



6-1-2008

## Language, Law and Legitimacy in the WTO Agreement on Agriculture

Fiona Smith

Follow this and additional works at: <https://repository.nls.ac.in/ijiel>

---

### Recommended Citation

Smith, Fiona (2008) "Language, Law and Legitimacy in the WTO Agreement on Agriculture," *Indian Journal of International Economic Law*: Vol. 1, Article 8.

Available at: <https://repository.nls.ac.in/ijiel/vol1/iss1/8>

This Article is brought to you for free and open access by the Scholarship Repository at Scholarship Repository. It has been accepted for inclusion in Indian Journal of International Economic Law by an authorized editor of Scholarship Repository.

## Language, Law and Legitimacy in the WTO Agreement on Agriculture

Fiona Smith<sup>1</sup>

### ABSTRACT

*Regulating international agricultural trade is the most difficult challenge the World Trade Organisation (WTO) faces. Despite the breakthrough in the WTO Agreement on Agriculture following years of piecemeal regulation under the General Agreement on Tariffs and Trade (GATT), agriculture remains problematic. Why is that? The traditional response to this question is that the existing rules in the WTO Agreement on Agriculture are inappropriate because they do not reduce restrictive barriers to trade; do not address developing countries' concerns sufficiently; or do not accommodate non-trade issues like human rights and the environment. Whilst all these assertions may be true, this article argues that this focus is too narrow. Instead, it suggests that linguistic problems, or 'gaps,' exist in the current rules which fundamentally undermine the agreement's legitimacy in subtle, but potentially damaging ways. It argues that not all linguistic 'gaps' or omissions in the Agreement on Agriculture are of the same type. Some of the 'gaps' can be addressed by the WTO's dispute settlement mechanism using the Vienna Convention's methodology. However, other 'gaps' are actually deliberate omissions in the text reflecting members' fundamental disagreement on certain issues. These latter 'gaps' may lead to abandonment of the agreement by some members if the 'gaps' are filled by the dispute settlement mechanism in ways many members oppose. It is important that WTO members understand the nature of these omissions before they incorporate further obligations into the existing Agreement on Agriculture in the Doha Round of multilateral trade talks. Failure to do so will only lead to further difficulties in international trade regulation.*

---

<sup>1</sup> Fiona Smith LLB (Wales), LLM dist. (Leicester), PhD (Leicester) is Director of the WTO Scholars' Forum and Lecturer in Law, University College London (UCL), UK. She previously held academic posts at the University of Sheffield and the University of Leicester UK, and joined UCL in 2005. Her specialist research area is international agricultural trade in the WTO and she is currently finishing a book for Edward Elgar Publishers using jurisprudential thought to understand the problems of international agricultural trade.

Author's note: I have benefited from discussions with my colleagues Professor Joanne Scott and Dr Sean Coyle (UCL) in the preparation of this article. Any remaining errors remain my own.

## CONTENTS

I.	INTRODUCTION .....	35
II.	THE AGREEMENT ON AGRICULTURE.....	38
III.	LANGUAGE AND THOUGHT .....	41
IV.	POLYCENTRIC PROBLEMS AND REGULATORY FRAME WORKS .....	46
V.	THE AGREEMENT ON AGRICULTURE'S APPROACH TO NON-TRADE CONCERNS, THE WTO AND LEGITIMACY .....	50
	A. Power and Legitimacy .....	50
VI.	DEFINING RULE LEGITIMACY .....	55
	A. Legitimacy and qualitative assessment .....	57
	B. Rule Legitimacy and the 'Green Box' .....	60
	C. Non-trade Concerns and the Agreement on Agriculture's rules: finding legitimacy problems .....	61
VII.	RULE LEGITIMACY AND THE WTO .....	70
VIII.	CONCLUSION .....	78

### I. Introduction

Regulating international agricultural trade is the most difficult challenge the World Trade Organisation (WTO) faces. Despite the breakthrough in the WTO Agreement on Agriculture following years of piecemeal regulation under the General Agreement on Tariffs and Trade (GATT), agriculture remains problematic. Why is that?

The traditional response to this question is that the existing rules in the WTO Agreement on Agriculture (AoA) are inappropriate because they do not reduce restrictive barriers to trade, do not address developing countries' concerns sufficiently or do not accommodate non-trade issues like human rights and the environment. Whilst all these assertions may be true, this article argues that this focus is too narrow. Instead, it suggests that linguistic

problems, or 'gaps,' exist in the current rules which fundamentally undermine the agreement's legitimacy in subtle, but potentially damaging ways.

At this point, it is important to stress that this article uses the ideas of 'legitimacy' and 'linguistic gap' in specific ways: 'legitimacy' is not the usual idea of a lack of accountability measured in terms of democratic deficit, for example. Instead, it is a more subtle idea drawn from Thomas Franck's analysis.<sup>2</sup> Franck sees legitimacy as the ability of the treaty language, as originally selected by its drafter (in the WTO's case, its members), to effectively achieve the goals of the organisation. Failure of the language to achieve the goals, therefore, directly affects the legitimacy of the organisation. This article also does not consider 'linguistic gaps' in terms of what the panels or Appellate Body are capable of finding a meaning for, using the Vienna Convention on the Law of Treaties as a guide to treaty interpretation.<sup>3</sup> Instead, this article is interested in a different issue: it concentrates on the point before the Vienna Convention comes into play. It considers the nature of the language used in the treaty and asks whether every 'gap' in the treaty text is of the same type: i.e., *should* every linguistic 'problem' be resolved using the interpretative tools in the Vienna Convention when a dispute is brought before the dispute settlement system, or do some omissions require different treatment?<sup>4</sup> Some gaps may, at first, seem capable of resolution using the Vienna Convention approach, but might in fact conceal complicated political compromises (or agreements not to agree on anything) so that filling the gap through the dispute settlement process is not just about finding a textual meaning, but also involves making a significant decision on the political nature of the direction of the

---

<sup>2</sup> FRANCK, T. K., *THE POWER AND LEGITIMACY AMONG NATIONS* 91 (1990).

<sup>3</sup> Articles 31 & 32, Vienna Convention on the Law of Treaties done at Vienna May 23, 1969, 1155 UNTS 331, 8 ILM 679, (1969). This approach is endorsed by the Appellate Body in *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, April 29 1996, 17. In some respects, considering the Vienna Convention in this way starts at the point where the treaty is already formed and provides a methodology which can be used by a judicial body (i.e. a WTO panel or the Appellate Body) to interpret the language in line with the meaning and purpose of the treaty in a specific dispute. There are many incisive academic commentaries which have already considered this important question. See *generally* PAUWELYN, J., *CONFLICTS OF NORMS IN PUBLIC INTERNATIONAL LAW - HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003).

<sup>4</sup> This is an argument focussing on the inherent nature of language and meaning based on ideas from the philosophy of language (semantics): for an overview of the main theories see COFFA, A. J., *THE SEMANTIC TRADITION FROM KANT TO CARNAP: TO THE VIENNA STATION* (1991).

particular agreement. Textual gaps therefore have differing impacts on the legitimacy of the agreement, when legitimacy is defined in Franck's terms.

We might argue that the function of the dispute settlement process is to interpret the text in line with the ordinary meaning of the words and the context generally, so an argument that the dispute settlement body should not undertake a task of interpretation in a given case appears somewhat spurious. However, it is clear from the practice of the WTO dispute settlement process that the panels and Appellate Body are aware of the difficulties of intervention in some cases and have not decided difficult issues, even though they could have done so. For example, in the *EU-Biotech* case, the panel did not consider the highly controversial issue of whether a genetically modified product is 'like' a non-genetically modified product even though this issue would have fallen well within their range of competency.<sup>5</sup> Of course it is difficult to speculate why the panel did not address the issue of 'likeness' in more detail from a political point of view, but it is clear that the decision that a biotech product is 'like' a non-biotech product would have been highly controversial.<sup>6</sup>

While the analysis of linguistic problems clearly has resonance beyond international agricultural trade, this article concentrates on the WTO AoA as this is the first time agriculture has been incorporated into the international trade regulatory scheme. Despite its inclusion, it is clear that successful regulation remains elusive and the area remains as controversial and challenging as it was prior to the successful conclusion of the Uruguay Round.<sup>7</sup> This article argues that not all the difficulties with international agricultural trade regulation are found outside the agreement's scope: some may be buried in the text in the form of textual omissions or gaps which have the capability to undermine the legitimacy of the WTO in subtle and varied ways. Many such 'gaps' are actually deliberate omissions in the text reflecting members' fundamental disagreement on certain issues. These 'gaps' may lead to

---

<sup>5</sup> *EU-Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292 & 293/R, September 29 2006, para 7.2411.

<sup>6</sup> See generally Conrad, *The EU Biotech Dispute and the Applicability of the SPS Agreement: Are the panel's findings built on shaky ground?*, 6 *WORLD TRADE REVIEW* 233 (2007).

<sup>7</sup> See generally *THE WTO AND AGRICULTURE* (Anderson, K., & Josling, T., Eds., 2005).

abandonment of the agreement by some members if they are filled by the dispute settlement mechanism in ways many members oppose. It is important that WTO members understand the nature of these omissions before they incorporate further obligations into the existing AoA in the Doha Round of multilateral trade talks. Failure to do so will only lead to further difficulties in international trade regulation.

The article first provides an overview of the AoA particularly focussing on the domestic support rules. It secondly considers how we understand language using ideas from the philosophy of language and how that understanding inevitably informs the construction of agreements at international level. This section also considers how textual deficiencies or 'gaps' are formed. Third, the article explores the relationship between such textual deficiencies and the legitimacy of the WTO. Finally, the discussion applies these insights to one of the most problematic areas of international trade regulation: domestic support. It shows how textual deficiencies can undermine the legitimacy of the WTO rules on agriculture, and in certain circumstances, the WTO itself.

## II. The Agreement on Agriculture

The AoA is a complex agreement whose long-term objective is the removal of barriers to international agricultural trade.<sup>8</sup> Although the agreement refers to 'agriculture' in general terms, its scope is more restrictive. First, the rules only apply to those agricultural 'products' specifically listed in Annex 1 to the Agreement.<sup>9</sup> Second, the Agreement only regulates certain measures which are applied to the products in Annex 1.<sup>10</sup> If a measure is not

---

<sup>8</sup> Preamble, Agreement on Agriculture, paras 1-2.

<sup>9</sup> Article 2, Agreement on Agriculture. These products are both 'food' and 'non-food,' but are identified by their individual customs classification coding from the Harmonised Customs Classification Coding System (HS Code). See [http://www.wcoomd.org/home\\_online\\_services\\_hs\\_online.htm](http://www.wcoomd.org/home_online_services_hs_online.htm).

<sup>10</sup> The Agreement on Agriculture only applies first to measures, like quotas and variable import levies for example, which impinge on market access; second to export subsidies and finally to domestic support measures, or more specifically, domestic subsidies. These measures are each addressed in one of the agreement's three 'pillars': Part III covers market access, Part V addresses export subsidies and Part IV concentrates on domestic support.

one to which the agreement relates, then another WTO agreement will apply to it.<sup>11</sup> A detailed discussion of all these rules is beyond the scope of this paper as the analysis concentrates on the ways in which linguistic ‘gaps’, in the exceptions to the rules on domestic support, affect the legitimacy of the rules and the WTO as a whole. The domestic support rules and exemptions only are, therefore, discussed below.<sup>12</sup>

Article 3.2, AoA states that members cannot use domestic support measures which exceed the reduction commitments they made in Section I, Part IV of their schedule to the Agreement.<sup>13</sup> Part IV’s numeric methodology, the Aggregate Measurement of Support (AMS),<sup>14</sup> calculates the monetary equivalent of members’ domestic support measures on a sector-wide basis from a 1986–88 base.<sup>15</sup> Covered measures are divided into 3 categories: those which affect market price support, direct payments which are not exempt by virtue of the exclusions contained in the AoA and all other non-exempt domestic support subsidies. Measures falling within the AMS are referred to as ‘amber box’ measures: in other words, they are deemed to have a highly distortive effect on international agricultural trade and their use should be immediately restricted and then phased out over time. Members with

---

<sup>11</sup> There is inevitably an important link between the WTO agreements and this link is well recognised in the WTO dispute settlement process so violation of more than one agreement may occur. E.g. the link between agricultural subsidies and the WTO Agreement on Subsidies and Countervailing Measures is discussed extensively in *US-Subsidies on Upland Cotton*, WT/DS267/AB/R, March 3 2005, paras 395–488.

<sup>12</sup> For a full and detailed analysis of the whole WTO scheme on agriculture, see McMAHON, J., *THE WTO AGREEMENT ON AGRICULTURE: A COMMENTARY* (2006).

<sup>13</sup> Article 3.2, Agreement on Agriculture’s scope was raised by the parties in *US-Cotton* panel report, but not included in the panel’s reasoning. See *US-Cotton*, WT/DS267/R, September 8 2004, Australia, para 7.1026 & the European Communities, para 7.1027.

<sup>14</sup> Article 6.1, Agreement on Agriculture. Also Annex 3: Calculation of the AMS. On the calculation of the AMS see *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea-Beef)*, WT/DS161/AB/R & WT/DS169/AB/R, December 11 2000, paras 111–115.

<sup>15</sup> The AMS is based on various equivalents used in the OECD, including the Producer and Consumer Subsidy Equivalent (PSE). The AMS calculation differs from the PSE because the AMS used a fixed base from which to calculate the levels of support (i.e. 1986–88) whereas the PSE uses prevailing prices in the world market in the year in which the calculation is made: see Cahill & Legg, *Estimation of Agricultural Assistance using Producer and Consumer Subsidy Equivalents: Theory and Practice*, 13 OECD ECONOMIC STUDIES SPECIAL ISSUE: MODELLING THE EFFECTS OF AGRICULTURAL TRADE POLICIES 13 (1989–90); see also Blandford, *Disciplines on Domestic Support in the Doha Round*, INTERNATIONAL AGRICULTURAL TRADE RESEARCH CONSORTIUM TRADE POLICY ISSUE PAPER #1, 7 (August 2005).

reduction commitments in Part IV section I of their schedules<sup>16</sup> are permitted to use amber box measures subject to a requirement to reduce their total AMS by 20% during the implementation period (1995-2001).<sup>17</sup> All other members are prohibited from pursuing measures which would otherwise fall within the amber box above *de minimis* (too small to be of legal relevance) levels where they do not have a total AMS commitment.<sup>18</sup> Reduction in permitted levels of domestic support is only required for those measures falling within the AMS.<sup>19</sup> In addition to politically expedient exemption from reduction commitments in the 'Blue Box',<sup>20</sup> the rules state that otherwise prohibited measures used to achieve non-trade concerns fall within the jurisdiction of the AoA, but can only be used to the extent that they conform to the normative criteria in Annex 2, the so-called 'Green Box'. An approach which reflects the exhortation in paragraph 6 of the AoA's Preamble that the liberalisation programme should be undertaken "having regard to non-trade concerns."

Annex 2 excludes domestic support measures from the AMS which have "no, or at most, minimal trade-distorting effects or effects on production."<sup>21</sup> To claim the benefit, members' measures must fulfil two criteria: first, domestic support must be provided "through a publicly-funded government programme (including revenue foregone) not involving transfers to consumers" and "shall not have the effect of providing private support to producers"<sup>22</sup> the *chapeau* to the Green Box. In addition to the *chapeau*, measures

<sup>16</sup> Currently 34 members have amber box reduction commitments: WTO, *Domestic Support: Background paper by the Secretariat*, TN/AG/S/4, March 20, 2002, para 4.

<sup>17</sup> Article 1.f, Agreement on Agriculture.

<sup>18</sup> Article 7.2(b), Agreement on Agriculture.

<sup>19</sup> See *Korea-Beef*, *supra* note 14.

<sup>20</sup> The Blue Box is a consequence of European Union and the United States' fears that their domestic agricultural policies might not be exempt under Annex 2 Agreement on Agriculture, a specific exclusion was included in the rules during the 'Blair House' talks. Article 6.5, Agreement on Agriculture. Note that exemption is from the current total AMS which is the amount subject to reduction commitments. However, Desta notes many members included both Blue and Green Box measures in their base AMS figure which forms the basis of the reduction commitment. DESTA, M.G., *THE LAW OF INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS: FROM GATT 1947 TO WTO AGREEMENT ON AGRICULTURE* (2002).

<sup>21</sup> Para 1 Annex 2.

<sup>22</sup> Para 1(a) & (b) Annex 2.



must satisfy the Annex 2 criteria. Covered measures are either those which do not provide a payment to producers, but “provide services or benefits to agriculture or to the rural community,”<sup>23</sup> food security or food aid,<sup>24</sup> or are direct payments to producers made in accordance with the general and subject-specific criteria in paragraphs 6-13 Annex 2. New or existing direct payments to producers not within the subject categories in Annex 2 only fall within the Green Box if they are fully decoupled from production in accordance with Annex 2:6(b)-(e).<sup>25</sup>

Despite the complexity of the agreement, it is evident that linguistic gaps remain, and as discussed above, not all these gaps are small drafting problems. To argue that every textual gap can be resolved through the application of the Vienna Convention is to potentially underestimate the impact that filling some gaps may have on the legitimacy of the remaining rules. In order to predict which linguistic gaps pose the greatest problems, we have to know how we understand language and how that understanding is used to construct treaties at the international level. This understanding in turn allows us to identify difficult and controversial gaps which cannot be filled in one way, but in fact might be filled in many ways, each of which is correct. Detailed examples are given below, but suffice to say at this stage, that whether a solution is ‘correct’ depends ultimately on your own viewpoint.

### III. Language and Thought

“If our knowledge claims are to have objective reality, i.e. if they are to refer to an object and thereby have meaning and sense, it must be possible that the object be given in some manner. Otherwise the concepts are empty, and even though one indeed has thought with them, through this thinking nothing has really been known; one has merely played with representations.” – Kant<sup>26</sup>

“The essence of language is a picture of the essence of the world.” – Wittgenstein.<sup>27</sup>

---

<sup>23</sup> Annex 2.2.

<sup>24</sup> It is unclear if food aid payments paid directly to producers amount to direct payments under Annex 2.

<sup>25</sup> Annex 2:5.

<sup>26</sup> KANT, I., *KRITIK DER REINEN VERNUNFT*, (Schmidt, R., Ed.), (1956) A 155/B194-5 (Critique Of Pure Reason).

<sup>27</sup> WITTGENSTEIN, L., *PHILOSOPHICAL REMARKS*, (Rees, Ed. R., 1975), at 85.

A critical relationship exists between language and thought. When we seek to clarify our thoughts on a specific instance, we do so through the medium of language, irrespective of whether we express those thoughts orally, reduce them to writing, or muse on them in a period of self reflection. Language is therefore fundamental to the structure of all thought and is not merely a mechanism through which we express our ideas to others.<sup>28</sup>

Rules are linguistic vehicles which communicate thought in a specific way, whether or not that thought is then reduced to a corporeal legal text. In other words, when we clarify our thoughts on a specific instance as 'rules,' we are communicating a definite idea about that thought through language. Whether or not that thought is *in fact* a rule with legal force is not relevant because we are not being asked *at this stage* to externally verify its veracity. Instead, what is important is that structuring our thought as 'rules' in this way *communicates* the idea to ourselves and others that the language conveys deontic, but not modal necessity.

In one sense, 'language' is a term for the generic form our reaction to the specific instance takes in terms of the words used and the sentence constructions we place those words into. What drives this constructive process however, is our interpretation of the individual constituents of the language, which is itself driven by our understanding of what those words and sentences mean in a specific context. In other words, we react differently to linguistic structures dependent on the context in which they are used; this could be a reaction common to all individuals based on a shared understanding of the context. For example, we will all react to the phrase 'it is raining' differently if it is raining, than if it is not. This understanding can be called the basic level of meaning.

Whilst words and sentence constructions can have meaning for two individuals because they understand the specific words and phrases in a generic sense, the implications of those words and phrases can be different for each of them depending on whether they are familiar with and appreciate how the context subtly changes the meaning: that is, the phrase will still have a meaning

---

<sup>28</sup> See COFFA, *supra* note 3 at 4.

to both individuals, but one will have additional insight which subtly adds an extra layer of meaning and leads to a *different and/or enhanced* understanding of the words and phrases. This can be defined as the secondary level of meaning. For example, three people, A, a brain surgeon and B and C, two lawyers, are approached by D who says 'I *offer* to sell you my teapot for £10.' A, B and C all understand from this statement that the teapot is *offered* for sale at the price of £10. Only B and C, the lawyers, further understand that if one of them agrees to pay for the teapot, a legally binding contract could result. This outcome occurs because D's use of the word *offer* has a technical legal meaning.<sup>29</sup>

In addition, the personal views and values of such an individual with specialist knowledge may further shape her thoughts and add an extra level of complexity to her linguistic response. This can be referred to as the higher level of meaning. For example, in the same scenario as above, whether B and C, the lawyers, *both* think that D's statement to sell the teapot *is* an offer which becomes contractually binding once accepted is based on B and C's opinions of how the law applies to this situation. Whether B and C orally articulate their views, or seek outside verification of their opinions is not relevant because the truth of their opinions is not at issue at this stage. Rather, the key point is that their thoughts in response to D's statement are shaped by this complex process.

Thus, a single homogenous response to the interpretation of those constructions at *all levels* of meaning is very difficult, if not impossible to reach, even in the case of members of a privileged group where certain linguistic constructions have special meaning. Our thoughts on the specific instance, structured as they are in language, are not then made up of a random collection of words and phrases, but are instead a complex methodological process based on our interpretation and understanding of linguistic constructions.

---

<sup>29</sup> In English law, an offer followed by a valid acceptance forms a binding contract. See *Gibson v Manchester City Council*, [1979] 1 WLR 294.

Translating the oral articulation of thoughts and ideas into legal rules in the international trade sphere draws on this methodological process.<sup>30</sup> In the absence of the Austinian sovereign, the 'drafter's' task is to select words and phrases which articulate the diplomatic settlement concluded through multilateral trade discussions in a way which sufficiently conveys the rules' meaning to those affected by them.<sup>31</sup> In one sense, the structural form the rules take is important: difficulties of political compromise, negotiating parties' failure to agree on specific instances, their deliberate omission of certain issues from the legal sphere coupled with the quickly evolving international trading environment mean that comprehensively and tightly drafted obligations covering every possible loophole in a way which addresses these variables is unworkable. The 'drafter' must produce a text so that those subject to the rules are sufficiently persuaded by them as a whole, that they will adhere to them in the long term; even if they choose not to adhere to the wording in a specific instance; that is, they are convinced of the rules' legitimacy.

In addition to these structural elements, the drafter must also draw on language's methodological process: she must appeal to a shared understanding and interpretation of the linguistic structures to convey the rules' fundamental essence notwithstanding the necessity for broadly crafted obligations. That is, she relies on the fact that words not only convey their basic level of meaning (their 'ordinary meaning'), but take on a secondary level of acknowledged meaning informed by their context as part of the WTO's other rules and the general political environment in which the rules operate.<sup>32</sup> This assertion does not indicate that the drafter has managed to adopt a linguistic structure that appeals to every level of meaning, so that all affected parties agree on the way the drafter chooses to implement the settlement, but only that those

---

<sup>30</sup> On the utility of linguistics in international law see ALLOTT, P., *Language, Method and the Nature of International Law* 45 BRITISH YEARBOOK OF INTERNATIONAL LAW 79 (1971).

<sup>31</sup> AUSTIN, J., *THE PROVINCE OF JURISPRUDENCE DETERMINED* 201 (1954). We might say in the WTO that there is no 'drafter' as such because the text is negotiated and then agreed by consensus. However, the process remains the same, whether the 'drafter' is an individual, or a group.

<sup>32</sup> Cf. Interpretation of the text itself. This occurs *after* the rules' creation and so raises its own difficult issues: see Zang, D., *Textualism in GATT/WTO Jurisprudence: Lessons for the Constitutionalization Debate*, 33 SYRACUSE JOURNAL OF INTERNATIONAL LAW & COMMERCE 39 (2005-6).

affected are sufficiently persuaded through an appeal to the connection between the basic and secondary levels of meaning to the higher level of meaning that the context *should* inform the interpretation in some way. It is important to appreciate that drafting the content of rules only forms the start of a process where meaning is ascribed to the text produced; a process which is inevitably built on through judicial interpretation when disputes based on the text are brought to adjudication.

Even after the drafter has completed her difficult task, the resultant regulatory structure is not static, but is inherently unstable, imposed as it is on the complex interplay between necessarily loosely drafted obligations, regulatory gaps and the intricate methodological process that is language. Changes to the international trading environment following product innovation coupled with a growing emphasis on bilateral agreements between WTO members, the power of specific members involved in bilateral arrangements, evolving consensus over former regulatory gaps and emerging different opinions on the scope of some obligations, adjudicatory findings on some issues, all mean that members' response to the rules is not static, but subtly shifts over time as these circumstances influence members' interpretation of the rules. In other words, as members' response to the rules at the higher level of meaning changes, it colours their understanding of the rules' context at the secondary level of meaning: existing tensions between competing structural and methodological issues may change the rules' nature, increase or diminish those tensions, and/or new tensions may be created, thereby distributing the effects differently throughout the regulatory structure.<sup>33</sup>

The critical point is that the regulatory structure must be flexible enough to accommodate this movement if it is to remain relevant to the changing needs of those who are affected by the rules. And certain problems tend to be so complex and difficult that they will have to be addressed by means other than traditional adjudicatory mechanisms like the dispute settlement process.

---

<sup>33</sup> The polycentric problem described by Fuller: FULLER, L.L., *The Forms and Limits of Adjudication*, 92 HARVARD LAW REVIEW 353, 395 (1978-9).

## IV. Polycentric Problems and Regulatory Frameworks

Fuller noted that certain problems can be regarded as ‘polycentric.’ He likened such a problem to a spider’s web:

“A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions, but will rather create a different complicated pattern of tensions. This would certainly occur...if the doubled pull caused one or more of weaker strands to snap. This is a “polycentric” situation because it is many centred—each crossing of strands is a distinct centre for distributing tensions.”<sup>34</sup>

In other words, the problem is not a single linear issue, but there are many possible ways in which the problem can be described; each of which is correct. Describing a polycentric problem in one way then places a strain on the other aspects of the problem, because these other aspects do not disappear when the problem is described a certain way; instead, they merely shift around that description.<sup>35</sup>

In the WTO, members may ask the dispute settlement body to adjudicate on the interpretation of what appears at first sight to be a simple linguistic ‘gap’ in the WTO regulatory framework.<sup>36</sup> The gap may however disguise a polycentric problem: i.e., the ‘gap’ could be described in many different ways. The consequence is that there are numerous possible starting points from which the gap can be resolved. Each starting point leads to a different solution,

---

<sup>34</sup> *Id.*

<sup>35</sup> If we go back to Fuller’s analogy for clarification: if you select one strand of the spider’s web, the other strands remain attached to it; if you pull on the strand you hold, the other strands are pulled and stretched around the strand that you hold; they do not disappear unless you pull very hard, but instead twist and distort around the thread you hold. It is only when you pull very hard on your thread that the whole thing collapses.

<sup>36</sup> The argument here raises slightly different issues to the general argument about treaty interpretation. Here the argument concentrates on the inherent nature of the gap as it is revealed in the language of the treaty and the possible consequences which flow from that. The situation envisaged here is to some extent alluded to by the United States in their proposal for changes to the dispute settlement process: WTO, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement: Communication from the United States*, TN/DS/W/82, October 24 2005, Part I & TN/DS/W/82 Add. 1, October 25 2005.

which in turn has diverse and unpredictable effects throughout the regulatory structure. For Fuller, the most important reason to distinguish the polycentric problem from others is to identify those problems which are capable of adjudication and those where an alternative solution should be found through diplomatic means.

We can extrapolate Fuller's analysis to judicial interpretation of a specific agreement or rule. The key is to recognise that certain textual deficiencies are polycentric problems and as such cannot easily be addressed by the dispute settlement system. In such cases, the solution should not be found through the judicial route, but by alternative means where members can agree on how best to accommodate the polycentric effects.

Several implications arise from this insight: first, the negotiating process must not only strive for further reductions in the use of protectionist barriers to trade, it must also seek this on the basis of an understanding of the methodological nature of rule drafting at the international level, where the existing regulatory gaps are, whether those gaps exhibit polycentric characteristics and whether the gaps can undermine the long term stability of any diplomatic settlement. Those involved in the negotiating process must be aware that certain linguistic problems may in fact need to be resolved as part of the negotiating process itself in addition to the members' general task of obtaining agreement to trade barrier reductions. The 'right' solution to difficult areas of international trade regulation is not merely one based on policy imperatives where protectionist barriers to trade are further reduced, but rather one that appreciates the complexities involved in drafting a system of rules at the international level and the implications that textual deficiencies might have on those rules' long term stability. Failure to address these aspects means that deep instabilities in the rules are overlooked and the settlement's long term ability to resolve the problems is in question.

This discussion regarding the problems of language is important for many areas of international trade regulation, but raises particular legitimacy issues with respect to international agricultural trade. Reaching agreement in this area is notoriously difficult because members seek to use more elaborate measures to circumvent existing rules and protect their domestic agricultural

sectors. Failure to reach agreement on agriculture has undermined the credibility of the WTO in the past. It has been a major contributing factor to the collapse of multilateral trade discussions in the Uruguay Round, the third WTO Ministerial Meeting in Seattle, USA, at Cancún in 2003 as well as Hong Kong in December 2005.<sup>37</sup> It is also clear from the current Doha Round of multilateral trade discussions that a fundamental obstacle to its successful conclusion is members' inability to agree on whether the Agreement on Agriculture should regulate domestic measures designed to protect such concerns and if so how. Such concerns include preservation of the environment and rural communities, as well as a more fundamental human right to food.<sup>38</sup> International agricultural trade therefore acts as a microcosm for the remaining WTO multilateral discussions.

Till now, proposed solutions to this problem have focussed on amending the current rules to create an appropriate balance between achieving free trade in agricultural products, whilst allowing members to pursue non-trade concerns in the least trade-distorting manner.<sup>39</sup> These solutions, though valuable, start from the premise that only the least trade restrictive measures can be used by members to achieve non-trade goals in their domestic agricultural sectors, so solutions are conceptualised in the form of rule/exceptions with non-trade concerns subjugated to the free trade ideal by varying degrees in the event of an ideological collision between the two. This interpretation is a logical progression from the assumption that the WTO's existing approach to non-trade concerns is legitimate and failure to adhere automatically requires 'punishment' of the deviant. However, such

---

<sup>37</sup> Gowland, R., *Chemical Warfare in Seattle*, THE GUARDIAN (March 22, 2000), available at <http://www.cpa.org.au/garchve2/993cult.html>; *Conference Ends without Consensus* (September 14, 2003), available at [http://www.WTO.org/english/theWTO\\_e/minist\\_e/min03\\_e/min03\\_14sept\\_e.htm](http://www.WTO.org/english/theWTO_e/minist_e/min03_e/min03_14sept_e.htm).

<sup>38</sup> Breining-Kaufmann, C., *The Right to Food and Trade in Agriculture* in, HUMAN RIGHTS AND INTERNATIONAL TRADE 341 (Cottier, T., Pauwelyn, J., & Burgi, E., Eds., 2005).

<sup>39</sup> E.g. The Cairns' Group's Cartagena Declaration on International Agricultural Trade, April 1 2005, available at [http://www.cairnsgroup.org/meetings/min27\\_communique.html](http://www.cairnsgroup.org/meetings/min27_communique.html). See also WTO, *African Group: Joint Proposal on the Negotiations on Agriculture*, G/AG/NG/W/142, March 23 2001, para 17; WTO, *Note on Non-Trade Concerns*, G/AG/NG/W/36, September 22, 2000; WTO, *Review and Clarification of the Green Box: Communication by the African Group*, TN/AG/GEN/15, April 6 2006. Note also that this approach is mirrored in the latest *Revised Draft Modalities on Agriculture*, TN/AG/W/4, Rev. February 18 2008.



evaluations are based on linear notions of legitimacy where the enactment of existing rules through the WTO's legislative mechanisms automatically legitimises them.<sup>40</sup> Whilst this formalized approach recognizes the significance of process in rule legitimisation,<sup>41</sup> it assumes that rules only derive their legitimacy through the entity that generates them in a procedural sense; it fails to acknowledge that legitimacy issues flowing from the rules themselves play a crucial role in ensuring an effective and lasting settlement to the agriculture problem. Construction of the rules, particularly the language used to address the normative obligation ('rule legitimacy') can adversely affect the legitimacy of the WTO itself. This is not merely a causal relationship, but a more nuanced connection dependent both on the degree of textual deficiency and the extent to which the drafter of the rules is able to translate the diplomatic settlement into a coherent regulatory framework. More importantly, it also shows how the panels/Appellate Body's response to seemingly innocuous 'loopholes' in the text can subtly alter the WTO's normative framework over time. Whilst such a subtle change might be seen as a desirable response to fragmentation and to developing a more integrated relationship between trade and non-trade issues in the WTO on many levels, it has important implications for the role of the dispute settlement mechanism. Particular questions are whether the panels and Appellate Body should be adjudicating on every non-trade issue and what are the implications of any panel/Appellate Body findings for other non-WTO agreements?<sup>42</sup>

---

<sup>40</sup> This notion of legitimacy could be conceived as procedural or 'input' legitimacy see Krajewski, M., *Democratic Legitimacy and Constitutional Perspectives of WTO Law* 35 JOURNAL OF WORLD TRADE 167, 169 (2001).

<sup>41</sup> See FRANCK, T.M., FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 30 (2002).

<sup>42</sup> Although the Appellate Body seemed to endorse an evolutionary change to the way the WTO agreements should be interpreted in relation to environmental issues; the more recent jurisprudence, whilst recognising the importance of environmental issues, seemed to indicate a movement away from this approach and a recognition of the need to remain close to members' original treaty obligations: *Brazil-Measures Affecting the Imports of Retreaded Tyres*, WT/DS332/AB/R, December 3 2007, paras 224-233. Note also *EU-Biotech*, *supra* note 4, where the panel specifically did not endorse a reference to the Cartagena Protocol on Biosafety, paras 7.49-7.75.

## V. The Agreement on Agriculture's Approach to Non-Trade Concerns, The WTO and Legitimacy

Traditionally, understanding and solving the difficult relationship between trade and non-trade concerns in international agricultural trade regulation is seen through a regulatory lens:<sup>43</sup> that is, commentators concentrate on the methods by which members can achieve non-trade objectives using domestic support measures in the least-trade restrictive manner. Difficulties identified in existing rules or solutions proposed are conceived as ones which damage or interfere with the WTO's trade liberalisation ethos, rather than ones which explore the deep rationale for members' adherence to, and defiance of international agricultural trade rules. Arguably, a solution to the problems of international agricultural trade will only be found when these deep-rooted problems are understood.<sup>44</sup>

### A. Power and Legitimacy

Some WTO members support changes to the AoA by adding a specific provision addressing non-trade concerns generally to the rules.<sup>45</sup> Currently, the only non-trade concerns specifically recognised as such by the agreement, are those listed in paragraph 6 of the Preamble: food security and the preservation of the environment. Those members who support a new specific exception challenge the WTO's emphasis on trade maximization to the detriment of, *inter alia*, the environment, development and rural economies. In defence of the existing position, advocates of free trade argue that the WTO's stated goal is only to "preserve the basic principles and to further the objectives

---

<sup>43</sup> Desta, M.G., *The Bumpy Ride Towards the Establishment of a 'Fair and Market-Oriented Agricultural Trading System' at the WTO: Reflections Following the Cancun Setback*, 8 DRAKE JOURNAL OF AGRICULTURAL LAW 489 (2003).

<sup>44</sup> Preamble to the Marrakesh Agreement Establishing the WTO.

<sup>45</sup> WTO, *Review and Clarification of Green Box Criteria*, G20/DS/Greenbox Final, June 2 2005, available at <http://www.tradeobservatory.org/library.cfm?refid=73230>; Cairns' Group, 'Cairns' Group 27<sup>th</sup> Ministerial Meeting: Cartagena Declaration April 1 2005 cf. African Union, *The Arusha Development Benchmarks for the 6<sup>th</sup> WTO Ministerial Conference in Hong Kong, China*, November 24 2005 (the Arusha Benchmarks), para 3; Preamble to the Arusha Benchmarks & Article 12.II(b).

underlying this multilateral trading system.”<sup>46</sup> For advocates of free trade, the WTO’s main purpose must be the liberalisation of trade, meaning any non-trade issue affected by a trade policy either must be read as falling outside the competence of the WTO completely, or be interpreted through a ‘trade lens.’ Inherent in this conflict of views is disagreement over the scope of the WTO’s competence in relation to agriculture: that is, its continuing ability to exercise power over international agricultural trade regulation. The WTO acquires such power following members’ limited surrender of sovereignty on their accession. However, the extent to which the mere acquisition of power provides the rationale for its retention is questionable.<sup>47</sup>

At one level, it is axiomatic that the WTO is a creature of treaty law and as such it derives its power from that treaty. The corollary to this is that its members retain the ability to exercise their rights as independent sovereign entities and withdraw from membership in the event that they disagree with the WTO’s exercise of power (a right which is made express in Article XV Marrakesh Agreement). In reality, this may be an empty threat once a state accedes as a member.<sup>48</sup>

World trade rules become factually entrenched within ‘national’ legal systems<sup>49</sup> through the modification of domestic rules as a consequence of WTO regulatory requirements, particularly in areas like intellectual property. The Agreement on Trade-Related Intellectual Property Rights (TRIPs) requires members to institute minimum guarantees of intellectual property protection within their domestic jurisdictions in the areas of patents, copyright and

---

<sup>46</sup> Marrakesh Agreement Establishing the World Trade Organization (the Marrakesh Agreement), Preamble, para 5.

<sup>47</sup> Bacchus, J., *A Few Thoughts on Legitimacy, Democracy and the WTO* 7 J. I. ECON. L. 667 (2004).

<sup>48</sup> Whilst the WTO is a member-driven organisation, Jackson points out that in terms of traditional ideas of Westphalian sovereignty where members had complete power over their external relations are no longer relevant. Once a member accedes to the WTO, this traditional conception of sovereignty as absolute power declines and new ideas of ‘sovereignty modern’ take its place. Traditional ‘sovereignty’ is still eroded in this model: see JACKSON, J.H., *SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* 57-62 (2006).

<sup>49</sup> Note that a similar debate is prevalent in the context of the European Union where some political activists within the UK have called for the UK’s withdrawal from Europe. As Habermas notes, this is more a myth than reality: Habermas, J., *Why Europe Needs a Constitution* 11 NEW LEFT REVIEW 5, 11 (2001).

trademark protection to encourage an increase in global standards, even if such a regime was not in existence previously.<sup>50</sup> Withdrawal from the WTO is particularly problematic in this latter case because the adjudicative response at the national level may become heavily dependent on jurisprudence from the WTO panels.

In addition, rules may be entrenched in a normative sense if individuals rely on WTO rules before their national courts. For example, individuals may argue that the domestic rules are inconsistent with the member's obligations and should therefore be amended in the light of WTO jurisprudence.<sup>51</sup> Such an approach has met with resistance in the European Union where, despite strong protests to the contrary, the Court of Justice has consistently denied individuals<sup>52</sup> the right to rely on GATT jurisprudence when arguing that a Community act is unlawful, unless the act was one which implemented EU commitments under GATT rules.<sup>53</sup> However, individuals can argue that a national rule should be interpreted in the light of the WTO rules. In contrast to its approach with respect to Community acts, the Court of Justice has strongly indicated that Community measures should, wherever possible, be interpreted in the light of international commitments, including those within the WTO and has even encouraged direct effect of some treaty

---

<sup>50</sup> Part II section 5; Part II section 1& Part II section 2 TRIPS respectively; note also protection for geographic indications (Part II section 3), Integrated Circuits (Part II section 6) and Industrial Designs (part II section 4) also Paras 3, 4 & 5 Preamble to TRIPS. See Wegner, H.C., *TRIPS Boomerang: Obligations for Domestic Reform* 29 VJ. TRANS.L. 535 (1996).

<sup>51</sup> This whole area is complex and this article does not revisit the complexities eloquently argued elsewhere. The point only is that WTO law does play a role in domestic jurisdictions to differing extents. See Antoniadis, A., *The European Union and WTO Law: a nexus of reactive, coactive and proactive approaches* 6 WORLD TRADE REV. 1 (2007) & Francis Snyder, *The Gatekeepers: The European Courts and WTO Law* 40 C.M.L.REV. 313, (2003). See the attempted reliance on the WTO *Bananas* ruling by individuals to challenge the efficacy of European Union measures on bananas before the European Court of Justice; (C104/97 P) *Atlanta AG v Council of the European Union*, [1999] ECR I-6983, paras 17-23, where the Court dismissed the reliance on procedural grounds.

<sup>52</sup> Note the extension to members of the EU as well: Case C-280/93 *Germany v Council*, [1994] ECR I-4973.

<sup>53</sup> Cases 21 & 22/72 *International Fruit Co NV v Produktschap voor Groeten en Ffruit* (no.3), [1973] ECR 1219. See Advocate General Tesouro in Case C-53/96 *T Hermes v FH Marketing Choice BV*, [1998] ECR I-3603.

obligations where the treaty confers rights on individuals.<sup>54</sup> Even if recognition of the rules themselves is not accepted, awareness of the possible utility of WTO principles in the national context is created irrespective of the continuation of the state's WTO membership.<sup>55</sup>

Coupled with entrenchment at the national level, withdrawal is problematic because the increase in state membership means that remaining within the WTO sphere is the pragmatic option. Globalisation through international trade means that states' economies are increasingly dependent on each other for both domestically consumed products and the availability of export markets. Such interdependence facilitates economic growth which has consequential effects for individuals: they have more disposable income, their standard of living increases and they live longer. As Stiglitz points out, the boom in the Asian markets was in fact largely led by export driven industrial policies supported by liberalised international markets.<sup>56</sup> This connection is both facilitated and enhanced by the WTO: its existing rules, building on those in GATT, further liberalise international markets in goods, services and intellectual property enforced through the dispute settlement mechanism, thereby continuing the perceived benefits enjoyed by many members.<sup>57</sup> In addition, the WTO provides a framework for the renegotiation of existing commitments to further liberalise existing markets and the possibility of expansion into new areas. Withdrawal from the WTO means that members lose their ability to profit from the benefits gained from further liberalisation commitments because their products are excluded from their traditional export markets. Withdrawal by one state, followed by others may in fact reduce the global welfare of all through the gradual re-introduction of trade restrictive policies eventually resulting in system collapse. As Dunoff observes: "the dilemma is that pursuit of individually rational strategies results in a sub-

---

<sup>54</sup> *Id.*; Case C-192/89 Sevince, [1990] ECR I-3461 & Case C-18/90 Bahia Kziber, [1991] ECR I-199.

<sup>55</sup> Context of international arbitration rules: in the context of oil and gas arbitration, *see generally* Wälde, T.K., *Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues Based on Recent Litigation Experience*, paper given at 'International Economic Disputes: Wider Perspectives' April 1-3 2004, St John's College, Cambridge, (on file with author), at 9.

<sup>56</sup> STIGLITZ, J.E., *GLOBALISATION AND ITS DISCONTENTS* 4 (2002).

<sup>57</sup> *See some notes of caution expressed by RODRIK, D., HAS GLOBALISATION GONE TOO FAR?* (1997).

optimal outcome.”<sup>58</sup> Withdrawal from the WTO is thus not an attractive option.

Whilst a member’s threat to immediately withdraw from the WTO will not affect the WTO’s continued ability to exercise power in international agricultural trade in the short term, members’ patchy adherence to the rules may inflict damage in the long term, due to incremental erosion of the WTO’s efficacy from inside the organisation.<sup>59</sup> From a game theoretic perspective, members’ continued adherence to the AoA is predicated on the premise that they will maximise gains from trade by acting collectively with other members. This outcome is facilitated by the existence of “a stable environment for mutually beneficial decision-making [which will] constrain behaviour.”<sup>60</sup> Such an environment is defined merely as a ‘first level’ regulatory system where obligations are at least reduced to writing to allow measurement of all state activity. Inconsistencies in the rules may mean that the critical mass necessary to constrain cheating is not achieved either because too many members fail to adhere to the rules, or because a significant member, for example, the United States, or grouping of members like the European Union fail to comply. Incentives to pursue individual strategies in international agricultural trade consequently increase. ‘Spillover’ effects may also occur if members question the efficacy of adhering to the rules in other linked subject areas. Given agriculture’s invasive spread into other areas of international trade regulation in terms of substantive overlap and use as a bargaining tool in multilateral negotiations, the potential damage to the WTO’s ability to exercise power is significant. But what factors may induce a member to ‘cheat?’ Arguably, a significant reason why members may refrain from ‘cheating’ is when they are satisfied that the rules are ‘legitimate.’ Focussing on this aspect

---

<sup>58</sup> Dunoff, J.L., *Re-Thinking International Trade* 19 U. PA. J. INT’L ECON. L. 347, 359 (1998).

<sup>59</sup> It is clear that members generally adhere to the findings of the panels and Appellate Body, although some issues remain unresolved including the controversial Hormones dispute: *Canada-Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS321/R, March 31 2008, para 7.842. On the general level of adherence see Zimmerman, *The DSU Review (1998-2004): Negotiations, Problems and Perspectives* in GEORGIEV, D. & VAN DER BORGH, K., Eds., *REFORM AND DEVELOPMENT OF THE DISPUTE SETTLEMENT SYSTEM* 445 (2006).

<sup>60</sup> Dunoff, *supra* note 57, at 361 quoting Abbott, K.M., *Modern International Relations Theory: A Prospectus for International Lawyers* 14 YALE INT L.J. 335, 359 (1989).

of legitimacy means the discussion is confined to why laws are adhered to when there is no coercive element in the international sphere, rather than a broader, more ambitious metaphysical discussion about why law is obeyed *per se*. Consequently, the discussion does not attempt to draw on more detailed constitutional theories, but refers to them in passing.

## VI. Defining Rule Legitimacy

Defining 'legitimacy' is difficult and numerous hypotheses exist. Despite the complexities of the literature, it is clear that the conceptualization of legitimacy changes depending on the context in which it is employed: much of the seminal work explores legitimacy within the confines of the nation state. As Chalmers notes, whilst the national model offers a coherent starting point, the dynamics within the international arena, particularly in the context of the WTO, mean that such ideas cannot be used in their pure form and must be modified to take these subtle differences into account.<sup>61</sup> Although Chalmers confines his comments to the context of the process of constitutionalization outside the confines of the nation state, it is arguable that his conception can be extrapolated to include legitimacy concerns as well as broader constitutional questions as adherence to the rules by either individuals or the nation state is inextricably linked to the ability of the governing entity to exercise its authority.

It is possible to ask whether the AoA's rules on domestic support adequately address non-trade concerns, and the effect that any textual deficiencies have on the WTO itself. Phrasing the question in this way means that the choice of analytic construct must be appropriate to the international environment and start from the basis of the rules' legitimacy, before establishing the connectivity between the rules' legitimacy and that of the WTO. The term 'legitimacy' in this context means that aspect of the rule

---

<sup>61</sup> Chalmers, D., *Post Nationalism and the Quest for Constitutional Substitutes* 27 JOURNAL OF LAW AND SOCIETY 178, 179 (2000). *Contra* Wincott in the context of the European Union who argues that the European Union has reached the stage where it resembles the national model more: Wincott, D., *Nation States, European Union and Changing Dynamics in the Quest for Legitimacy* 487, 487 in ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION (Arnall, A. & Wincott, D., Eds., 2002).

which exerts a pull towards compliance on those subject to it, irrespective of the existence of consequences which compel obedience including sanctions authorised by the dispute settlement process.<sup>62</sup> Legitimacy here is broader than the notion of 'fairness,' although some commentators have adopted the notion of 'fairness' when they describe qualities of 'law' which lead those subject to it to comply.<sup>63</sup>

Quantitatively, the degree to which a rule can exert 'compliance pull' is determined by a broadly empirical assessment measuring the *actual* level of adherence. The existence of a quantitative failure to adhere to the rules is itself an indication of a lack of legitimacy, without any link to the compliance pull of the rule.<sup>64</sup> Evidence of compliance can be assessed on the basis of the number of complaints subject to dispute settlement proceedings and the criticisms of the level of adherence made to the Committee on Agriculture. Although the number of actual complaints brought before dispute settlement proceedings concerning the Green Box is low, it is evident from the multilateral negotiations on the AoA that there is widespread dissatisfaction on the operation of the rules.<sup>65</sup> Arguably, the Green Box rules' ability to quantitatively exert compliance pull is inextricably linked with the qualitative assessment. In the light of this assertion, the existence of quantitative evidence that the rules are not adhered to is a consequence of a lack of qualitative compliance pull. One should therefore concentrate on the qualitative aspect of the rules: do the words and phrases chosen by the rules' drafter 'make linguistic sense' at the most basic level of meaning; do they convey the requisite notion of added context sufficient that the words take on a secondary level of meaning and thirdly, do the words and phrases chosen persuade those

---

<sup>62</sup> Franck, T.K., *Legitimacy in the International System*, 82 AJIL 705, 712 (1988). Note that even though the WTO has a dispute settlement body which has in fact authorised the use of sanctions in certain cases, it is doubtful whether their existence acts as a sufficient deterrent to members to act in accordance with WTO rules: *Hormones* sanctions. In this sense, the Dispute Settlement Body would not be the supreme sovereign in the Austinian tradition: see Delbrück, J., *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies* 10 IND. J. GLOBAL LEGAL STUD. 29, 33 (2003).

<sup>63</sup> See generally FRANCK, *supra* note 41.

<sup>64</sup> Krajewski, *supra* note 40, at 168.

<sup>65</sup> WTO, *Secretariat Background Paper: Green Box Measures*, TN/AG/S/10, November 11, 2004.



who are affected by the rules that they adequately convey the nature of the diplomatic settlement?<sup>66</sup>

### A. Legitimacy and qualitative assessment

Qualitatively, the Green Box rules must possess an inherent value or worth. In the sense employed in this discussion, value is derived from the ability of the words' and phrases' used within the rules to convey meaning to members, rather than the "cultural and anthropological" symbolic process through which it becomes 'law.'<sup>67</sup> First, the rules' must indicate that they appear validly placed within a recognised framework or system of other associated rules, rather than flowing from a power hierarchy per se in the form of a supreme sovereign or as a consequence of judicial power ('principle coherence').<sup>68</sup> This first stage is not an investigation into the structure of the Green Box rules; instead, the process juxtaposes the language used in the WTO's *stated* principles and values in relation to non-trade concerns in the Preamble to the Marrakesh Agreement with the agriculture-specific objectives in the Preamble to the AoA. This is differentiated from a more general investigation of the value of non-trade concerns per se because it is norm-specific and focuses only on those norms listed in the two preambles. Unlike important contributions by other commentators elsewhere, it does not, for example, explore whether human rights and labour standards should form part of the debate.<sup>69</sup>

Acceptance of the principles on which the Green Box rules are based is a different question from the approval of the rules themselves. The Green Box rules may lack the requisite value if WTO members accept the principles, but go on and reject the actual rules because they are not *constructed* in a way

---

<sup>66</sup> Section I, *infra*.

<sup>67</sup> FRANCK, T.K., THE POWER AND LEGITIMACY AMONG NATIONS 91 (1990). See also HABERMAS, J., BETWEEN FACTS AND NORMS 110 (1996).

<sup>68</sup> AUSTIN, *supra* note 31; HOLMES, O.W., THE COMMON LAW, 35-36 (1881).

<sup>69</sup> JONES, K., *The WTO Core Agreement, Non-Trade Concerns and Institutional Integrity*, 1 W. T. REV. 257 (2002).

which makes members' obligations clear ('constructional clarity').<sup>70</sup> This is *not* an assessment of how the language in the rules is interpreted by members when they introduce measures based on the completed text, or how the panels Body interpret the rules in case of a dispute. Rather, the point here is whether the language used *by the drafter* when the rules are originally created conveys meaning at least at the basic and secondary levels of meaning to those affected by them.<sup>71</sup>

This second stage then focuses on these "literary properties" of the Green Box rules. The starting point is clearly the language used to ascertain the nature of the obligation. This begins as an issue of clarity of expression, both in terms of internal consistency in the rules and the ability to determine the scope of the members' obligations.<sup>72</sup> However, if analysis only concentrates on clarity of expression, it may conclude that the Green Box rules lack legitimacy either because they do not clearly define members' obligations or because they use very "elastic" standards that can only be measured through a series of qualitative tests necessitating difficult subjective assessment. This approach conflates difficulties with the Green Box rules' structure with those of their wording: asking whether the words used lead to ambiguity in the abstract presupposes the existence of a single construct which is appropriate in all cases. The consequence of this view is that any textual ambiguity will always be the cause of any failure in compliance pull, whereas in fact, textual deficiency could be a logical result of the structure adopted: an obligation may be deliberately drafted in an open-ended way using few definitions either because its scope is currently uncertain and this approach builds flexibility into the system, or because those responsible for its negotiation were unable

---

<sup>70</sup> This part of the analysis draws on Franck's seminal work on legitimacy in the international system. Whilst the analysis owes much to his general ideas, I have re-categorized his ideas slightly: construction coherence draws on 2 of Franck's categories: "determinacy" and "coherence". See FRANCK, *supra* note 41, particularly chs 4, 6 & 10.

<sup>71</sup> On interpretation see Zang, *supra* note 32.

<sup>72</sup> Franck refers to the "clarity of the message" in the rule: see FRANCK, *supra* notes 66 and 69. Clarity used in this sense is a textual question so the wording used must not be incongruous (internal clarity) or exclude key categories which form part of the obligation resulting in an erosion of its efficacy (external clarity). External clarity is distinguished from internal clarity because the latter presupposes a boundary for the normative obligation and merely considers whether there are any textual deficiencies within those confines; whereas, the former is aimed at the situation where the rule is silent on issues which appear to flow naturally from the principle on which the rule is based.

to agree on a stricter form of words. This is a different point to Franck's discussion of 'idiot' and 'sophist' normative structures which explain the relationship of the rule's wording to the principles underlying it. This point instead focuses on the rule's wording and the choice of structure per se.<sup>73</sup> It applies Franck's literal/sophist taxonomy to the rule only and not the principle. Consequently, "elastic" standards can be implemented through strictly defined phraseology with the consequence that either the phraseology does not mirror the elasticity of the standard in its generality of wording, or the phraseology is not sufficiently comprehensive to accommodate all the nuances of the obligation. This is a construction point and so the scope of the principles on which the rule is based are not in question as such; instead, the point is that if the construct chosen is a literal approach, then the rules must be comprehensively drafted; whereas, if the construct chosen is more fluid, then the text should reflect that, by adopting a broad textual approach with a possibility of adjudication to define clarity where this is not apparent from the text.<sup>74</sup>

Deciding whether the Green Box rules have constructional clarity starts with an evaluation of their structure which in turn indicates the type of language usual in that type of structure. Once the type of language used is determined, the degree to which the rule exhibits internal and external textual clarity can be assessed. As Franck succinctly notes,

"rules which have a high degree of ...readily ascertainable normative content-would seem to have a better chance of actually regulating conduct in the real world than those which do not."<sup>75</sup>

This first aspect of constructional clarity builds on Franck's analysis of 'idiot' and 'sophist' norms where idiot rules are expressed in very simple terms e.g. "No running in the halls" whereas sophist norms are more complex, involving more "elastic" terms e.g. "No running in the halls unless there is a

---

<sup>73</sup> See FRANCK, *supra* notes 41 and 67.

<sup>74</sup> In some respects, the discussion conflates some of Franck's ideas on 'coherence' and 'determinacy:' see FRANCK, *supra* notes 41 and 67.

<sup>75</sup> FRANCK, *supra* notes 41 and 63.

fire or your life is in danger.”<sup>76</sup> However, the point here is slightly different because it is not necessarily equating the appropriateness of the rule’s construction to the norm, but instead equating the rule’s construction to the possibility of acceptance within a political environment. Franck’s idiot/sophist approach is more akin to the later discussion on the second part of construction coherence.<sup>77</sup>

Establishing the degree of clarity within the language used in the Green Box is only the second stage to establishing whether the Green Box rules have the requisite qualitative value to exert compliance pull: the obligation expressed through the language used must in itself accord with the principles and values of the WTO using the Preambles to the Marrakesh Agreement and the AoA (‘constructional coherence’). Constructional coherence differs from principle coherence because it concentrates on comparing the language in the Green Box rules with the stated values and principles of the WTO, and doesn’t merely evaluate the *idea* behind the rules as evidenced by the Preambles to both the Marrakesh Agreement and the AoA. Textual ambiguity as a consequence of regulatory omission and/or confusion over terminology at each level is readily apparent in the Agreement on Agriculture. Identifying the way linguistic problems are manifest in the AoA’s rules is important to understanding how the legitimacy of those rules is undermined. More critically, it allows us to move on and determine which linguistic deficiencies have the power to undermine the legitimacy of the WTO itself.

## B. Rule Legitimacy and the ‘Green Box’

Assessing the AoA’s rules on domestic support and non-trade concerns against notions of rule legitimacy reveals a difficult and confused picture. Linguistic ambiguity and omissions are revealed at each stage of the drafting process which in turn masks a series of complex problems which do not only flow from a simple linguistic omission/ambiguity on the part of drafters, but also reflect fundamental underlying disagreements between members which could not be addressed in the text. If further obligations are added without

---

<sup>76</sup> For a wonderful illustration of this point see Simmonds, N. E., *Between Positivism and Idealism* 50 CAM. L. J. 308, 311 (1991).

<sup>77</sup> FRANCK, *supra* notes 41 and 67.

appreciating the true nature of these regulatory gaps, then the divisions amongst members on key issues remain and the agreement's long term stability is in doubt. These issues may never be resolved, but the key is to appreciate what the gaps are hiding, rather than assume that all linguistic gaps are of the same nature and can be resolved in the same way.

### C. Non-trade Concerns and the Agreement on Agriculture's rules: finding legitimacy problems

The Marrakesh Agreement does not specifically recognise the role that non-trade concerns play in international trade regulation under the WTO as such. Instead paragraph 1 of the Preamble to the Marrakesh Agreement acknowledges a broadly 'ethical' approach to trade and economic activity which encompasses sustainable development, preservation of the environment and general development issues.<sup>78</sup> Several conclusions follow from this construction: first, separating trade from the other issues listed in paragraph 1 and juxtaposing it with 'economic activity' sees trade as an economic issue which is separate in some way from sustainable development, environmental protection and development generally. This categorisation of trade means that the said concerns are 'non-trade concerns' to the degree that they do not form economic activity. A distinction between trade and non-trade issues is therefore made in a pragmatic sense.

At the basic level of meaning, paragraph 1 can be seen as a value neutral conception of non-trade concerns which implicitly recognises the crucial role that such concerns play in shaping trade policy decisions, without ascribing any legal function to them at the secondary level of meaning. A closer look at the wording of paragraph 1 reveals an intention to create meaning at the secondary level: by stating that "relations in the field of trade and economic endeavour *should* be conducted with a view to raising the standards of

---

<sup>78</sup> The Appellate Body recognised the preservation of the environment as a "non-trade concern" in *Shrimp/Turtle: United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, October 12 1998, para 129. There was no discussion that environmental protection was a non-trade concern: see below *infra*. Scott, J., *On Kith and Kine (and Crustaceans): Trade and Environment in the EU and the WTO in THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE* 125 (J.H.H. WEILER, ED., 2000).

living... *while allowing for the optimal use of the world's resources...*"<sup>79</sup> Paragraph 1 places the emphasis on trade issues first and then the relationship that trade has with those specified non-trade concerns. This approach does suggest a normative hierarchical relationship where trade is the primary policy which is only influenced, but not driven by these concerns, but does not say how trade goals should be influenced by non-trade goals, or what these non-trade goals are specifically, and how they should be defined.

Paragraph 6 of Preamble to the AoA offers some limited information regarding the role that non-trade concerns play at least in the context of agriculture. It states that members' commitments undertaken as part of the reform programme for international agricultural trade should be "made in an equitable way among all Members, having regard to non-trade concerns including food security and the need to protect the environment."<sup>80</sup> Two conclusions can be drawn from this statement: first, that the pursuit of non-trade concerns is accepted as a legitimate policy under the WTO agriculture regime and second, that food security and environmental protection are examples of non-trade concerns. However, there is no further indication of what the 'other' non-trade concerns might be, or how the relationship between trade and non-trade issues should be addressed in the AoA.

Further difficulties arise with respect to the construction of the rules-constructional clarity relating to the stated non-trade concerns in the AoA, food security and environmental preservation. Article 3:2 AoA states that members cannot use domestic support measures which exceed reduction commitments made in Section I, Part IV of their schedule.<sup>81</sup> Whilst this appears to be a blanket prohibition, it is evident from Part IV that this is not necessarily the case and members can claim exemption from their domestic support reduction commitments if their policies accord with the Annex 2 criteria covering policies aimed at food security and environmental

---

<sup>79</sup> Emphasis added.

<sup>80</sup> Paragraph 6 Preamble Agreement on Agriculture; the Draft Modalities on agriculture do not alter the Preamble: WTO, *Draft Possible Modalities on Agriculture* TN/AG/W/3, July 12 2006, Annex H.

<sup>81</sup> Article 3.2 Agreement on Agriculture's scope was raised by the parties in *US-Cotton* panel report, but does not form part of the panel's reasoning: *United States-Subsidies on Upland Cotton*, WT/DS267/R, September 8 2004, Australia, para 7.1026 & the European Communities, para 7.1027.

protection. Food security is expressly covered in paragraph 3 of Annex 2: it is policy specific and limited in scope.<sup>82</sup>

Annex 2:3 contains a number of linguistic difficulties which undermine the legitimacy of the rules in specific ways. First, there is no definition of what constitutes food security. On the face of paragraph 3, provided members state they are stockpiling for food security purposes, this appears to be sufficient.<sup>83</sup> Linked with this observation is that paragraph 3 does not specify who can take advantage of the stockpiling exemption. Some members think, at the connection of the secondary and higher levels of meaning, that footnote 5 raises an assumption of legality for developing country programmes. In contrast, other members think paragraph 3 does not expressly limit the application of the exemption to such countries. Consequently, all members with domestic support reduction commitments can take advantage of the exemption. A third possible meaning can also flow from the wording in paragraph 3.

Anderson characterises food security as ensuring a member's population always has "access to minimum supplies of basic food necessary for survival"<sup>84</sup> reiterating the Food and Agriculture Organization's statement at the World Food Summit Declaration in 1996 where food security is "food that is available at all times, that all persons have means of access to it, that it is nutritionally adequate in terms of quantity, quality and variety, and that it is acceptable within the given culture."<sup>85</sup> Both these explanations place the emphasis on

---

<sup>82</sup> Note that members may choose to support local farmers through direct payment schemes to promote food security through payments to local farmers to encourage the production of specific commodities: this could be covered by paragraph 5 of Annex 2 which covers direct payments to producers. This article does not address the scope of this article, but clearly textual problems arise, as the *United States-Uplands Cotton* report indicates. See *United States-Upland Cotton*, WT/DS267/AB/R, March 3 2005, paras 324 & 334-335.

<sup>83</sup> This would be subject to the general *chapeau* in paragraph 1 Annex 2. Draft Modalities above n 49., Annex H (amendments Annex 2:3) version (ii) does discuss an *additional* criteria for developing nations, but this does not define food security per se.

<sup>84</sup> Anderson, K., *Agricultural Trade Reform and Poverty Development in Developing Countries*, World Bank Policy Research Working Paper 3396, September 2004, 18.

<sup>85</sup> FAO, *Elements for possible inclusion in a draft Declaration and Plan of Action on Universal Food Security*, Rome (1995). See also Sophia Murphy, *Food Security and the WTO*, Institute of Agriculture and Trade Policy September 2001, available at <http://www.cafod.org.uk/archive/policy/WTOfoodsecurity.shtml#executive>.

the human rights aspect of food security therefore seeming to accord equal treatment to all states irrespective of their level of development.<sup>86</sup> Whilst this is a literal translation, in reality it is difficult to see that the phrase would require all states to be treated equally in the context of the WTO, particularly as the EU, amongst other developed nations, had stockpiled 60 million tonnes of grain in government stores in 2001: three times in excess of the amount required to feed European citizens.<sup>87</sup> Whilst food security should be a right enjoyed by all individuals, it seems difficult to justify an interpretation of paragraph 3 which permits stockpiling policies for members who are perceived traditionally as self sufficient.

Such linguistic ambiguity means that members cannot determine whether the domestic measures they wish to adopt in their own agricultural policies designed to protect non-trade concerns comply with the AoA. Specifically, it is difficult to ascertain the limit of any policy implemented on the grounds of paragraph 3. Members must stay within “predetermined targets” which are explicit in their policies, but it is unclear whether these targets must be externally verifiable or not. Likewise, member purchases and sales of food pursuant to the stockpiling policy must be at “current market prices,” but paragraph 3 does not specify at which date prices should be calculated, or how to define the relevant product and geographic market which forms the basis of the market price assessment.<sup>88</sup> In terms of paragraph 3, it is difficult to establish when policies aimed at food security will fall within the Green Box exemption with any degree of certainty.<sup>89</sup> These substantive limitations might be seen as an elastic normative construction arising purely from

---

<sup>86</sup> This is not resolved by the Draft Modalities *ibid*. Note the considerable opposition to strengthening footnote 5 to allow developing nations to exclude acquisition costs of foodstuff stocks from their AMS: a proposals which is currently fiercely opposed, WTO, *Chair's Reference Paper Green Box Rev.1*, May 30 2006, para 3; Draft Modalities Annex H (amendments Annex 2:3) version (ii).

<sup>87</sup> UK Food Group and Sustain, *World Trade Organization and Food Security*, May 1 2005, available at [http://www.sustainweb.org/agtrad\\_WTO.asp](http://www.sustainweb.org/agtrad_WTO.asp).

<sup>88</sup> Establishing market prices are issues traditionally encountered in competition policy. This is not resolved by the Draft Modalities.

<sup>89</sup> On these problems generally see Diakosavvas, D., *The Uruguay Round Agreement on Agriculture in Practice: how open are the OECD markets*, 37, 60 in *AGRICULTURE AND THE NEW TRADE AGENDA: CREATING A GLOBAL TRADING ENVIRONMENT FOR DEVELOPMENT* (Ingco, M.D. & Winters, L.A., Eds., 2004).



members' inability to agree on more concrete substantive obligations. Even if this conclusion is correct, adopting a numerical assessment of the extent to which food security policies are permitted is a literal solution to a more complex problem as it merely addresses how much food can be stockpiled, rather than commenting on the non-trade objectives for such implementation. Not placing a verifiable ceiling on them is problematic in terms of its possible exploitation for protectionist purposes and the implications this may have for the WTO's legitimacy.<sup>90</sup>

Similar problems arise in the linguistic meaning of the second non-trade concern – preservation of the environment. Paragraph 12 exempts payments made from the Aggregate Measurement of Support (AMS) calculation<sup>91</sup> where payments are made pursuant to a “clearly-defined government environmental or conservation programme” for the exact purposes specified by that programme, even if these are linked to agricultural production.<sup>92</sup> Any payment made in terms of compensation is limited to the cost incurred by fulfilling the requirements of the environmental programme.<sup>93</sup> Like the food security exemption, a significant degree of uncertainty is inherent in the meaning of the environmental provisions.<sup>94</sup> First, there is no definition of what constitutes an environmental/conservation programme for the purposes of the exemption. In particular, whether the environmental programmes covered by paragraph 12 merely include those which preserve the physical environment, particularly

---

<sup>90</sup> Such ‘gaps’ are very problematic for the legitimacy of the WTO as an organisation: see below.

<sup>91</sup> The AMS is a calculation which reflects the monetary equivalent of members' domestic support measures on a sector-wide basis from a 1986-88 base. Article 6:1 Agreement on Agriculture. Also see Annex 3: Calculation of the AMS. Note that following the July Framework Agreement (WTO, *Decision Adopted by the General Council August 1 2004*, WT/L/579, August 2, 2004, para 7, reiterated in the Draft Modalities, TN/AG/W/3, Articles I (definition) & 78-84), permitted levels of domestic support will be calculated in accordance with the Overall Trade Distorting Domestic Support (OTDS) which includes the final bound AMS (Draft Modalities, Articles 50-55), permitted product-specific (Draft Modalities, Articles 56-59) and non-product specific de minimis support (Draft Modalities, Article 62) and an agreed level of exempted support under Blue Box (Draft Modalities, Articles 65-75).

<sup>92</sup> Paragraph 12, para (a) Agreement on Agriculture.

<sup>93</sup> Paragraph 12 para (b) *ibid*.

<sup>94</sup> Developed nations are the primary users of the environmental exception, see Whalley, J., *Environmental Considerations in Agricultural Negotiations in the New WTO Round in AGRICULTURE AND THE NEW TRADE AGENDA*. This is not resolved by the Draft Modalities, Annex H (amendments Annex 2:12), TN/AG/W/3.

the rural landscape together with flora and fauna, or whether paragraph 12 also encompasses preservation of the cultural heritage, the rural community and fulfilment of a “balanced pattern of development” in rural areas<sup>95</sup> even though those issues are dealt with elsewhere in Annex 2.<sup>96</sup> Second, paragraph 12(a) states that such a programme must be “clearly-defined,” but there is no indication of the degree of clarity required, nor whether the degree of clarity is determined by the member who introduces the programme, or if it should be objectively verifiable. In terms of the payments made under the programme, whilst the amount paid is limited to the “extra cost” or income loss pursuant to compliance with the programme, paragraph 12 does not indicate whether payments should be limited to the initial start up costs of compliance, or if payments can be made on a continuous basis to offset on-going costs incurred by the producer for the duration of the programme.

Clearly textual ambiguity exists in both the programme construction and the duration of the payments. But rather than reflecting defects in drafting they may in fact be indicative of fundamental disagreements between members on what the scope of the obligation should be. That is, there was evidently some consensus that members should be able to use domestic support measures to pursue environmental goals. The lack of further prescription on the types of environmental policies which could be pursued, or even the way those policies should be implemented (beyond the general Green Box rules) is actually indicative of members’ general views of global environmental obligations contained in treaties operating outside the WTO and a fear that they may be forced to adhere to such norms by default if further information was included into the agreement. In this sense, rather than the text acting as the definitive statement on the use of domestic support measures to pursue environmental policies, in fact the text did not even attempt to resolve the issue at all.

---

<sup>95</sup> Rodgers, C.P., *Environmental Policy and the Reform of European Agriculture Law*, in *AGRICULTURE AND INTERNATIONAL TRADE: LAW, POLICY AND THE WTO* 277, 284 (Cardwell, M.N., Grossman, M.R., & Rodgers, C.P., Eds., 2003).

<sup>96</sup> Paras 9 & 10 address retirement programmes which inevitably impact on rural communities; See also para 13 addresses payments made through rural assistance programmes.

The final stage in the assessment of the Green Box rules' legitimacy is to compare the stated principles in the Preambles to the Marrakesh Agreement and the AoA with the rules as drafted in the Green Box which appear trade restrictive: so-called 'constructional coherence.' The core problem is revealed through members' differentiated approaches to agricultural policies' inevitable impact on the environment, food security and other non-trade goals agriculture's 'multifunctional character.' There is no universally accepted definition, but the OECD characterizes multifunctionality as:

"the existence of multiple commodity and non-commodity outputs that are jointly produced by agriculture; and the fact that some of the non-commodity outputs exhibit characteristics of externalities or public goods, with the result that markets do not function correctly."<sup>97</sup>

On this definition, it is axiomatic that agricultural production generates food, but concurrently it directly affects the shape of the landscape and the environment more generally through the use of pesticides and crop production methods; in addition, increased production potentially brings income to rural communities and stops population shift to the cities. Multifunctionality recognizes that these 'non-commodity outputs' may not be generated through policies which maximise efficiency. Agricultural policies designed to protect the environment would only be efficient in economic terms if the gains to the country implementing the policy were outweighed by the detriment suffered in trade terms by the country adversely affected by the policy.<sup>98</sup> This approach is problematic as measures aimed at non-trade concerns only enjoy Green Box exemption if they comply with the *chapeau* and specific requirements in Annex 2 AoA; otherwise such measures fall within the Aggregate Measurement of Support (AMS) and are subject to reduction commitments where members have such commitments in their schedules. Attributing this meaning to the language prioritises the free trade goal so any instruments used by members should be the least trade restrictive. Whilst this is an

---

<sup>97</sup> OECD, MULTIFUNCTIONALITY: TOWARDS AN ANALYTICAL FRAMEWORK, 7 (2001).

<sup>98</sup> This is the so-called Kaldor-Hicks efficiency, based on the Pareto Efficiency which describes the situation where "goods cannot be reallocated to make someone better off without making someone else worse off." See PINDYCK, R.S. & RUBINFELD, D.L., MICROECONOMICS 588 (4<sup>th</sup> edn., 1997) quoted in YARDSTICKS FOR "TRADE AND ENVIRONMENT, available at <http://www.jeanmonnet.program.org/papers/01/013701-04.html>. This calculation assumes that benefits and losses can be calculated in financial terms, whereas the benefits may actually be nebulous, though based on global welfare gains.

accepted meaning, the existing rule scheme, unchanged in its emphasis by the Draft Modalities, raises some doubts regarding the balance which the AoA sets between free trade and non-trade concerns in its rules vis-à-vis the balance it appears to set in its Preamble when read in conjunction with the Preamble to the Marrakesh Agreement.

The Preamble to the AoA states that the agreement's long-term objective is to "provide for substantial progressive reductions in agricultural support" and thereby "establish a fair and market-oriented agricultural trading system."<sup>99</sup> Immediately, this seems to place the emphasis on free trade and orient the agreement's rules towards this ideal. This understanding is supported by Annex 2's *chapeau*, which makes it clear that domestic support measures aimed at non-trade concerns will fall outside the AMS only if they have "no, or at most minimal, trade-distorting effects or effects."<sup>100</sup> Whilst the policy specific criteria in paragraphs 2 to 13 do not reiterate the free trade goal as such, they generally only provide exemption for support which is fully decoupled from production.<sup>101</sup> For example, government service programmes can only be provided under paragraph 2 if direct payments are not involved and also in the case of marketing and promotion services, provided that such services cannot be used as a device by sellers to reduce their selling price.<sup>102</sup> The separation of support from production allows market forces to operate so that the price for the goods reflects the true cost of production, rather than a deflated one: free trade is therefore achieved.

Paragraph 6 of the Preamble states a balance should be achieved between free trade and protecting non-trade concerns, but does not specify exactly how that balance should be realised or what emphasis should be placed on free trade to the detriment of non-trade concerns: a view that is supported by the Preamble to the Marrakesh Agreement. Some members, notably the EU and Japan, argue that agriculture's multifunctional character means that the best measure to employ to address the non-trade concern may not necessarily

---

<sup>99</sup> Paras 3 & 2 Agreement on Agriculture respectively.

<sup>100</sup> Annex 2:1 *ibid*.

<sup>101</sup> Paras 2, 6, 7(c); 8(c) 9(b), 10(c), 11(b), 13(c) Annex 2.

<sup>102</sup> Annex 2: 2(f).

be the least trade distorting. This is because the pursuit of non-commodity outputs, or more specifically non-trade concerns, in agricultural policies inevitably results in market dysfunction in any event, so members should be able to adopt measures which most appropriately achieve the non-trade goal, rather than those which minimise the adverse effect on trade.<sup>103</sup> Such members' interpretation of the balance required could be that they are using the least-trade restrictive measures available *in the light of* agriculture's unique multifunctional characteristics. Whilst this interpretation may not reflect the spirit of the agreement, nor be in line with the Appellate Body's factual interpretation of the obligations in relation to decoupled support, it is a plausible construction, particularly on the scope of paragraph 12, Annex 2, which requires members to institute a "clearly defined governmental environmental or conservation programme" which would have minimal effects on international agricultural trade.<sup>104</sup> When assessing whether the measure has minimal effects, a member may argue that they adopted a measure which had the least adverse effects taking agriculture's multifunctional character into account.

A number of conclusions can be drawn from the preceding analysis. The WTO's continued ability to exercise power over members' domestic agricultural policies through the Agreement on Agriculture's rules is based on members' acceptance that the rules are legitimate so they feel constrained to comply with them, and are not tempted to 'cheat.' Enacting rules through a specific process contained in the Marrakesh Agreement is important, but the rules themselves must possess specific qualities which persuade members to adhere to them despite the absence of external entity compelling adherence. Such qualities are contained in the linguistic constructions employed in the rules' text: in one sense, this draws on the methodological process which shapes our reaction to linguistic constructions where the rules must make 'sense' at the very basic level of meaning and also be consistent with members' understanding of the way that the general context of the overall WTO regulatory structure informs the rules (the secondary level of meaning). In

---

<sup>103</sup> Most notably the European Union and Japan, but see also WTO, *Note on Non-Trade Concern, G/AG/NG/W/36*, September 2 2000.

<sup>104</sup> *United States-Upland Cotton Appellate Body Report*, paras 332-334.

addition to these general considerations, the ideas underlying the specific rules must also 'fit' within the existing regulatory structure so that they conform to the WTO's *stated* principles and values (principle coherence); the rules must use linguistic constructions which convey the scope of the obligations (constructional clarity) and finally that those rules reflect the WTO's stated principles and values (constructional coherence). Examples of deficiencies in all these elements are clearly evident from the AoA's rules regulating non-trade concerns through domestic support measures.

The critical point is that such deficiencies indicate numerous ways in which rules can lack legitimacy, but they are actually symptomatic of deeper problems which flow from fundamental divisions amongst members on key issues. In other words linguistic gaps may arise from inappropriate drafting; but, such gaps more likely reflect members' fundamental disagreements at the connection between the secondary and highest levels of meaning (i.e. their knowledge of their rules and what they think the rules mean) which manifest themselves as a specific linguistic compromise in a specific instance, or deliberate omission as diplomatic conciliation outside the rules' formal structure is regarded as preferable to regulation. It is these deep divisions revealed as inadequacies in the rules' text that undermine the legitimacy of the WTO itself.

## VII. Rule Legitimacy and the WTO

Adopting a literary interpretation of rule legitimacy focuses on an evaluation of the rules' internal composition and form. Whilst it is evident from the preceding discussion that such an analysis is highly complex, it is open to challenge on the grounds that it only exposes inconsistencies and gaps in the rules' language, highlighting them for change, and/or assessing aspects as undesirable but sufficiently robust to withstand the rigours of members' lack of adherence particularly taking into consideration the existence of a highly effective dispute settlement process. Inherent in this criticism, is the view that a literary approach is linear, in the sense that it merely concentrates on a single dimension to the problem of textual difficulties – language – and has little to say about underlying tensions, like members'

domestic policies driving their response to the rules, the WTO's own objectives, or influences external to the organisation feeding into the interpretation of its rules like influential lobby groups for non-governmental organisations or multinational corporations for example.<sup>105</sup> The allegation is then that the literary approach does not attempt to show how all these variables fit together to offer *coherence* to the difficulties of WTO regulation at this level.<sup>106</sup>

An immediate response to such an allegation might be that a textual analysis is valuable in itself as it operates to focus members' attention on weak areas; also it reveals potential hotspots which could form the basis of dispute settlement proceedings if a conciliatory solution cannot be reached. On this view it is an easy step to find a causal connection between the textual ambiguity in the rules and an adverse impact on the WTO itself—a 'legitimacy deficit': if the rules do not address all aspects of a members' domestic agricultural policies, then it is not surprising that members would choose to exploit these loopholes to enable them to continue their practices.

Damage to the WTO is then measured in an empirical and intuitive sense: empirically, the greater the number of members failing to comply with the rules, the greater the damage to the WTO, as members' perceive that the WTO's ability to constrain their behaviour is diminished. At an intuitive level, if members pursue policies which are 'protectionist,' then this must have an impact on the WTO, built as it is on a free trade ethos. Even if these ideas are accepted at least at a very basic level, they are still very vulnerable to the observation that constructing rules at the international level is as much a diplomatic process as a literary one and therefore loopholes in the rules are inevitable; WTO members must be aware of this when joining and so the real effect of textual ambiguity on the WTO is less significant than it first appears. These criticisms are based on the assumption that literary problems are only helpful for the negotiators to bear in mind next time, but they offer little real insight into the reasons why rules lack the requisite 'compliance pull'.

---

<sup>105</sup> Such influence may take the form of *amicus curiae* briefs: see US-Shrimp/Turtle case.

<sup>106</sup> Simmonds, N.E., *The Changing Face of Private Law: Doctrinal Categories and the Regulatory State*, 2 LEGAL STUDIES 257, 258 (1982).

The picture which emerges is a complex and confused one where deficiencies may not be rectified by simply tightening up the odd sentence, or compiling more similarly drafted rules to plug what is conceived as a regulatory gap.

Drafting rules in the international sphere is not merely a question of finding the most appropriate words to address a particular policy problem. In her linguistic and grammatical selection, the 'drafter,' must also proceed on the basis of a series of assumptions about those who are in Allott's phraseology, the "cohesive elite"<sup>107</sup> who will be subject to the rules. The elite in this sense is not established by WTO membership *per se*, although this will be one way by which the group could be identified; rather it is identified as those who will be affected by the rules more broadly and who share similar values about the nature of rule-drafting at the international level so that when the drafter presents the completed rules, they need not be presented in a completely exhaustive way, but rather in a form which *sufficiently* conveys their meaning and purpose to those who will be subject to them, or whose behaviour may be informed by them.<sup>108</sup> This is not an argument about coherence *per se* because coherence is understood more in terms of the rule's own *de facto* application, its purpose, how it could be used to solve this and similar problems within an existing or new regulatory framework, although this will certainly be relevant;<sup>109</sup> instead, the drafter's task is an act of persuasion: by appealing to shared values through the medium of language, she must convince those who are, or will be subject to the rules that all parties are working towards a common objective – the diplomatic outcomes previously negotiated.

As Allott eloquently puts it in the context of academic commentaries on international law, the task is to produce a text

---

<sup>107</sup> ALLOTT, *supra* note 30 at 95.

<sup>108</sup> In this context states will be subject to the WTO rules, but in addition multinational corporations policies and NGO lobby groups' policies/campaigns will be influenced by their perception of the rules' content/scope.

<sup>109</sup> The way in which rules cohere can be seen in the nature of principle and constructional coherence discussed in section II above *infra*: on the notion of coherence in relation to international law rules see FRANCK, *supra* note 35 at 148.



“...presented in such a fashion and ... continued for so long as is necessary to produce a movement of assent in the mind of a sensible reader, on the assumption that the reader is not a Martian or even a Marxist, but a person who shares sufficient values of the writer to ensure that a dialogue between them is not a meaningless waste of time.”<sup>110</sup>

In one sense, this task of persuasion has a structural element which manifests itself in the form the rules take:<sup>111</sup> in the context of international agricultural trade, difficulties of political compromise in conjunction with a quickly evolving international trading environment may require broadly defined, rather than comprehensive and tightly drafted obligations to accommodate such volatility. Questions like- ‘what do we mean by ‘research’ in Annex 2:2(a) AoA;’ what specific types of ‘pest’ are covered in Annex 2:2(b);’ why should a WTO member justify why it wants to introduce an environmental programme under Annex 2:12;’ ‘what is food security for Annex 2:3?’ and ‘what is an environmental programme’ for Annex 2:12?’ - are actually illustrative of a range of questions both at a methodological and theoretical level which could be raised for every word adopted by the text drafter. But to address such questions by including a definition/justification of every possible ramification would be both impractical for the drafter and provide an impossibly complex and unwieldy text which may then be abandoned purely on this ground. Instead the ‘rules’ of the drafting process require that the fundamental ‘essence’ of the ideas is conveyed so that should litigation ensue, the task for the adjudicator is only to plug the apparent ‘loopholes’ leaving the remaining text largely untouched.<sup>112</sup>

The key therefore is to produce a text which, despite potential loopholes, still retains sufficient essence of the diplomatic outcome so that while those subject to the rules may choose not to adhere to the specific wording as a consequence of perceived textual deficiencies in the short-term, they are sufficiently persuaded by the rules as a whole that they will adhere to them in the long-term. Whilst such short-term defection clearly affects the WTO, it

---

<sup>110</sup> ALLOTT, *supra* note 30 at 95.

<sup>111</sup> This relates back to the notions of constructional clarity discussed above.

<sup>112</sup> ALLOTT, *supra* note 30 at 96. This accords with the general exhortation in Article 3:2 DSU that the task for the panel/Appellate Body is only to “clarify the existing provisions” of the WTO agreements and not to add to or reduce those obligations.

is arguable that long-term abandonment is much more critical. This is not just an argument advocating the avoidance of multiple deficiencies in the text where the more textual deficiencies in the rule are assessed on a cumulative basis, the more likely it is that the rule will be abandoned. This is because such an approach presupposes some sort of scientific process where specific words *automatically* convey the 'right' meaning to the members.<sup>113</sup> Instead, it goes beyond the mere empirical and centres on the methodological process through which the rules' fundamental essence must be conveyed through broadly defined obligations.

In choosing the appropriate text to address the diplomatic outcome, the 'drafter' proceeds on the assumption that all members of the cohesive elite share particular values, thereby diminishing the importance of exhaustive drafting.<sup>114</sup> The basic assumption is that members appreciate that words do not merely reflect their 'ordinary meaning' in the abstract, but are instead informed by the context for which they are employed.<sup>115</sup> Context in this sense refers not just to other words in the rules themselves, although this will be helpful; rather it means the overall political background in which the rules operate. This assertion does not mean that all members will agree on the way in which context should fully inform the term, but more that the context *should* inform it. For example, "direct payments to producers" in Annex 2:2 could in its widest definition apply to any person who "brings forth" or "produces" a product, as 'producer' is not defined at all in this section,<sup>116</sup> but in the light of the preceding and subsequent language of Annex 2:2, Article 6 on domestic support commitments for which Annex 2 is an exception and the context of the AoA as a whole, this would be a nonsensical interpretation, as it is evident from this context that 'producers' denotes 'agricultural producers.' Whilst all members may accept this assertion, they may go on and disagree about what constitutes an 'agricultural producer,' particularly whether an

---

<sup>113</sup> Edgeworth, B., *Legal Positivism and the philosophy of language: a critique of H.L.A. Hart's 'Descriptive Sociology'*, 6(2) LEGAL STUDIES 115, 120 (1986).

<sup>114</sup> ALLOTT, *supra* note 30 at 96.

<sup>115</sup> WITTGENSTEIN, L., PHILOSOPHICAL INVESTIGATIONS, §1, p. 2e (1953).

<sup>116</sup> There is no definition of agricultural producer in the definitions section in Article 1 Agreement on Agriculture either. See Appellate Body discussion on US-Cotton, paras 332 & 334.

agricultural producer needs to produce anything in order to fall within the term.

Consequential damage to the WTO in the light of specific internal inconsistencies in the text (internal clarity) or through gaps in the normative obligation which appear to flow from that obligation, (external clarity) as is the case here, might cause damage in the short-term because members argue over the scope of the obligation; but arguably disagreements over the way in which regulatory gaps of this nature should be plugged only reflects inevitable tensions between members and are not indicative of long-term abandonment.<sup>117</sup> This is because such defects are linear in nature and can be readily rectified through an adjudicatory process: there are other references to 'agricultural producer' in the remainder of the AoA's provisions including its preambular statements to allow the panel/Appellate Body to draw from these statements when interpreting the scope of the provision. Arguably the fact that the solution flows readily from the remainder of the text persuades the member that the gap in Annex 2 is a consequence of the nature of the international text drafting, than a deeper ideological flaw which could not be compensated for in the completed text. A more difficult problem relates to both principle coherence and constructional coherence: that is, when there is uncertainty of application in between the WTO's stated *principles* in the Preamble to the Marrakesh Agreement and those contained in the AoA's Preamble (principle coherence); and where there is an omission or conflict between the Agreement on Agriculture's *rules* in the Green Box for example and the stated principles and values of the WTO. In both cases, it is difficult to tell from the text alone how non-trade concerns should be addressed in the WTO scheme, especially what priority they should be accorded vis-à-vis its free trade ethos.

The difficulty in both these instances is that a hasty prophylaxis by the panels/Appellate Body by 'patching' one textual gap has fundamental implications for the WTO's entire regulatory framework and raises potential difficulties for the stated functions of the dispute settlement mechanism.<sup>118</sup>

---

<sup>117</sup> In one sense this might be interpreted as a basic structure within which interpretation can take place: Comments, *Jurisprudence and the Nature of Language* 42 WASH. L. REV. 847, 868 (1966-7).

<sup>118</sup> Or indeed by members negotiating a settlement based on the same regulatory structure with or without closing the gap.

For example, paragraph 6 of the Agreement on Agriculture's Preamble states that the reform programme should be instituted "having regard to non-trade concerns *including* food security and the need to protect the environment."<sup>119</sup> As argued earlier, this statement implies that food security and the environment are examples of non-trade concerns, but that the list could be wider, maybe even including broader ideas of sustainable development from the Preamble to the Marrakesh Agreement – however sustainable development is conceived in the context of the WTO. There is no further detail in the rules themselves, apart from a general exhortation to protect non-trade concerns in the future reform programme in Article 20, and specific rules on food security and environmental protection for the purposes of exemption from domestic support reduction commitments in Annex 2. This can be seen as a textual 'gap.' The difficulty is the way in which this gap could be filled: this is because the decision to include another non-trade concern immediately has wide-ranging implications for the AoA, the WTO and other regimes to which the non-trade concern could be linked. For example, if human rights generally are 'added' as a non-trade concern because a member wishes to introduce policies aimed at support for a general 'right to food,' this then raises questions about what priority should be accorded to them, in particular, what should the relationship between human rights ideas and the free trade goal be?<sup>120</sup> More complex questions also arise: if human rights are included in the AoA, should they then be extended to other areas of the WTO rules? If they are, what is the relationship between human rights obligations in other treaties and the WTO? What priority should interpretations from these treaties be accorded, if any? How might/should WTO regulation be 'transformed' by the human rights discourse and what implications will such 'hi-jacking' have for the interpretation of human rights in other human rights treaties?<sup>121</sup> This example does not seek to come to a decision on the difficult question of whether human rights issues should or should not be incorporated into the

---

<sup>119</sup> Emphasis added.

<sup>120</sup> Petersmann argues that the 'right to trade' might be viewed as a form of human rights: *Human Rights and International Trade Law: Defining and Connecting the Two Fields* in COTTIER ET AL, *supra* note 38 at 29 and 36.

<sup>121</sup> For a very interesting critique of Petersmann's approach see Alston, P., *Resisting the Acquisition of Human Rights by Trade Law: A Reply to Petersmann* 13 E.J. INT'L L. 815 (2002); see also CASS, D.Z., *THE CONSTITUTIONALIZATION OF THE WTO* (2005).

AoA, but is presented merely to illustrate that the solution imposed where there are principle or constructional coherence deficiencies in the rules has profound implications beyond the mere solution that is imposed in the instant case.

The inclusion of human rights in its conception as a ‘non-trade concern’ not currently covered specifically by the wording of the AoA to patch this type of regulatory ‘gap’ is illustrative of Fuller’s “polycentric” problem described in the first section.<sup>122</sup> If we see textual deficiencies arising in principle and constructional coherence as polycentric in the sense described by Fuller, then the method by which such gaps are patched is critical due to the potential cascade effect throughout the WTO structure.

At a substantive level, the choice to ‘add in’ a non-trade concern like human rights and accord it a specific role in agriculture immediately feeds into members’ domestic agricultural policies, their perception of how those policies should be constructed and the place that non-trade concerns have in that policy. Whilst they may support human rights ideals, members may not choose to pursue them through restrictive trade restrictive barriers and may in fact be actively opposed to such inclusion.<sup>123</sup> A failure in the text to address whether human rights belong to that category of ‘non-trade concerns’ not specified in the AoA might also be reflective of yet another instance where members cannot agree on *how* difficult issues should be resolved, but the point here is that the disagreement is so deep that it goes to the root of what individual members feel to be the purpose of WTO agreements. Arguably, this is not a problem that can be addressed either in the text-hence the inevitability of the gap in coverage-or the dispute settlement mechanism as it requires law creation, rather than mere innovation which is problematic

---

<sup>122</sup> On ‘polycentric tasks’ see Fuller, *supra* note 33. Categorizing a problem as polycentric means it is “many-centred” where a decision must be made between two outcomes: either outcome is correct, but each one is a different way in which the problem can be seen.

<sup>123</sup> E.g. Members of the Cairns’ Group actively oppose the use of trade restrictive measures to achieve non-trade objectives see *generally* The Cairns’ Group’s *Cartegena Declaration on International Agricultural Trade*, April 1 2005, available at [http://www.cairnsgroup.org/meetings/min27\\_communique.html](http://www.cairnsgroup.org/meetings/min27_communique.html).

given the limitations on adjudication in Article 3.2 Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU).<sup>124</sup>

Attempts to address these difficulties through adjudication in this way could lead to long term abandonment of the rules. Abandonment occurs because the solution proposed is unworkable as the implications for the AoA, other aspects of the WTO agreements and/or the members' own domestic agricultural policy are too profound.<sup>125</sup> The best way forward is to recognise the limits of international regulation and not to expect that deep underlying defects in the rules can be miraculously patched by the dispute settlement body. Members must either accept that compromise is inevitable and so agree on the 'best' solution they can in the circumstances, or alternatively leave a regulatory gap so difficult issues fall to be considered through diplomatic conciliation and not through adjudication. Our most important insight is appreciating what international trade regulation can achieve and what it cannot. Merely adding new rules on the basis that difficulties with the old ones can in some way be rectified by 'more of the same' is to ignore the complexities of rule construction at the international level with potentially damaging consequences to the entire WTO scheme, particularly in a difficult area like international agricultural trade where deep and fundamental divisions in the way that non-trade concerns should be regulated remain.

## VIII. Conclusion

Regulating international agricultural trade is difficult. In the light of growing concerns about how the WTO should respond to trade impacts on development, human rights and environmental issues, it is increasingly important that any solution address the complex interplay between these seemingly competing objectives. Only if these difficult issues are addressed,

---

<sup>124</sup> Members may also pursue bilateral solutions. On suggestions for dealing with polycentric problems see Fuller *supra* note 33, at 400.

<sup>125</sup> FULLER, *supra* note 33 at 403. It is clear that the panels are already aware of potential adverse consequences flowing from deciding difficult issues. The panel in the *GMO* dispute managed *not* to decide whether GM products were 'like' non-GM products: *European Communities-Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292 & 293/R, September 29 2006.

can the WTO remain an effective participant in international agricultural trade and international trade issues more generally.

Critical to the WTO's future role, is whether members continue to see it as legitimate: that is, whether members continue to regard its rules as binding in nature. In one sense, the WTO's rules are legitimate because they are enacted through a clearly identifiable process, but it is evident that broadly conceived obligations with apparent gaps in coverage might undermine the legitimacy of the WTO in a more subtle way. This is not to say that every linguistic ambiguity in the text will give rise to problems, but more that some apparent deficiencies are indicative of fundamental disagreements between members and cannot be resolved through the dispute settlement process without profound effects throughout the WTO regulatory framework.

It is these problems which undermine the legitimacy of the WTO as members abandon the rules. As attempts are made to conclude the Doha Round following its latest re-start, negotiators must appreciate that the 'right' solution cannot be founded on policy alone, but must instead take into consideration the complexities involved in translating a diplomatic settlement into a regulatory framework and the effects that textual deficiencies might have on any settlement's stability in the long term.