



Between Law and Diplomacy

The Social Contexts of Disputing at the World Trade Organization



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For Lou and Diana

Preface

The kings and queens of capitalism who gathered for their 2009 annual meeting of the World Economic Forum at the mountain retreat of Davos, Switzerland, faced dire global economic conditions. What had begun as the bursting of a speculative bubble in the U.S. housing market had devolved into a global financial contagion. Some of the world's largest financial institutions had failed, and many more teetered on insolvency. Iceland's coalition government failed under recessionary stress, and other governments faced austerity programs or massive deficit spending. The governments of Sweden, Germany, France, India, China, Brazil, and other countries took steps to protect sensitive industries such as automobiles and steel. And the United States was considering a second massive economic rescue package in six months that included "buy American" provisions, mandating the government to prefer domestic sources in the purchase of key materials and goods. Economic nationalism, like a zombie returned from the dead, stalked the global economy and threatened descent into a global trade war.

The exuberance over the most recent age of globalization had vanished. The beginning of the World Trade Organization (WTO) in 1995 had appeared to inaugurate an era of private global economic action, where the important questions seemed to hinge on whether states could continue to govern a world dominated by mobile global capital. Business leaders and scholars pondered the end of the nation-state, and offered new models of private governance for a borderless world. While the attacks of September 11, 2001, reminded many of the continued salience of borders, it was only with the global economy teetering on collapse and talk of a new Great Depression that the role of states in constructing and maintaining globalization resurfaced and came again into focus. In the words of Klaus Schwab, founder of the Davos meeting, "[T]he pendulum has swung, and the power has moved back to governments."¹

But do not be mistaken. Despite the hand-wringing over protectionism, the current economic crisis has not signaled the return of some classic idea of modern sovereignty and an international system modeled on the peace of Westphalia. The apparent ascendancy of states in the current moment is a reflection of the important role they have always played in fostering globalization. Now, the world economy in crisis (yet again) created the imperative to act. Opting out, choosing not to act, is not an option for states, particularly rich and powerful states. But this is not the manner of regulatory or profit-driven arbitrage that is the typical image of the weakening power of states. Powerful states must act in concert. They are locked in—rebuild the global economy or be destroyed.

At Davos, it did not go unnoticed that the global economic crisis had its origins in the Global North, and particularly in the United States. There was no small sense of irony about the crisis originating in the same countries that promoted free-market liberalism and financial integration in the first place. To some it appeared that economic globalization had gone too far, forcing countries far removed from the epicenter of the crisis to face political turmoil and a dramatic unraveling of economic prospects. This contributed to acrimonious debates about trade, particularly about the languishing Doha Development Round of negotiations and the U.S. turn toward protectionism. In this way, the current crisis reflected an earlier one. In the aftermath of the Asian Financial Crisis, Fidel Castro addressed trade diplomats gathered to celebrate the fiftieth anniversary of the General Agreement on Tariffs and Trade. He chastised the United States for its role in the crisis, but lauded the new World Trade Organization for giving each country a vote and limiting the abilities of powerful countries to veto the will of the membership. He then called on trade delegates to turn the WTO into an “instrument of the struggle for a more just and better world.”² Remarkably, the anticapitalist revolutionary saw possibilities for democratic global governance in an institution designed to foster the expansion and deepening of global capitalism.

But how could the developing world challenge the dominance of the Global North, and particularly the United States, when those countries have established the very system of rules that govern the global economy? Aren't international rules really a manifestation of the hegemony of powerful countries, imposed as they were through decades of colonialism and imperialism? Can developing countries really force rich nations to abide by rules? What did Castro see in the

system of rules that defined the WTO trading system? These are the broad questions about the relationship between trade, power, and law that motivate this book.

To be certain, many developing countries are severely disadvantaged by the requirements for effectively mobilizing the WTO. These include the need for significant resources, investment in organizational development of trade bureaucracies at home and in Geneva, and the acquisition, maintenance, and mobilization of sophisticated legal expertise. Even then, the mechanisms provided at the end of the dispute process for ensuring compliance are ineffective for countries dependent upon trade flows from their richer trading partners. Consequently, the structure of the dispute system ensures that only the richer countries can effectively use its most coercive tools.

Since Castro's challenge, however, the global economy has been transformed, with emerging economies continuing to achieve high rates of growth and increasingly asserting themselves in international affairs. In 2009, faced with slowdowns from lack of import demand from developed countries, developing countries have begun looking for ways to continue these patterns of economic growth. Despite the recessionary turn in the Global North, developing countries remained in a relatively strong position, expecting modest but continued growth. This strong position coupled with the sentiment that the developing world is being crowded out of diminishing stocks of international capital led to calls for greater cooperation over trade between developing countries. Indeed, South-South trade had increased more than 42 percent since 2000, and it is expected to continue to grow. The growing volume of these trade flows both reflects a shift in global power away from the United States and Europe and offers a prescription for containing the economic crisis unleashed by the North by rethinking how trade is practiced.

While the developing world will remain reliant on trade with advanced economies, their growing economic power and investment in the global system of trade is the basis for new challenges to the United States and Europe and the trading order that they have dominated since World War II. These include new demands to complete the Doha Development Round of negotiations on development-friendly terms and for vigorous enforcement of trade rules against protectionist practices. When charged with confronting "buy American" provisions, WTO secretary-general Pascal Lamy remarked, "I am not that

big cop,” and if there are violations of WTO rules, it would be dealt with by WTO member nations initiating disputes against the United States.³ Lamy’s comments highlight both an important feature of disputing at the WTO and a signal development in global political economy. Member nations must mobilize WTO rules to assert their rights. Indeed, the Brazilian foreign minister Celso Amorim considered going to the WTO over the “buy American” provisions “a real option.”⁴ That those rules exist and can be mobilized creates a platform for skirmishes between states and authorizes strategic contests over state power and the constitution of global markets. By mobilizing WTO law, countries accept the risks associated with direct confrontation. Armed with growing economic power and political influence, that is what developing countries are doing with increasing efficacy.

How does the legalization of the world economy reconfigure power inequalities between states? Why can’t the United States simply ignore the demands of developing countries? The dispute processes of the World Trade Organization provide an opportunity to empirically examine how the economic and political positions of member nations in the world political economy are mediated by the institutional and legal contexts created by the legalization of world trade. The relationship between power and law and how they create the architecture for global markets is complex and nuanced. In part this complexity has to do with the system of states, deep histories of power politics, and dependencies fostered by economic integration. But it also has to do with the relationship between formal rules, the meanings that they acquire, and how they are used in practice. This is a central concern of this book, drawn from significant scholarship in law and society and the sociology of law.

How law and legal institutions are used is the real story of power struggles over trade and is the critical insight for understanding how developing countries strategically mobilize the WTO for a variety of reasons other than, but including, winning substantive trade concessions. Rich countries have greater room for maneuver. They are better able to exert pressure on their trading partners, and they are better able to resist pressures put on them. Only rich countries can truly deploy the economic leverage that underpins the WTO’s retaliatory mechanism. But this is not to say that powerful countries can ignore the WTO as a matter of course. They cannot. Recalcitrance among the world’s richest does occur. The United States is frequently called out for failing to live up to its

WTO obligations. But these failures are always exceptional, even if they appear frequent. Focusing only on instances of noncompliance obscures the deeper trend. When the United States or Europe fails to comply, significant effort is made to present such events as actual compliance, or, failing that, to present it as exceptional. Deference is given to the rules. The trend for the major players is one of active engagement in the WTO, validation of it as a legal forum, and ultimately, accommodation to its authority. This was made evident yet again in the particular construction of “buy American” provisions so heavily derided at Davos. The legislation specifically exempted all signatories to the WTO agreement on government procurement. It was drafted to be WTO compliant to the letter of the law.

This book characterizes the multiple meanings and uses of WTO law, how that law mediates power between states, defines markets, and creates unexpected opportunities for developing countries to challenge rich countries, sometimes with significant effect. These are important issues in the context of rapid economic changes and the continued institutionalization of a liberal world economy. The future is uncertain, and in thinking about states, markets, and the distribution of power we should not be bound by received assumptions about the dominance of the United States and Europe or how long that will last. The rise and fall of hegemonic powers proceeds through glacial economic change punctuated, during periods of transition, by cataclysmic politics. Scholars are debating the decline of the United States, pointing to the rise of China and other emerging countries, or possibilities of a multipolar world, in which political and economic power are not located in a single country.

This book describes a similar trajectory, but from the perspective of the inside of the WTO dispute system and the ways that law both replicates and challenges structures of power. Where the global trading system was once a tool for securing national development, its purpose and operation have become transformed, providing new capabilities for different global actors. This transformation is in no small part due to the ad hoc and incremental introduction of lawyers and legal practices in the world trading system, as well as new norms about the role of law in international relations. Indeed, a multifaceted tension between law and diplomacy is a defining feature of the WTO as an international economic institution. The legalization of the global trading system, which was once a manifestation of the hegemony of the United States and its vision for a

legitimate, stable, and inexpensive form of domination, has unleashed a new logic for the global trading system. It is producing unanticipated consequences for power relations in the global economy. Even developing countries are finding that they can mobilize the WTO to enforce trade liberalizing practices on their trading partners.

So while the economic crisis reveals the continued salience of states in structuring globalization, this book demonstrates that the relationship between states, and between states and global markets, has been transformed through the increasingly important role of law in governance of the world economy. Global politics is no longer just about the “congress of nations” but also about supranational authority and, in the case of the WTO, legal authority. This can be seen by looking inside WTO law in action. Law authorizes specific resources and tactics, creating forums for the construction and maintenance of the architecture of the global economy while hailing supranational authority as a field of power beyond the control of any single country. This book demonstrates how and why this has occurred through the processes of disputing at the WTO.

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Sociolegal Studies and Disputing at the World Trade Organization

It's not so much that dispute settlement is one of the tools of politics; it is that dispute settlement is an aspect of politics. It's politics by another means, if you will.

—Counsel, Canadian trade delegation, Geneva, Switzerland

The dispute settlement system of the World Trade Organization (WTO) is a complex social forum for economic, political, and symbolic skirmishing between vastly unequal states. Established in 1994 through a treaty agreement of 128 nations, the WTO has jurisdiction over nearly 95 percent of world trade, making it a central institution of the global economy.¹ The Dispute Settlement Understanding (DSU) of the WTO provides an empirical site for the study of international law-in-action as it offers mechanisms for member countries to litigate when they believe their rights under the terms of the WTO agreements have been violated. The most defining characteristic of this international legal system is a multifaceted tension between law and diplomacy in the processes of disputing. This tension is a product of the international context and lack of overarching world government, but perhaps equally as important, this tension stems from the “creeping invasion” (Hudec 1998: 116) of legal concepts, norms, and lawyers into a formally exclusive diplomatic terrain.

Much attention has been given to the legalization of world trade, though less to how actors in the system make sense of and mobilize WTO law. The tendency has been to view the WTO as a machine for trade liberalization. In this book, I challenge that presumption by utilizing a multimethod approach to study legal action at the World Trade Organization. At the center of the analysis is a concern for the relationship between law and state power. Does law constrain the powerful and empower the weak? Given the interstate context, how does law do this, to what degree, and why?

To address these questions, this book charts a new course for studying and thinking about the law and dispute settlement in the World Trade Organization by examining the thoughts and practices of actors working in WTO legal contexts. In so doing, this book builds on Shaffer's (2003) sociolegal analysis of relationships between private actors and government officials in the use of the WTO system as well as Chorev's (2007) institutionalist account of the internationalization of components of the U.S. government in the formation of the WTO system. What this book adds is an interior view of the WTO, an examination of its dispute resolution processes from the inside, a focus on the WTO itself, not predominantly the states that bring disputes to its Appellate Body. The WTO is a social world that actors must make sense of before using the law. Understanding the dynamics of WTO disputing requires attention to the institutional and professional relationships that characterize the working lives of practitioners. Focusing only on grand political games or structural trade issues misses how institutional dynamics, like legal capacity and experience, and interpersonal dynamics, like reputation, shame, and fear, shape processes of disputing. How states go about disputing is persistently mediated by the institutional arrangements in place for managing trade and the personnel who occupy those institutional spaces, whose judgment and discretion are at the basis of making and enacting policy. Indeed, while a trade grievance is a prerequisite for initiating a dispute, a trade grievance alone is insufficient and in practice is accompanied by a number of different motives and expectations. The practice of law at the WTO is not reducible to trade relationships and macrolevel structures of the world political economy. Institutional and small group social phenomena are sites for the formation of state's strategies, for calculating the possible, forming reasonable expectations, and thus for determining the specific contours of state interests.

The legalism of the WTO maintains states and their agents at the center of the political and legal processes facilitating trade globalization. The WTO only directly regulates states. This justifies the focus on legalization and state power. States retain the authority to pick economic winners and losers in how they go about complying, compensating, or retaliating over trade. But the implications are broad. Beyond commerce and questions of economic development, the fates of indigenous peoples, the environment, and civil society very often depend on state measures regulated by the WTO. The WTO is thus a pivotal institution of

global governance, with wide-ranging implications not only for states but also for the peoples and the myriad relationships touched by state policies. While the rapid growth in the number of free-trade agreements has made the international trading system highly complex, the WTO remains the central pillar of the legal foundations of the global trading system. How this legal foundation is managed is central to understanding the modern world economy and relations among states. Disputing is a site where these relationships become clear. And while the rules for trade and for disputing over them have been written, there is much left to decide about what the rules mean, how they should be used, and to what ends. There is much to be learned from close examination of the procedures and practices of WTO disputing and the sense made of them by practitioners. A sociolegal analysis, as I hope to demonstrate, can fruitfully contribute both empirically and theoretically to ongoing scholarship about globalization.

This book intervenes in two lines of thinking about the World Trade Organization. The first intervention is directed at scholars of world order and globalization that have largely overlooked the WTO as a complex social forum, preferring instead to evaluate the WTO in its macro social, political, and economic context. The second intervention is aimed at proponents of the WTO, particularly those emphasizing the equalizing effects of legalization. Each of these points of intervention is taken up in turn below. In the sections that follow, I will briefly outline different approaches to these interrelated questions of trade globalization, law, and state power. The purpose of doing so is to create the foundations for a sociolegal framework for international trade law. This framework will be applied over the course of the book. My goal, drawn from the insights of sociolegal scholarship, is to provide insight into the meanings and uses of the WTO and how they mediate but do not eliminate vast inequalities between states.

Globalization and the State

One of the central themes in the literature on globalization is the changing role and character of the nation-state in the world political economy and the emergence of multilayered and multicentric organizations of global authority, or what Sassen terms the “deterritorialization” of sovereignty (Hardt and Negri 2000; Sassen 1996, 2006; Shaw 2000; Held et al. 1999). For instance, Robinson