

TRADE RULES

B
E
H
I
N
D

B
O
R
D
E
R
S

Pierre Sauvé

CÄMERON
 MAY
INTERNATIONAL LAW & POLICY

Trade Rules Behind Borders:
Essays on Services, Investment and the
New Trade Agenda

Pierre Sauvé

CAMERON
MAY
INTERNATIONAL LAW & POLICY

Copyright © Cameron May 2003

Published 2003 by Cameron May Ltd
69-71 Bondway, London SW8 1SQ
Tel: +44 (0)20 7582 7567 Fax: +44 (0)20 7793 8353
email: enquiries@cameronmay.com
Website: <http://www.lexmercatoria.org>

All rights reserved. Except for the quotation of short passages for the purpose of criticism and review, no part of this publication may be reproduced, stored in a retrieval system or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior permission of the publisher.

This book is sold subject to the condition that it shall not by way of trade or otherwise, be lent, re-sold, hired out, or otherwise circulated without the publisher's prior consent in any form of binding or cover other than that which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

ISBN: 1 874698 29 5

Printed and Bound in Great Britain by Biddles

Trade Rules Behind Borders:
Essays on Services, Investment and the
New Trade Agenda

Table of Contents

Foreword.....	7
Introduction	9
I. Services	17
1. ASSESSING THE GENERAL AGREEMENT ON TRADE IN SERVICES: HALF FULL OR HALF EMPTY?	19
2. SERVICES AND THE INTERNATIONAL CONTESTABILITY OF MARKETS	47
3. DEVELOPING COUNTRIES AND THE GATS 2000 ROUND	63
4. COMPLETING THE GATS FRAMEWORK: ADDRESSING URUGUAY ROUND LEFTOVERS	73
5. DOMESTIC REGULATION AND THE GATS: UNTANGLING THE ISSUES	113
6. FINANCIAL SERVICES AND THE WTO: WHAT NEXT?	131
7. LIBERALISATION SCENARIOS FOR INTERNATIONAL AIR TRANSPORT ...	171
8. TOWARDS MULTILATERAL RULES ON TRADE AND CULTURE: PROTECTIVE REGULATION OR EFFICIENT PROTECTION?	193
9. TRADE, EDUCATION AND THE GATS: WHAT'S IN, WHAT'S OUT, WHAT'S ALL THE FUSS ABOUT?	221
10. LESSONS FROM THE PERIPHERY: COMPARATIVE PERSPECTIVES ON SERVICES, THE WTO AND REGIONAL TRADE AGREEMENTS	249
11. GATS: THE CASE FOR OPEN SERVICES MARKETS	275
II. Investment	295
12. A FIRST LOOK AT INVESTMENT IN THE FINAL ACT OF THE..... URUGUAY ROUND	297

13. QS AND AS ON TRADE, INVESTMENT AND THE WTO	311
14. INVESTMENT LIBERALIZATION IN GATS	335
15. SCALING BACK AMBITIONS ON INVESTMENT RULE-MAKING AT THE WTO	367
16. INVESTMENT RULES FOR DEVELOPMENT: OPTIONS FOR COLLECTIVE ACTION	377
III. Looking Ahead	417
17. OPEN MARKETS MATTER	419
18. THE INTERNATIONAL CONTESTABILITY OF MARKETS AND THE NEW TRADE AGENDA	437
19. THE TRADE POLICY IMPLICATIONS OF THE NEW ECONOMY	451
20. CANADA, FREE TRADE AND THE DIMINISHING RETURNS FROM REGIONALISM	483
21. SUBSIDIARITY PERSPECTIVES ON THE NEW TRADE AGENDA	493
22. DARK CLOUDS OVER GENEVA? THE TROUBLED PROSPECTS OF THE WORLD TRADE ORGANIZATION	529

TRADE RULES

B
E
H
I
N
D

B
O
R
D
E
R
S

Pierre Sauvé

CAMERON
 MAY
INTERNATIONAL LAW & POLICY

12(9)96-1

Trade Rules Behind Borders:
Essays on Services, Investment and the
New Trade Agenda

Pierre Sauvé

CAMERON
MAY
INTERNATIONAL LAW & POLICY

Copyright © Cameron May 2003

Published 2003 by Cameron May Ltd
69-71 Bondway, London SW8 1SQ
Tel: +44 (0)20 7582 7567 Fax: +44 (0)20 7793 8353
email: enquiries@cameronmay.com
Website: <http://www.lexmercatoria.org>

All rights reserved. Except for the quotation of short passages for the purpose of criticism and review, no part of this publication may be reproduced, stored in a retrieval system or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior permission of the publisher.

This book is sold subject to the condition that it shall not by way of trade or otherwise, be lent, re-sold, hired out, or otherwise circulated without the publisher's prior consent in any form of binding or cover other than that which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

ISBN: 1 874698 29 5

Printed and Bound in Great Britain by Biddles

Table of Contents

Foreword	7
Introduction	9
I. Services	17
1. ASSESSING THE GENERAL AGREEMENT ON TRADE IN SERVICES: HALF FULL OR HALF EMPTY?	19
2. SERVICES AND THE INTERNATIONAL CONTESTABILITY OF MARKETS	47
3. DEVELOPING COUNTRIES AND THE GATS 2000 ROUND	63
4. COMPLETING THE GATS FRAMEWORK: ADDRESSING URUGUAY ROUND LEFTOVERS	73
5. DOMESTIC REGULATION AND THE GATS: UNTANGLING THE ISSUES	113
6. FINANCIAL SERVICES AND THE WTO: WHAT NEXT?	131
7. LIBERALISATION SCENARIOS FOR INTERNATIONAL AIR TRANSPORT ...	171
8. TOWARDS MULTILATERAL RULES ON TRADE AND CULTURE: PROTECTIVE REGULATION OR EFFICIENT PROTECTION?	193
9. TRADE, EDUCATION AND THE GATS: WHAT'S IN, WHAT'S OUT, WHAT'S ALL THE FUSS ABOUT?	221
10. LESSONS FROM THE PERIPHERY: COMPARATIVE PERSPECTIVES ON SERVICES, THE WTO AND REGIONAL TRADE AGREEMENTS	249
11. GATS: THE CASE FOR OPEN SERVICES MARKETS	275
II. Investment	295
12. A FIRST LOOK AT INVESTMENT IN THE FINAL ACT OF THE	297
URUGUAY ROUND	

13. Qs AND AS ON TRADE, INVESTMENT AND THE WTO	311
14. INVESTMENT LIBERALIZATION IN GATS	335
15. SCALING BACK AMBITIONS ON INVESTMENT RULE-MAKING AT THE WTO	367
16. INVESTMENT RULES FOR DEVELOPMENT: OPTIONS FOR COLLECTIVE ACTION	377
III. Looking Ahead	417
17. OPEN MARKETS MATTER	419
18. THE INTERNATIONAL CONTESTABILITY OF MARKETS AND THE NEW TRADE AGENDA	437
19. THE TRADE POLICY IMPLICATIONS OF THE NEW ECONOMY	451
20. CANADA, FREE TRADE AND THE DIMINISHING RETURNS FROM REGIONALISM	483
21. SUBSIDIARITY PERSPECTIVES ON THE NEW TRADE AGENDA	493
22. DARK CLOUDS OVER GENEVA? THE TROUBLED PROSPECTS OF THE WORLD TRADE ORGANIZATION	529

Foreword

The Uruguay Round of global trade negotiations profoundly altered the international economic environment. Not only did it produce a new institution, the WTO, but it endowed the WTO with a scope and an agenda far beyond its predecessor (the GATT). The advent of the WTO brought new multilateral disciplines in the form of an important agreement for the liberalization of trade in services (GATS), global rules for the protection of intellectual property (TRIPs), and an initial step toward an international agreement on investment (TRIMs).

The eight years since the formation of the WTO have seen continued activity on many fronts. Much unfinished business remained for negotiation after the Uruguay Round, especially in the services area. Proposals to expand further the scope of the WTO have also been abundant. The suggested subjects of new or broader agreements include competition policy, investment, trade and the environment, and labor rights. Some of these subjects, along with others, became a formal part of the WTO agenda at the last WTO ministerial meeting in Doha. Global negotiations are not the only locus of intense activity — more and more nations are availing themselves of the opportunity to enter regional trading arrangements.

Few scholars have been any closer to these myriad developments than Pierre Sauvé. During Pierre's career he has worn many hats — national trade negotiator, international trade bureaucrat, and academic scholar. He was intimately involved on behalf of Canada in the negotiations that led to the creation of NAFTA, with particular emphasis on the service sector negotiations. That experience was bracketed by stints as a senior economist with the GATT and later at the OECD, where he witnessed firsthand the rise and fall of the proposed Multilateral Agreement on Investment. He has taught at Harvard University, and now at the Institut d'Études Politiques de Paris.

The one constant throughout all of these affiliations has been Pierre's commitment to thoughtful academic writing, and his remarkable scholarly productivity. Pierre is among the rare observers of the international trading system with firsthand, high level policymaking experience coupled with the intellectual firepower and training that is essential to rigorous academic analysis.

This book brings together Pierre's recent writings on an impressive range of subjects, with the emphasis on the "new" issues in the trading system

after the Uruguay Round. The largest segment of the book, Part I, contains eleven essays on the important and academically neglected area of trade in services. Pierre thoughtfully assesses the results of the Uruguay Round negotiations, and lights the road ahead with thorough attention to the range of issues that must be resolved through further negotiations. The section's chapter devoted to regionalism in services trade again reflects Pierre's unique perspective with both the NAFTA and the WTO. The chapter offers a thoughtful comparison of the various institutional approaches on offer, and some judgments about the value of regional approaches to services and investment problems. The essays in this section make clear why services liberalization is so complex due to the unique issues that arise in each sector, and includes discussions devoted to air transport, education, financial services and cultural industries.

Part II addresses investment issues. It too affords a thoughtful analysis of the modest progress made during the Uruguay Round, and highlights the intertwined nature of investment rules and services trade liberalization. It considers the linkage between investment policy and economic development, and draws some lessons for the future of investment rules in the WTO from experience with the ill-fated Multilateral Agreement on Investment at the OECD.

Part III concludes with a discussion of issues that will affect the future of the "new" trade agenda. It attends to some of the more recent political developments regarding the pace of globalization, brings to the fore the ongoing tension between efficiency and equity in various contexts, and adds to the debate over the "legitimacy" or "accountability" of global institutions such as the WTO.

Collectively, the papers in this book display vast range with comparable depth, proving that Pierre Sauvé is surely among our most thoughtful commentators on international trade issues. By bringing together much of his recent work under one cover, he has produced an important book that will be useful for policymakers and academics alike.

Alan O. Sykes

Frank and Bernice Greenberg Professor of Law and Faculty Director for Curriculum
University of Chicago Law School

Introduction

This collection of essays chronicles some of the tectonic shifts that have reshaped the landscape of multilateral trade diplomacy over the past decade. The Chinese saying: “may one live in interesting times”, seems decidedly apt when applied to trade policy and the institutions governing international commerce today. The changes that have taken root in the multilateral trading system during the last ten years have indeed been nothing short of momentous. Membership of the world trade body has grown by almost 50 percent in the short period since the curtain fell on the Uruguay Round in December 1993. The WTO comprises 147 members today, eighty percent of which are developing countries. That share that is set to exceed 85% when the twenty-nine countries currently queuing to join the organisation conclude accession negotiations in the next few years. The soon to be universal nature of the organisation can only be welcomed - current members already account for some 97% of world trade, conferring as it will essential democratic legitimacy to negotiated outcomes. Still, such a growth in membership, and the diversity of economic and commercial realities it entails, presents important new challenges of governance in an organisation where decisions continue to be taken on a consensus basis. Indeed, it should come as little surprise that in such a configuration, consensus is hard, and increasingly harder, to come by.

For all its systemic importance, the broadening of WTO membership must also be seen and appreciated in the context of the remarkable deepening in the trade body’s substantive remit. The Uruguay Round moved the trading system more deeply behind borders than it had ever been, continuing the work begun timidly during the Tokyo Round by developing new disciplines governing domestic regulatory behaviour in complex and politically sensitive areas such as standards, services, trade-related intellectual property rights and trade-related investment measures. The Doha Development Agenda that WTO Members agreed to pursue in November 2001 aims to take the system further inland. Indeed, it promises to take trade policy squarely into the boardroom, with calls voiced for the adoption of full-fledged disciplines on investment and competition policy.

Negotiated in the euphoric, “end of history”, context of the early 1990’s, the process of deepening brought upon by the Uruguay Round proceeded on the basis of a Single Undertaking and its “one size fits all” logic. While this provided developing countries with a powerful negotiating weapon (as nothing is agreed until all is agreed), it afforded

them little more than a few extra years' time to comply with disciplines often written for, and in response to, developed country contexts and interests. The ideological bubble that produced the Uruguay Round was not long to burst, as developing countries came to realise the costly implementation burdens and equivocal developmental impacts from flowing some of the Round's heralded new agreements. Not surprisingly, the last few years has witnessed a [natural] reassertion of political tensions along North-South lines within the trading system. The current protracted debate over attempts to rehabilitate and operationalize new forms of special and differential treatment within the WTO system epitomizes such a trend.

Trade policy's shift inland was in all likelihood inevitable in a globalising environment, given the far-reaching changes occurring in domestic regulatory regimes, the rising share of services in output, employment and trade, the rapid diffusion of ideas in a knowledge-based economy and the fact that investment, more than trade, has become the chief integrating force in the world economy. A trading system that ignored such trends ran the risk of becoming rapidly obsolete. Much of the rule-making deepening performed by the Uruguay Round can thus be seen as a process of institutional catch-up, one that took place against the unfolding backdrop of globalisation and the deepened economic integration among nations coming in its wake.

A trading system that has simultaneously become much broader in country coverage and significantly deeper in issue coverage was bound to raise complex governance challenges. And so it has, with negotiating rounds taking ever longer to launch and conclude. The substantive complexity of modern trade diplomacy, and the diversity of interests represented at the negotiating table in Geneva, has potentially important implications for the management of the world trading system. Three such implications stand out most vividly. First, the recent years have seen the emergence of a subtle but unmistakably growing disconnect between the lengthening negotiating cycle bureaucrats contend with in trade policy circles and the shortening product cycle firms confront in global markets. The result has been a progressive, if not always apparent, ebbing of corporate interest for multilateralism in trade matters. To be sure, there is no so such thing as outright opposition to the WTO and to trade liberalisation in the business world, but rather a sense of creeping indifference as firms are less able to project themselves and their business models several product cycles in advance.

Such a void has led to the second major shift in the way trade rules are brokered multilaterally, with competing voices in civil society picking up much of the slack. The latter groups, which in many instances display considerable aversion towards the very pursuit of open market policies, are paradoxically drawn to the trading system's unique and credible enforcement mechanism with a view to securing compliance with non-trade objectives in various policy domains. The influence and trade policy expertise of non-governmental organisations has grown markedly as trade rules have more resolutely entered the domestic regulatory domain of nations.

Long gone are the days when the multilateral trade policy agenda was the product of an essentially linear, bilateral, relationship between governments and businesses in the industrialized world. The WTO agenda is today the by-product of the triangular interplay of competing interests in business (still primarily from the OECD area, but more feebly so), governments (80 percent of whom are developing countries) and increasingly vocal NGOs (again from both North and South and with competing priorities and perspectives). It should come as no surprise that governments have experienced significant difficulties in navigating the choppy waters of such a policy triangle.

Resurgent regionalism, the third major shift at play in trade diplomacy today, is in many respects a response to the above developments. The advent of globalisation has yet to negate the influence of geography and the economics of proximity in trade and investment matters. The integration of product and factor markets is indeed far greater at the regional than at the world level. Globalisation can in fact be viewed as the aggregation of regional integration processes. Not surprisingly, governments and corporate interests have shown a ready willingness to pursue regional approaches to trade and investment liberalisation. These have come about because the latter provide ready-made laboratories in which to tackle and tame the forces of deeper integration with key trading partners but also because they can be far more expedient. Reaching agreement on the complex parameters of modern trade policy is indeed likely to be easier, command greater private sector support, and stand greater chances of occurring in real time if it is conducted within a less diverse environment than that on offer at the multilateral level.

At the same time, regionalism offers smaller countries, and developing countries in particular, the extra appeal of political ownership. Rather than being rule-takers, as many of them tend to be in the WTO