



Polluting the Future of the WTO

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The Wall Street Journal recently reported about the European Commission's latest bid to promote United Nations sustainable development (SD)-based 'global governance' (See "EU Trade Chief Poses WTO Rules in Energy" – WSJ 6/23/06). Although EU Trade Commissioner Mandelson has recommended that WTO Member States negotiate an energy treaty under WTO auspices to ensure global energy security and to enhance international 'economic harmonization', his appeal should be stripped of its rhetoric and recognized for what it truly is – an attempt to subject global energy production and distribution to EU SD regulation.

During the past decade, a new genre of disguised protectionist trade barriers (non-science and non-economics-based technical regulations and standards) premised on illusory environment (pollution) and health (SD) concerns has evolved. Once identified as a substantial threat to SD by European (mostly German)-funded UN agencies and non-governmental organizations (NGO pressure groups), these measures are then employed by creative EU bureaucrats to mask serious regional and national industry deficiencies. Coincidentally, these non-tariff barriers have proliferated at an alarming rate within the EU and many of its trading partners, as border tariff rates and government subsidies have been rapidly reduced. And, they may even serve to prevent a prompt and tidy completion of the current WTO Doha round of negotiations, if included within the round's modalities as WTO Director General Pascal Lamy has suggested.

In essence, Mr. Mandelson's call to add but another treaty to the existing panoply of half-baked UN-informed international agreements should be construed as nothing more than another disguised attempt to tie down (pollute) the world's leading economies with ostensibly 'fairer' but more onerous, costly and less efficient energy/environmental rules and regulations. EU industries, in particular, have found that the use of such technical measures can be very beneficial; they can serve to ensure the level global playing field they require in order to more effectively compete. Also, it has become increasingly clear how regulatory-minded EU Commission and member state government officials would find such a treaty to be empowering. Hamstrung by intra-regional squabbling over the scope of 'subsidiarity' governance rules and by Russian energy-roulette diplomacy, these bureaucrats would be anxious to impose political and economic control over foreign energy production and distribution sources. This would enable them to secure for EU consumers reliable delivery of badly needed energy, which they are currently unable to do.

Furthermore, Mr. Mandelson's recommendation betrays a faith in and cultural preference for the power of regulations over the power of markets. Like many socialists in government, academia, and especially, civil society, he believes that there is an overarching 'public good' to be realized from artificially shaping, limiting or otherwise redefining (polluting) market forces, private property rights and science and technology so that they are more 'moral, fair and accessible'. However, by promoting social parity over social progress, EU regulators have failed miserably in

assessing the economic and legal impacts of such SD-related regulations and standards on industry, technology and society. Indeed, it is arguable that Europe's high-minded 'public international goods' talk is rather cheap and hollow, and that the serious maladies being covered up go far beyond the competitiveness of European industries. In fact, there is increasing evidence that such ills have infected Europe's core ability to discover and create new inventions and have rendered its universities and industries unable to commercialize their inventions into market-relevant and socially beneficial innovations. The ongoing debate/consultation over EU regional patent and innovation policy seems to reflect these difficulties.¹

Mr. Mandelson's energy treaty proposal, moreover, may reflect but another attempt to insert non-trade concerns within trade agreements to change (pollute) international trade law; i.e., to better 'harmonize' WTO with non-WTO law. Emerging economies, such as Brazil and Argentina, for example, have relied on European (mostly French) and NGO coaching to learn how to better articulate and expand the scope of such non-trade concepts as, 'open source' and 'universal access' to healthcare and information technology know-how, and access and benefit sharing. They have also learned how to employ the tactic of 'regime shifting' – i.e., to insert non-WTO human rights, environment and health law into WTO and World Intellectual Property Organization (WIPO) fora and to expand the mandates of non-WTO and non-WIPO institutions (e.g., the World Health Organization (WHO), UN High Commission on Human Rights (UNHCHR), the UN Environment Program (UNEP), etc.) so that they now address trade and innovation issues. Their immediate goal has been to secure at-or-below-cost HIV/AIDS, malaria, tuberculosis, and other drugs by playing on public sympathies for developing country victims; and they have achieved this by exploiting the several derogations contained within the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. Their ultimate objective, however, is to restructure the international framework for intellectual property and innovation (WTO and WIPO) law. They seek to change the existing framework, which is currently based on the common law notion of exclusive private property rights, in order to expedite socialist-style technology and information transfers and the global redistribution of wealth at concession rate prices.

In this regard, Mr. Mandelson's appeal is conspicuously consistent with the thinking of WTO Director General Pascal Lamy, who recently delivered two very important speeches during this past May (on 5/19 and 5/30). In them, he outlines one possible future course for the WTO as a multilateral institution, along with its 'special' relationship to the UN network of international organizations. Specifically, Mr. Lamy speaks of the relationship of trade to non-trade law. Although he focuses on the need to harmonize international trade, environment and health treaty law, which is now governed largely by the GATT (1994) and the WTO Sanitary and Phytosanitary (SPS), Technical Barriers to Trade (TBT), and TRIPS Agreements, he also aspires to articulate broader ideas. One such idea is to gradually transfer a portion of the WTO's jurisdictional and governance responsibilities to the UNEP, the WHO, the UNHCHR, etc., so that other than pure trade-related science, technology, intellectual property and innovation-related issues may fall increasingly under less technical and commercial *UN* auspices. Alternatively, he suggests that it is necessary to expand the jurisdictional and governance responsibilities of the WTO so that it may encompass and address *all* trade *and* non-trade cross-cutting issues together under one roof.

In his May 19th speech, in particular, Mr. Lamy focuses on this latter possibility. Specifically, he discusses how the available GATT Article XX chapeau and exceptions from the WTO Agreements' general trade principles permit WTO Member States to pursue non-trade policies without fear of violating WTO rules. He argues that, "WTO Members' trade restrictions imposed to implement non-trade considerations, will be able to prevail over WTO market access obligations *so long as* they are not protectionist ... *Absent protectionism*, a WTO restriction based on non-WTO norms, will trump WTO norms on market access" (emphasis added). Obviously, the Director General has stepped out on a limb to candidly acknowledge that the WTO treaties and accompanying jurisprudence place important substantive technical limitations on the ability of WTO Member governments to utilize non-trade measures (environment, health and safety (EHS) regulations and standards) to 'protect' home-country industry competitiveness.

Since the proof is usually in the pudding, however, it is the EU Commission that should be most concerned. During the past several years, more than sufficient empirical and anecdotal evidence has been adduced by international trade and regulatory scholars which demonstrates, beyond a reasonable doubt, that many non-trade rules (environment, health, safety and consumer choice-related regulations and standards often premised on the precautionary principle) amount to nothing more than disguised protectionist barriers to trade. These studies also show how such measures represent *other than* the least trade-restrictive alternatives available to achieve what would otherwise be legitimate public policy goals. Hence, to state the inverse of Mr. Lamy's proposition, there are arguably multiple instances in which EU regulatory protectionism must yield to non-EU market access demands.

To resolve these legal inconsistencies and diffuse international political tensions, transatlantic government and industry officials and intellectuals must thoughtfully and openly ask themselves about the best possible future role for the WTO. I recently enjoyed a frank conversation about this with WTO Deputy Director General, Rufus Yerxa, who spoke openly at the Carnegie Endowment for International Peace about the subject matter of Mr. Lamy's two speeches.²

Experts can begin by asking themselves the following difficult questions: Is the WTO any longer to be considered a treaty/contract (instrument) - facilitating institution that promotes adherence to the rule of law, as agreed upon between willing negotiating parties? Or, is it now to be viewed more as a *global* regulatory and standards-based forum to facilitate international economic harmonization and inter-organizational governance that spans beyond commercial trade? Should the relationship between trade and non-trade law, as interpreted by WTO dispute resolution bodies, be premised on the time-tested notion of 'shared sovereignty' or on an evolving supranational UN global governance model which is likely to be less than transparent and publicly accountable? And, if it is concluded that harmonization rather than technological and economic advancement is the WTO's primary role, will it be consistent with EU or U.S. interests – i.e., will it be fixed at the level favored by Europe or by the U.S.?

Perhaps the answers to these questions will determine whether the U.S. government and certain of its allies which, for the most part, believe in the power of free markets, private property and individual-based innovation to preserve international peace and security, will expand their



multilateral engagements beyond the WTO, or otherwise seek, on national sovereignty grounds, to retain their independence, and consequently, their global leadership.

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¹ See “Study Evaluating the Knowledge Economy – What Are Patents Actually Worth? – The Value of Patents for Today’s Economy and Society” (5/9/05) at:

(http://ec.europa.eu/internal_market/indprop/docs/patent/studies/patentstudy-report_en.pdf) ; “Future Patent Policy in Europe – Preliminary Findings: Issues for Debate”, European Commission (June 2006), at: (http://ec.europa.eu/internal_market/indprop/docs/patent/preliminary_findings_en.pdf).

² See “Conversation with Rufus Yerxa, WTO Deputy Director-General, on the Doha Round”, Carnegie Endowment for International Peace (5/24/06), at:

(<http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=888&&prog=zgp&proj=zted>).