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2012

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#### Recommended Citation

Petros C. Mavroidis, *Free Lunches? WTO as Public Good, and the WTO's View of Public Goods*, 23 EUR. J. INT'L. L. 731 (2012).

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# Free Lunches? WTO as Public Good, and the WTO's View of Public Goods

Petros C. Mavroidis\*

## Abstract

*The WTO can be viewed as a public good in that it provides a forum for negotiations which also produces the necessary legal framework to act as a support for agreed liberalization. To avoid any misunderstandings, in this article the discussion focuses on the WTO as a forum and a set of agreements, not on free trade. Since the legal agreements coming under its aegis are for good reasons incomplete, the WTO provides an additional public good by 'completing' the original contract through case law. The importance of this feature increases over time as tariffs are driven towards irrelevance. In turn, the WTO has no particular attitude towards public goods provided by its Members.*

## 1 Introduction

There are two dimensions in the discussion regarding the WTO and public goods, depending on the perspective adopted: on the one hand, whether the WTO can be viewed as a public good, and if so which aspects of the WTO? And, on the other, how does the WTO view public goods?

To respond to the first question, I assume the commonplace definition for public good (non-rival and non-excludable) and build on a distinction between the design and the actual use of the WTO first discussed in Staiger.<sup>1</sup> In short, the idea is that the WTO is a public good in the sense that it provides a forum that is necessary to address (negative) external effects stemming from the unilateral definition of trade policies. Similar effects stem, in the classic formulation of the terms of trade theory, from unilateral tariff-setting: trading nations have little, if any, incentive to control for the effects of their tariffs on their partners; they will typically set them taking into

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<sup>1</sup> See R.W. Staiger, *Report on the International Trade Regime for the International Task Force on Global Public Goods* (2004).

account their own producer and consumer welfare. To the extent that they have bargaining power, they can affect terms of trade when doing so. Absent an international agreement that will help ‘internalize’ similar effects, one could end up in a spiral of unilateral tariff-setting that will be met by retaliatory responses.<sup>2</sup> The GATT (and now the WTO) is the instrument that helps to address this issue.<sup>3</sup>

In its original form, the GATT was meant to provide an insurance policy against those incentivized to circumvent their tariff promise:<sup>4</sup> this could happen since tariffs could be decomposed into taxes for consumers cum subsidies to producers (equivalence propositions), and, thus, absent a commitment on domestic instruments as well (such as domestic taxes and subsidies) the tariff promise could become meaningless.<sup>5</sup>

Baldwin,<sup>6</sup> with his wonderfully simple yet highly accurate tide metaphor, explained why it was only sensible for negotiators to focus initially on tariffs: high tariffs obscured the ‘bite’ of non-tariff barriers (domestic instruments). Terms of trade can, moreover, be affected through domestic instruments as well, and not just through tariffs. Indeed, what is the difference between a 100 per cent import tariff and a 100 per cent consumption tax?<sup>7</sup> And indeed, the gradual reduction of tariffs brought the bite of domestic instruments (policies) to the fore and negotiators were asked to address them in order to preserve the value of their prior efforts: this is in essence the ‘bicycle’ and/or ‘tricycle’ theory that Bhagwati developed in his writings<sup>8</sup> that we discuss in more detail *infra*. This is why to discuss the WTO as public good one needs also to focus on the legal arsenal that has been added to the original GATT.

One caveat is necessary here at the outset: the WTO is not free for all; in fact non-Members are excluded from using this forum.<sup>9</sup> And to become a Member one

<sup>2</sup> See Johnson, ‘Optimum Tariffs and Retaliation’, 1 *Rev Economic Studies* (1953–1954) 142.

<sup>3</sup> The rationale for the GATT is not solely dependent on a prior espousing of the terms of trade explanation: indeed the GATT has also been explained by some as an instrument to avoid future inconsistent behaviour (‘commitment’ theory): see J. Tumlrir, *Protectionism: Trade Policy in Democratic Societies* (1985), and more recently Maggi and Rodriguez-Clare, ‘The Value of Trade Agreements in the Presence of Political Pressures’, 106 *J Political Economy* (1998) 574. The persuasiveness of this theory to explain the original GATT is doubtful in light of the very limited commitment regarding domestic instruments. Irrespective of the rationale for it, it is the aspect of the GATT to serve as a forum for international trade negotiations that makes it a public good.

<sup>4</sup> See C. Wilcox, *A Charter for World Trade* (1949).

<sup>5</sup> For a formal explanation see K. Bagwell and R.W. Staiger, *The Economics of the World Trading System* (2002); Limão, Broda, and Weinstein, ‘Optimal Tariffs: the Evidence’, 98 *Am Economic Rev* (2008) 2032 have provided empirical proof of the theoretical terms-of-trade argument.

<sup>6</sup> See R. Baldwin, *Non-tariff Distortions in International Trade* (1970).

<sup>7</sup> See Ossa, ‘A New Trade Theory of GATT/WTO Negotiations’, 119 *J Political Economy* (2011) 122.

<sup>8</sup> See J. Bhagwati, *Protectionism* (1998), and J. Bhagwati, *Termites in the World Trading System* (2008).

<sup>9</sup> There is a caveat to the caveat: preferential trade agreements (PTAs) are now routinely notified between WTO Members and non-Members (Bahamas, e.g., participates in the EU–Cariforum agreement. This practice is *contra legem*, since Art. XXIV(5) GATT states that ‘[a]ccordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area’ (emphasis added). Participation in a PTA does not amount, of course, to participation in the WTO. Still, non-Members can be treated better than WTO Members in the markets of some WTO Members with which they have formed a PTA.

needs to pay a price, a 'ticket to enter' which, as the years go by, becomes more and more expensive. A look into China's Protocol of Accession as well as all protocols of accession post-1995 and a comparison with accessions before the Uruguay round amply prove this point.<sup>10</sup> It follows that to start thinking of the WTO as public good one needs to make a generous concession and think of it not as a good free for all but as one only for its Members. Secondly, usually when referring to public goods one has in mind private citizens enjoying, say, clean air or a park for free. Here the units of account are states and not citizens and, as argued above, not all states.<sup>11</sup>

With regard to the second question addressed in this article, namely how does the WTO address public goods, our discussion will be briefer: the rationale for brevity is that the WTO has not developed a comprehensive approach towards public goods, although indirectly its actions may not be inconsequential.

With this in mind, in section 2 we discuss the WTO as a public good; section 3 focuses on the WTO's (non-)approach towards public goods, while section 4 concludes.

## 2 The WTO, a Public Good

In this section, I build on Staiger,<sup>12</sup> who distinguished between the creation/establishment of the GATT/WTO on the one hand, and its use on the other. In his view, whereas the former has public good features, the latter is prone to use for private ends. I find this distinction sensible. In what follows, I will concentrate a little more on the GATT/WTO regime of today, that is, the trade institution as a law-making entity, a point already noted by Staiger, albeit *en passant*.

Kindleberger<sup>13</sup> observes that public goods are typically under-produced not

for the Galbraithian reason that private goods are advertised and public goods are not – but because the consumer who has access to the good anyhow has little reason to vote the taxes, or pay his or her appropriate share. Unless the consumer is a highly moral person, following the Kantian Categorical Imperative of acting in ways which can be generalized, he or she is apt to be a 'free rider'.

How much of this is true as far as the WTO is concerned?

### A A Forum for Tariff Negotiations

The list of public goods provided by Adam Smith<sup>14</sup> was limited to national defence, law and order, and public works. Ever since, most people would agree that weights and

<sup>10</sup> This is the natural consequence of mainly two factors: MFN (most favoured nation) trade is more of a value nowadays than, say, 20 years ago, when accession to the GATT amounted to MFN-trade with countries controlling 60–70% of world trade, while it is nowadays over 90%. Moreover, it is typically former non-market economies that have joined the WTO post-1995 and have been required to make changes in many domestic policies before accession.

<sup>11</sup> The WTO is excludable but not rival in consumption; that is, it exhibits the characteristics of a natural monopoly, like fire protection, cable TV, or even uncongested toll roads.

<sup>12</sup> *Supra* note 1.

<sup>13</sup> See Kindleberger, 'International Public Goods without International Government', 76 *Am Economic Rev* (1986) 1.

<sup>14</sup> See A. Smith, *The Theory of Moral Sentiments* (1759).

measures, language, and money would qualify as such. In the international sphere, public goods are produced to serve common purposes. Political science has produced two schools: the realists, who argue that public goods are produced by a leading power, the ‘hegemon’, and the moralists (or institutionalists), who argue that hegemons set in motion regimes of international cooperation. Krasner<sup>15</sup> and Keohane<sup>16</sup> (especially the latter) discuss these schools in more detail. Of interest to us is that the free trade regime is the outcome of British and the subsequent US hegemony that put in place the regime for cooperation, the original GATT.<sup>17</sup>

Governments have a shared interest in the creation and maintenance of the WTO: absent this forum, negotiations on mutually advantageous tariff concessions would not have taken place and one would risk spiralling into retaliatory tariffs. At the same time, it is hard to imagine why one trading nation would have the incentive to provide this good – there is an undeniable collective action issue here.<sup>18</sup>

Bargaining involves bargaining externalities as well: this point is intimately linked with the discussion under 2C *infra*, since trading nations will use the WTO to pursue private goods. Home will discuss tariff exchanges with Foreign on items of export interest to Home and not to a third country. In extreme form, bargaining externalities could put into question the very existence of the edifice: it is disturbing, to say the least, that every time a negotiating round hits deadlock voices are raised to the effect that the WTO edifice as such is in grave danger. Are such fears unfounded?

The response to this question is multi-faceted, and much of it depends on difficult to quantify factors, such as willingness to invest political capital in the successful conclusion of rounds, etc. At a narrower level, Bhagwati<sup>19</sup> first explained why, assuming the bicycle goes the right way, the value of concessions made depends also on the continuation of the liberalization process. He<sup>20</sup> expanded on that and produced what he termed the ‘tricycle’ theory:<sup>21</sup> developing countries will sometimes sign preferential trade agreements (PTAs) with other countries at the same development level, hoping to learn from such PTAs without fearing massive disruptions from unequal competition; they will then and only then move to non-discriminatory (MFN, most favoured nation) competition. The point is that the continuous existence and relevance of the WTO holds the key in securing that past concessions will continue to be valuable to participants.

The GATT/WTO, by any reasonable benchmark, has been quite successful in dismantling tariff protection over the years.<sup>22</sup> It has also managed to add an impressive

<sup>15</sup> See S.D. Krasner, *International Regimes* (1983).

<sup>16</sup> See R.O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984).

<sup>17</sup> See D.A. Irwin, P.C. Mavroidis, and A.O. Sykes, *The Genesis of the GATT* (2008).

<sup>18</sup> In Mankiw’s inimitable expression, ‘markets work well when the good is ice cream, but they work badly when the good is clean air’: see G.N. Mankiw, *Principles of Economics* (5th edn, 2008), at 226.

<sup>19</sup> Bhagwati, *Protectionism*, *supra* note 8.

<sup>20</sup> Bhagwati, *Termites*, *supra* note 8.

<sup>21</sup> Inspired by the fact that timid children will go on to a bicycle after having first experienced a tricycle in order to reassure and acclimatize themselves to having their feet off the ground.

<sup>22</sup> Irwin, ‘Changes in US Tariffs: the Role of Import Prices and Commercial Policies’, 88 *Am Economic Rev* (1998) 1015 and Irwin, ‘The Smoot–Hawley Tariff: A Quantitative Assessment’, 80 *Rev Economics and Statistics* (1998) 326 provides the most comprehensive quantification of tariffs since the inception of the GATT and leading up to the post-Uruguay round era.

regulatory framework aimed at supporting the liberalization efforts, a point to which we will come back in the next sub-section. Of course the problems surrounding the continuing Doha round have cast some doubt on this rosy picture. There are mitigating factors explaining the current difficulties in concluding the Doha round and they should be taken into account: there are more players, more agreements to be negotiated, a theme (trade and development) that is proving more difficult to tackle and more divisive than originally anticipated, the impending US elections, etc. At any rate, on present evidence, it will be quite an exaggeration to argue that the bicycle theory no longer obtains in the multilateral trade talks.

The threat, if one exists, comes from the proliferation of PTAs, and more specifically from their content: Horn *et al.*<sup>23</sup> examine the subject matter of PTAs concluded by two hubs (EU, US) with various spokes between 1992 and 2008, and divide it into WTO+ ('WTO plus', say tariff cuts beyond the MFN-level), and WTOx ('WTO extra', issues that do not come under the mandate of the WTO, say positive integration in fields such as environmental policy, the fight against corruption, etc.). The WTOx part of the PTAs is quite substantial. This article thus suggests that the rationale for going preferential should also be sought in WTOx-type obligations. There is, thus, a discrepancy between the multilateral and the preferential agenda, and it could be that the reason for going preferential has to do with the content of the agenda: it seems plausible (although unproven as yet) to argue that PTAs are running away with the trade agenda of the 21st century, while the WTO still operates in last century's terms. If true, then this would be the first serious scare for the multilateral system. As things stand, nevertheless, it is too early to pronounce on this score.

## B The WTO Law and its Completion

The point in the preceding sub-section was that the WTO seen as a forum for negotiating trade liberalization is a public good the preservation of which is a function of its policy-relevance: to the extent that the WTO becomes policy-irrelevant, either because of disinterest in multilaterally liberalizing trade from now on, or for any other reason, then the point made falls.<sup>24</sup>

The WTO's relevance is being challenged but not threatened, so far at least. The best supporting argument for this thesis is that trade rounds (like the Doha round) are an integral part of but do not exhaust the bicycle in the bicycle theory discussed above. The WTO has life in between rounds: it administers the existing agreements, and it completes them. Let us take each point in turn.

The WTO has in place dozens of committees which take care of everyday business: they run the notifications procedures aimed at reducing transaction costs, decide on 'agreed interpretations' (like the definition of period of investigation in the

<sup>23</sup> Horn, Mavroidis, and Sapir. 'Beyond the WTO: An Anatomy of the EU and US Preferential Trade Agreements', 33 *The World Economy* (2010) 1565.

<sup>24</sup> Note that the recent US initiative to liberalize trade in services among some like-minded nations only, and not across the total WTO Membership, is supposed to take place within the WTO in the form of plurilateral agreement. Similar initiatives are, thus, not undermining the policy relevance of the WTO.

antidumping context),<sup>25</sup> and even manage to settle an impressive number of disputes so that the administrative burden for WTO adjudicating bodies is reduced.<sup>26</sup> In a way, this function of the WTO is a public good in itself, in that the WTO thus ‘completes’ the originally ‘incomplete’ contract.

The point is that the WTO can generate public goods by clarifying for all its Members the ambit and content of its various rules. This is best illustrated by the function of the WTO adjudicating bodies and is intimately connected to the inclusion of domestic instruments in the WTO edifice. Recall Baldwin’s intuition that the shift towards disciplining domestic instruments rationally followed the disciplining of border instruments. As far as time is concerned, the shift starts in the 1960s with the Kennedy round, albeit in a timid way at first. It is the successful conclusion of the Tokyo – and even more so the Uruguay – round that mark the definitive shift towards the multilateral disciplining of domestic instruments.

Yet, the inclusion of domestic instruments presented negotiators with more than they could have handled: first, there is an extremely large number of different domestic policy instruments with a trade impact; secondly, domestic policies are responsive to changes in the underlying economic/political environment, and as a result keep changing themselves. One possibility would be that the agreement specified for each Member the policies to be pursued in each and every situation that the Member might find itself in – that is, that the agreement is ‘state-contingent’ in economic jargon. But, of course, with the agreement intended to be in place for an extended period of time, there would be a huge number of such different economic/political situations that would call for different policy responses. As a result, WTO Members would have to be in constant negotiation, which probably also means the absence of an international trade agreement: the costs of negotiating and drawing up such a grand contract would be huge, and would most likely greatly outweigh the gains it would bring. Indeed, it would amount to central planning on a global scale. This is one reason why trade agreements are ‘incomplete’, in the sense that they do not contain all the information necessary for their operation at the moment of their inception.<sup>27</sup> Moreover, contracting social policies might be deemed politically undesirable in some quarters.

Contractual incompleteness can of course, take many forms:<sup>28</sup> undertakings may not be conditional on changes in the environment, they can be ‘rigid’; undertakings can also leave ‘discretion’ to individual governments to determine their policies unilaterally. The problem, of course, is that in this scenario, when discretion is permitted, there are good reasons to believe that governments have incentives to use such discretion for protectionist purposes, as a substitute for the border instruments that

<sup>25</sup> See Mavroidis, ‘No Outsourcing of Law? WTO Law as Practised by WTO Courts’, 102 *AJIL* (2008) 421 for a more general discussion of secondary law in the WTO-context.

<sup>26</sup> See, e.g., WTO Doc. G/TBT/29 of 8 Mar. 2011, where it is made clear that a number of disputes coming under the aegis of the Agreement on Technical Barriers to Trade (TBT) are being resolved at the committee level.

<sup>27</sup> See G.M. Grossman, H. Horn, and P.C. Mavroidis, *Principles of World Trade Law: National Treatment* (2012).

<sup>28</sup> See Horn, Maggi, and Staiger, ‘Trade Agreements as Endogenously Incomplete Contracts’, 100 *Am Economic Rev* (2010) 394.



have been bound. This is essentially where the political economy literature kicks in. Contractual incompleteness by itself is not *necessarily* a problem; governance problems are posed when incomplete contracts are combined with *opportunism*.<sup>29</sup> The GATT does not eliminate the potential for such behaviour: WTO Members will usually have private information when regulating which they have to reveal only in part (by virtue of the transparency obligation) and a strong incentive to cheat (by pretending, for example, to be internalizing environmental externalities when acting solely, or predominantly, in the interest of their domestic producer, and thus imposing costs on their trading partners through *beggar thy neighbour* policies<sup>30</sup>).

Economic theory and the negotiating record see eye to eye on this score: the Chairman of the Technical Sub-committee in charge of preparing the draft provision on national treatment (NT) during the London Conference in 1946 noted to this effect:<sup>31</sup>

Whatever we do here, we shall never be able to cover every contingency and possibility in a draft. Economic life is too varied for that, and there are all kinds of questions which are bound to arise later on. The important thing is that once we have this agreement laid down we have to act in the spirit of it. There is no doubt there will be certain difficulties, but if we are able to cover 75 or 80 or 85 per cent of them I think it will be sufficient.

They thus knowingly left the provision 'incomplete', to be gradually 'completed' through subsequent adjudication (and, eventually, renegotiation). Some renegotiation did indeed take place: the Working Party on Border Tax Adjustments is a good example, but, nevertheless, it did not manage to resolve many issues. The GATT could of course have been completed through renegotiation. The negotiating costs of this procedure are quite high since *de facto* all of the WTO Membership has to be on board. Kennedy<sup>32</sup> discusses the implementation of an agreed TRIPs amendment to provide empirical evidence of the very sizeable costs associated with this procedure.

In the absence of a (re)negotiated solution, it will be left to the WTO judge to decide whether particular interventions do or do not contravene the spirit of the 'incomplete' contract. The GATT/WTO judge has indeed been called upon to do that through case law.<sup>33</sup> It is important to note at the outset of this discussion that the WTO is equipped with a highly unusual (for international relations) dispute settlement system: the compulsory nature of third party adjudication in the WTO means that a vast number

<sup>29</sup> See Williamson, 'Why Law, Economics and Organization?', 1 *Annual Rev L and Social Science* (2005) 369.

<sup>30</sup> Maskin and Tirole, 'Unforeseen Developments and Incomplete Contracts', 66 *Rev Economic Studies* (1999) 83 have persuasively argued that the manner in which we think about incomplete contracts is not optimal. They point out that, instead of discussing contingencies, contractual parties could be discussing pay-offs. There are doubts, however, whether their model can fit the GATT. With respect to some of the policies (potentially) covered by NT, it is at least doubtful that governments would be willing to negotiate specific disciplines and (eventually) pay-offs.

<sup>31</sup> UN Doc. E/PC/T/C.II/PRO/PV/7.

<sup>32</sup> Kennedy, 'When Will the Protocol Amending the TRIPs Agreement Enter into Force?', 13 *J Int'l Economic L*, (2010) 459.

<sup>33</sup> See Maggi and Staiger, 'The Role of Dispute Settlement Procedures in International Trade Agreements', 126 *QJ Economics* (2011) 475.



of disputes have been submitted to it so far.<sup>34</sup> Pushing the decision on to the adjudicating bodies is not risk-free, since, depending *inter alia* on the information in the original contract (or lack of it), the judge may be committing errors (both false positives and/or negatives). The allocation of the burden of proof as well as the quantum of proof required will hold the key in developing a clear judicial strategy towards distinguish wheat from chaff so to speak.

The WTO judge does not start from a clean slate and its hands are not free. The judge is an agent bound by the agency contract signed with the principals, the WTO Members. The contract reads:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

It follows that the WTO judge cannot undo the balance of rights and obligations as struck by the WTO Members: it must respect the policy space entrusted to the WTO by all trading nations and transfer to the international plane sovereignty that the principals did not themselves agree to transfer.<sup>35</sup> Its job of course would have been easier if the contract had been clearer, that is, more ‘complete’. Alas, it is not. Its discretion to clarify it is not open-ended either: the WTO judge, from the first case it was called to address (*US – Gasoline*), has understood the reference to ‘customary rules of interpretation of public international law’ included in Article 3(2) DSU as tantamount to a reference to the VCLT (Vienna Convention on the Law of Treaties). The VCLT contains many interpretative elements, but does not decide how much weight should be given to each of them.<sup>36</sup> Consequently, the WTO judge is in an unenviable position: it is called on to interpret one incomplete contract (the GATT) through another (the VCLT).

From a purely methodological perspective, because the contract is incomplete the judge must:

- (a) decide on the coverage of this provision;
- (b) decide on the understanding of its key terms.

<sup>34</sup> Close to 440 disputes in its first 15 years, a record number of state to state adjudications where private parties have no standing.

<sup>35</sup> There is no *stare decisis* in the WTO. Still, the legitimacy of WTO courts depends largely on the manner in which they treat their own case law. They are expected to apply the same law to the same transactions irrespective of the identity of the parties involved in a particular dispute. There is definitely something in the colloquial saying ‘justice must be blind’. When adjudicating on disputes, judges and courts will be preparing their own demise: they will make law so predictable that in good faith there will be little to argue about. Of course, new laws, and new knowledge regarding the manner in which specific issues should be treated cast some doubt on this statement. The basic mould though should hold.

<sup>36</sup> When following contextual, as opposed to teleological, interpretations respecting the *in dubio mitius* maxim, the WTO judge runs a substantially lower risk of undoing the balance of rights and obligations struck by the principals.

Through case law, thus, WTO adjudicating bodies will be providing a public good by clarifying the existing agreements which, for the reasons mentioned, are 'incomplete'.<sup>37</sup>

Some might question that the law-making exercise (and its completion through adjudication) is indeed a public good, and often for good reasons. Indeed, what kind of public good is it to introduce an Agreement on Antidumping which legalizes decisions taken without considering economy-wide welfare effects? In my view, similar arguments are misplaced because the counterfactual to the existing Agreement (which is nowhere near my ideal scheme to deal with international price discrimination) is 'the law of the jungle': at least now an investigating authority will have to account for a series of procedural requirements when imposing duties which on occasion constrain its discretion and might even lead to non-imposition. Absent this disciplining, uncertainty would reign regarding the conduct of domestic institutions in charge of trade policy. It is true that there is little theoretical and empirical work analysing the value of WTO institutions (especially its legal institutions) in reducing uncertainty for prospective exporters. A notable exception is Handley:<sup>38</sup> in a dynamic model involving heterogeneous firms he shows that uncertainty would delay the entry of exporters into new markets and would also make them less responsive to applied tariff reductions. He tests all this empirically by investigating Australian imports in 2004 and 2006 to underscore his point that the WTO legal regime has a beneficial effect on trade by reducing uncertainty regarding the exercise of trade policies at the national level: the more the contract is 'completed' through case law, the less uncertainty survives of course.

### C Making Use of the WTO for Private Ends

Proponents of the hegemonic theory will go so far as to argue that Home's tariff reductions are a public good, since many can profit from them. This view should not be accepted; first, there is rivalry in consumption here since demand for goods is not typically infinitely elastic. Exports by source A to Home's market will diminish exports by B of the same good to the same destination, even if B is not excluded from making use of the concession. In the presence of rivalry in consumption, one cannot speak of public goods, at least in its commonplace definition (no rivalry in consumption, and no excludability). Secondly, Home will be asking Foreign to make tariff concessions in a matter of interest to it and not necessarily to the *rest of the world*.

Staiger<sup>39</sup> held correctly that the WTO is a public good used by trading nations to pursue private ends. Pursuing private ends may lead to prisoner's dilemma-type

<sup>37</sup> Whether the WTO has done a good job in this respect is outside the ambit of this article, and is very much a question of the benchmark used to evaluate the record so far. The various papers presented annually in the ALI Reporters' Studies suggest that the methodology used in reaching outcomes is wanting in the majority of cases; even when they agree with the final outcome, all authors almost always disagree with the methodology used by WTO adjudicating bodies.

<sup>38</sup> Handley, 'Exporting Under Trade Policy Uncertainty: Theory and Evidence', *WTO: Staff Working Paper ERSD 2011–20* (2011).

<sup>39</sup> *Supra* note 1.

situations, and this is where our discussion *supra* regarding bargaining externalities becomes relevant. The evaluation of the WTO insurance policy against this risk is hard for a number of reasons. It is, of course, possible to leave the WTO, but no one has left so far: does this suffice for a conclusion that the WTO is as strong as ever? No, since ‘cheap’ temporary exit is possible through violations of the agreed obligations; the WTO is, after all, a self-enforcing contract where bargaining asymmetries matter, so who would dare to retaliate against the EU or the US (other than either of them)? And yet we do not see trade wars very frequently, and when they do occur they concern a small, insignificant part of international trade. Bown’s<sup>40</sup> edited volume strongly supports the conclusion that the WTO has survived not only bargaining externalities but self-centred unilateral behaviour as well: post-crisis the evidence is that few trading nations have had recourse to few – very few indeed by any reasonable benchmark – trade protection measures. Theory has yet to come up with an explanation, as the many contributions in Bown’s volume suggest. Optimists support the view that it is because of the WTO that the financial crisis did not turn into a trade crisis as well. Indeed, the parallels with 1929 have been discussed in literature as have been the divergent responses of the international community then and now.<sup>41</sup> The bicycle seems to be going in the right direction in this respect at least.

### 3 The WTO and Public Goods

The WTO has not adopted a particular stance towards public goods. True, the preamble does contain explicit language acknowledging that trade liberalization under the auspices of the WTO should go hand in hand with

the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment ...

Similar language would suggest that the bridge to supplying or aiding the realization of public goods would be provided somewhere in the Agreement. It is not. The WTO does not address public goods in a meaningful manner, that is, beyond the hortatory language cited above which does not reflect legally binding obligations for its Members.

With the exception of TRIPs (Trade Related Intellectual Property Rights), the WTO is a negative integration contract, where domestic policies will be defined unilaterally and, to the extent that they exhibit international spill-overs, the latter will have to be internalized essentially through non-discrimination. The question whether a domestic policy yields a public good or not is simply immaterial to WTO law which cares only about ensuring compliance with WTO, and not whether WTO Members pursue public goods or not through their interventions.

The absence of common policies entails the absence of any discussion regarding a WTO view towards similar policies, assuming some of them could qualify as public goods.

<sup>40</sup> See C.P. Bown (ed.), *The Great Recession and Import Protection* (2011).

<sup>41</sup> See D.A. Irwin, *Peddling Protectionism* (2011).

The Appellate Body in its *EC – Asbestos* case law did state that it would adopt a more deferential standard of review whenever public health was at stake, and this is the only pronouncement to this effect. It did not link its standard to the provision of a public good though.<sup>42</sup> In *US – Gasoline*, the Appellate Body was dealing with a challenge to a US measure ostensibly aiming to protect a public good (clean air) and applied its usual standard of review under Article XX GATT without controlling for the fact that the protection of a public good was at stake.

One might think that the regulation of electronic commerce would point to a different solution here: after all, electronic commerce is a vehicle of ideas, free speech, etc. Yet electronic commerce is treated by the WTO as a mode of supply of services which must, like any other mode of supply, respect the various disciplines included in GATS (General Agreement on Trade in Services), like national treatment, MFN, etc. There is no positive integration with respect to electronic commerce: the so-called ‘consensus statement’ adopted by WTO Members to this effect is no more than an acceptance of the applicability of these principles (which do not question the negative integration character of the GATS) in the sphere of electronic commerce.<sup>43</sup>

One would have a hard time equating intellectual property rights with public goods, since they are characterized by monopoly rents and hence by an elements of excludability.

## 4 Conclusions

The analysis above points to the following conclusions:

- (a) The WTO provides a forum for tariff negotiations that otherwise would not exist because of a collective action problem. The forum can be viewed as a public good in the sense that all WTO Members can profit from its existence and can use it to advance private ends. The caveat here is that non-members cannot have access to it.
- (b) A legal arsenal to support the agreed trade liberalization is necessary for reasons having to do with the incentive of governments to renege on their promises (many times on political economy grounds). Unfortunately, nevertheless, the legal arsenal is obligationally incomplete, and to this effect the WTO adjudication process provides an additional public good by completing the contract for all WTO Members.
- (c) This WTO function is especially important between trade liberalizing rounds, since the major part of adjudication concerns the interpretation of non-tariff barriers: as tariffs are gradually reduced to irrelevance and most of protection takes regulatory form, the value of case law gains in importance.

<sup>42</sup> The case concerned a regulatory barrier that would ban sales of asbestos containing construction material into France.

<sup>43</sup> WTO Doc. S/L/74 of 27 July 1999.

- (d) On the other hand, the WTO has nothing particular to say regarding its stance towards public goods in terms of, say, a more deferential standard of review towards them. The WTO disciplines on subsidies certainly 'help' WTO Members to provide public goods themselves; as a matter of WTO law, though, there is no incentives to do so, WTO Members remaining free to act as they deem best. This is the unavoidable result of the quintessential character of the WTO contract which, with the exception of the TRIPs Agreement, is a negative-integration contract.