains as well.

The involvement of the WTO in non-trade issues also animates Arie Reich's article, *The Threat of Politicization of the World Trade Or-*

¹ Pascal Lamy, Director General, World Trade Organization, Opening Address at the WTO Symposium on Trade and Sustainable Development within the Framework of Paragraph 51 of the Doha Ministerial Declaration (Oct. 10, 2005), available at http://www.wto.org/english/news_e/sppl_e/sppl07_e.htm.

ganization. Underlying Professor Reich's article is the fear that involvement in non-trade issues, in particular extraneous geopolitical conflicts, may affect the WTO's ability to fulfill its objectives and result in serious organizational dysfunction. The article notes that the GATT/WTO has hitherto largely managed to stay away from the major geopolitical conflicts of our time, unlike many of the other specialized agencies of the United Nations, and thus has been able to better serve its objectives in the field of trade promotion. The article seeks to understand the reasons for this difference between the GATT/WTO and other intergovernmental organizations, and more generally what it is that makes one international framework more attractive than others to the influence of "general politics." By relating the notion of "politicization" to the theory of functionalism, one of the most prominent theories of international organizations, the article develops a definition of this notion that is theoretically sound and legally workable. The article suggests several explanations for the relative absence of politicization in the GATT. Based on these explanations, the last section of the article tries to assess the risk of future politicization of the WTO and the sources of that risk. It shows that many of the characteristics that in the past protected the GATT from politicization are no longer present in today's WTO. Its growing membership, broadened mandate in sensitive areas, and rising public profile are all likely to increase the threat of politicization, as are the recent calls, both from within and without the organization, for a revision of the consensus rule. Indeed, there are already worrying signs of politicization within the WTO that are discussed in the article. If the situation continues to deteriorate, WTO members may be faced with major organizational dysfunctions in the future. The article concludes with suggestions on what can be done to counter the threat of politicization of the WTO.

Joshua Meltzer, in his article *State Sovereignty and the Legitimacy of the WTO*, explores a question which also haunts the articles of Broude, Perez, and Reich—the legitimacy of the WTO. The problem of extension of the range of issues that are dealt with in the WTO (through linkage or internal evolution) and the threat of politicization, both raise questions with respect to the legitimacy of the WTO. Discussing this problem, Meltzer explores the relationship between the idea of state sovereignty and the WTO, and the implications of this relationship for the WTO's legitimacy. He argues that state sovereignty should be understood as comprising different and logically independent meanings, and that the implications

of membership in the WTO can be assessed only after we consider the impact of globalization and the increasing power asymmetries between states on the different meanings of state sovereignty. It is in this light that the impact of the WTO on state sovereignty is assessed, and the argument is made that the WTO strengthens, rather than undermines, state sovereignty. From the perspective of state sovereignty, state consent to the WTO is the starting point for any assessment of the WTO's legitimacy. The article analyzes the extent to which Appellate Body and panel decisions are consistent with states' consent as an important source of WTO legitimacy. For instance, if the text of the WTO Agreements is assumed to capture states' consent, attention to the text is the most important source of legitimacy for Appellate Body decisions. Nevertheless, the text of the WTO Agreements is often vague and ambiguous. As a result, the Appellate Body is often unable to base its decisions entirely on the text. Yet because of the significance of the text as a source of legitimacy, the Appellate Body has increasingly attempted to justify its decisions by using strict textual analyses of the applicable WTO Agreements. Meltzer argues that as a result of vague, ambiguous, and incomplete WTO texts, the Appellate Body has often been forced to rely on other justifications for its decisions despite its attempt to use only textual analyses. The article therefore uses these different meanings of state sovereignty to suggest justifications for Appellate Body decisions beyond state consent that are still consistent with or reinforce other meanings of state sovereignty. The article argues that a clearer articulation of justifications that are based on the sovereignty-enhancing role of WTO membership will increase the legitimacy of Appellate Body decisions and avoid the otherwise tortured and often unconvincing textual analysis that the Appellate Body currently feels that it is obliged to perform.

The Bar Ilan conference produced several other important articles that are not found in the current issue. *Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat*², deals with the institutional conflict between regional trade agreements ("RTAs") and the WTO, and offers a proposal to respond to this institutional threat. By suggesting substantive harmonization and institutional centralization of

² Colin Picker, *Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat*, 26 U. PA. J. INT'L ECON. L. 267 (2005).

RTAs with the WTO, Professor Colin Picker hopes to eliminate much conflict and resulting resource diversion, and thereby stem the continuing erosion of enthusiasm for the multilateral venue. Alternatively, Picker hopes his article will serve as a "wake-up call" for the most powerful WTO members, so that they may rectify the damage and avert the potential disaster he believes RTAs will produce. Other articles from the conference have been, or will be, published in other academic journals.³

We would like to take this opportunity to thank all the participants who came to Israel from near and far during somewhat troubled times in order to contribute to the success of this productive conference. Thanks are also due to the Board and Editors of the University of Pennsylvania Journal of International Economic Law, who placed their trust in the success of the conference long before it was convened and whose commitment to excellence has produced this great issue.

ARIE REICH & OREN PEREZ
Bar Ilan University
Conference Organizers

³ G.E. Evans, *LAWMAKING UNDER THE TRADE CONSTITUTION: A STUDY IN LEGISLATING BY THE WTO* (2d ed., forthcoming 2006); Ari Afilalo & Dennis Patterson, *Statecraft, Trade, and the Order of States*, 6 *CHI. J. INT'L L.* (forthcoming January 2006); Claire R. Kelly, *Power, Linkage, and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes*, 24 *BERKELEY J. INT'L L.* (forthcoming January 2006); Joel P. Trachtman, *The WTO Constitution: Toward Tertiary Rules*, available at <http://ssrn.com/abstract=815764> (last visited Sept. 1, 2005); Thomas Wälde, *Comments on the Discipline of National Treatment in International Investment Law: Boosting Good Governance Versus Intruding into Domestic Regulatory Space?* (Sept. 2005) (on file with the author).