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AN ANALYSIS OF PASCAL LAMY'S PROPOSAL ON COLLECTIVE PREFERENCES

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ABSTRACT

In September 2004, then-European Commissioner for Trade Pascal Lamy released his study on the political challenge of 'collective preferences' for the world trading system. Collective preferences cause a problem for the WTO if the resulting measure violates WTO rules and yet the measure is too popular in the regulating country for the government to withdraw it. The paradigmatic example is *EC – Hormones* in which the European Commission could not comply because of contrary popular and parliamentary opinion. To address such circumstances, Lamy proposes the negotiation of a new WTO safeguard that would permit governments to retain strongly-supported measures provided that compensation is paid. This article analyzes Lamy's paper and discusses the many challenges to validating a collective preference. The article posits that whether a new safeguard is needed depends in part on the leeway that WTO rules provide for legitimate domestic measures. The article concludes that while Lamy's purpose may be worthy, his proposal has several weaknesses, and enacting it in the WTO is highly unlikely.

INTRODUCTION

As he approached the end of his term as European Commissioner for Trade, Pascal Lamy initiated a study on the political challenge of 'collective preferences' for the world trading system. The project proved controversial and Lamy's ideas received considerable criticism.[1] When his paper was completed in September 2004,[2] it did not emerge with the imprimatur of the Commission.

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[1] See, e.g., Guy de Jonquieres, 'Lamy Studies Radical Idea for Imports Veto', *Financial Times*, 6 February 2004, 9; (Editorial), 'Lamy's Big Idea', *Financial Times*, 10 February 2004, 14; 'EU "Collective Preferences" Concept Rings Alarm Bells in Washington', *Food Chemical News*, 12 April 2004, 25; 'UNICE Slams Lamy Over "Collective Preferences"', *European Report*, 1 May 2004.

[2] Pascal Lamy, 'The Emergence of Collective Preferences in International Trade: Implications for Regulating Globalisation', 15 September 2004, http://europa.eu.int/comm/archives/commission_1999_2004/lamy/speeches_articles/indexpldat_en.htm#2004 [hereinafter 'Lamy Paper'] (visited 8 January 2005).

Still, Lamy's ideas merit attention and will be discussed in this article, beginning with a brief summary of Lamy's thesis.

Lamy defines 'collective preferences' as 'the end result of choices made by human communities that apply to the community as a whole'.[3] The community might be a nation, a subnational unit, or an international unit. Over the centuries, he explains, socially-defined preferences enable human progress and serve as markers of identity. Individual choices are synthesized through political debate via the governmental institutions inside the community.

Lamy contends that Europe has collective preferences for multilateralism, environmental protection, food safety, cultural diversity, public provision of education and health care, precaution in biotechnology, and welfare rights. Any such collective preference is 'not set in stone', he acknowledges, but rather evolves over time.[4] He also points out that collective preferences 'are not always rational; they are forged by political experience' within a community.[5]

Outside the community, collective preferences may collide because 'there is no legitimate higher authority, [and] no world government, to act as referee' and ensure that a global collective preference emerges.[6] This governance gap complicates international trade. As Lamy explains, 'Traded goods and services are both an embodiment of and vehicle for the collective preferences of the countries producing them; they then become an interface with the collective preferences of the consumer country'.[7] Although this phenomenon is not new, as Lamy recognizes, he asserts that only recently has this value interface become a key feature of international trade.[8] Lamy points to three factors promoting this development: (1) lower customs duties, (2) greater 'ideological content' of goods and services, and (3) greater awareness of citizens and consumers.

Although Lamy doubts that globalization threatens collective preferences, he points out that incompatibility problems may arise. Lamy views the WTO disputes on hormones, shrimp, and asbestos as disputes about collective preferences, and predicts that there will be more of such disputes. He expresses concern that globalization and the World Trade Organization (WTO) may be rejected by a public opinion that sees international trade and WTO rules as a threat to nationally-chosen collective preferences. The 'sudden emergence' and 'new difficulty' of collective preferences demonstrates the need for governments to respond, he says.[9]

The response Lamy proposes is for the WTO to defer to national collective preferences. In particular, he urges formal guarantees that have a legal and a

[3] Lamy Paper, above n 2, at 2. The tension between individual human preferences and collectivism in preferences is not discussed in Lamy's paper, or in this article.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid, at 3.

[8] Ibid.

[9] Ibid, at 5, 7.

'symbolic significance'.[10] With regard to future trade liberalization, Lamy suggests that 'it is advisable not to push for integration in areas rich in collective preferences'.[11] With regard to future WTO rules, Lamy points to the possibility of introducing an additional safeguard provision.

Such a safeguard would function as an 'insurance policy' to give a guarantee that trade integration will not intrude on legitimate collective preferences or be a threat to social choices.[12] In order to be justified in invoking this clause, a government would have to demonstrate a coherent underlying social demand in its country and show that the measure being challenged is consistent with that demand. Lamy's paper suggests that collective preferences to be acknowledged cannot include protectionism.

As I read Lamy's paper, he makes a distinction between the desire to insulate a domestic market from foreign competition and the protection of particular social values. Lamy is not seeking to provide more opportunities for mercantilism or autarky. Rather, he is implicitly distinguishing between wealth-generation values of a society and other social values like environmental quality, cultural diversity, or social equity. Lamy wants to preserve opportunities for values not centered on wealth.

Lamy distinguishes his proposal for a new safeguard clause from the existing WTO Agreement on Safeguards. One difference is that a government invoking the new safeguard would have to provide immediate compensation.[13] Lamy suggests that compensation could be a payment to affected exporters in other countries, or, in the case of harm to developing countries, could be the provision of trade-related technical assistance. Lamy favors the principle of compensation because a country making social choices has a 'responsibility to bear the external cost of those measures'.[14] Another difference from the current WTO safeguard is that a country wishing to use the new escape would have to conduct an internal review of the collective preference in order to find out whether it is well-founded. This review would entail widespread consultation or further scientific research. If the preference is 'unwarranted', there should be an effort to educate people with a view to changing their preferences.[15]

[10] Ibid, at 8.

[11] Ibid, at 9 (internal footnote omitted).

[12] Ibid, at 10.

[13] Under the WTO Agreement on Safeguards, a member invoking a safeguard is required to 'endeavour' to maintain a substantially equivalent level of concessions. Uruguay Round Agreement on Safeguards, Article. 8.1. The members concerned may agree on any adequate means of 'trade compensation for the adverse effects of the measure on their trade'. In the absence of suitable compensation, the affected exporting members may engage in self-help to retaliate. Ibid, Article 8.2. This right to retaliate may not be exercised for the first three years of the safeguard provided that the safeguard conforms to the Agreement and that there has been an absolute increase in imports. Ibid, Article 8.3.

[14] Above n 2, at 11.

[15] Ibid.

Lamy's paper is highly nuanced and thus hard to capsulate. Still, this short summary can serve as a basis for an analysis of the ideas in Lamy's paper.

The purpose of this article is to contribute to the international debate on 'collective preferences', and to offer some specific comments on Lamy's paper and its proposal for a collective preference safeguard. Lamy is currently a candidate to become WTO Director-General, and that selection is several months away as of this writing. Even if he does not become the Director-General, Lamy's intellectual talents assure that he will continue to have influence in the international economic arena.

The article proceeds in five parts: Part I examines the significance of the collective preference problem and takes note of some proposals that predate Lamy's paper. Part II discusses the many challenges to validating a collective preference. Part III considers whether Lamy's proposal would add anything new to the WTO and concludes that it would. Part IV takes note of the distinction between inwardly-directed and outwardly-directed preferences and their different dynamics. Part V posits that whether a new safeguard is needed depends in large part on whether the interpretation of existing WTO rules provides sufficient leeway for diverse and legitimate domestic measures.

I. THE SIGNIFICANCE OF THE COLLECTIVE PREFERENCE PROBLEM

The problem that Lamy addresses is real. Countries will often adopt different public policies, and, as Lamy says, trade can become a 'natural point of intersection for different systems of collective preferences'.[16] Clashing or distinctive collective preferences between governments have led to trade disputes (e.g. *EC – Hormones*), and will assuredly do so in the future. When WTO rules inhibit domestic autonomy, that can undermine public support for the trading system.[17]

Although Lamy's paper has been criticized for being protectionist, or unintentionally opening the door to protectionism, such criticisms are poorly aimed. Protection does not need to insinuate its way into the trading system. It is already legally present in the WTO rules that permit (or even encourage) tariffs, anti-dumping duties, special and differential treatment, China-specific safeguards, etc. Stakeholders who want to oppose protection should focus on those pervasive practices inside the system, rather than cavil at Lamy's efforts to enable the WTO to better accommodate democratic choice. Lamy's proposal should be evaluated on its own terms, not dismissed simply because it may inhibit specific cross-border transactions. After all, the rationale for

[16] Ibid, at 3.

[17] See Marco C. E. J. Bronckers, 'Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO', 2 JIEL (1999) 547; Bruce Stokes, 'New Trade Barriers: National Preferences', *National Journal*, 24 April 2004, 1276.

Lamy's project is to maintain the political consensus in favor of the trade-liberalizing function of the WTO.[18]

That noted, one might speculate on what a new safeguard rule would mean for global economic efficiency. Assume that Country A has a collective preference that has been ruled a WTO violation (e.g. a hormone ban), and the government of A decides to keep the measure anyway. Under current WTO practice, the complaining country will be authorized to impose prohibitive tariffs on A. Such a trade disruption lowers economic efficiency. This disruption would not happen if A compensates the complaining country by granting it more trade access or by paying cash. Thus, if Lamy's plan avoids an authorization of 'suspension of concessions or other obligations' (SCOO),[19] that avoidance could engender a more efficient outcome.

The calculation gets more complicated, however, when one also considers the impact of Lamy's proposal on the adoption of new collective preference measures by Country A. If trade sanctions against it can now be avoided, then A may be more likely to succumb to the gratification of collective preferences through measures that violate WTO rules. Whether an ensuing new collective preference is efficient is indeterminate in the abstract.

Although the disposition of collective preferences is a challenge for the trading system, such challenges are hardly as new as Lamy asserts. Perhaps collective preference clashes do have a greater saliency now than they did 20 or 100 years ago. Still, the issue of social policies embedded in traded goods is hardly a new challenge.[20] The need to provide space for national policies was the motivation for negotiations in 1927 regarding the exceptions for the proposed International Convention for the Abolition of Import and Export Prohibitions and Restrictions.[21] Those exceptions served as the model for Article XX of the General Agreement on Tariffs and Trade (GATT). In characterizing the collective preferences debate as a contemporary phenomenon, Lamy's paper may give the reader the mistaken impression that GATT and WTO law were not written to accommodate collective preferences. This neglect of history leads to a distortion in Lamy's analysis because he does not consider the extent to which a more flexible interpretation of the trade law

[18] See Laurence R. Helfer, 'Constitutional Analogies in the International Legal System', 37 Loyola of Los Angeles Law Review 193 (2003), at 231 (noting that escape mechanisms provide flexibility to respond to pressures from domestic interest groups so as to avoid government exit from the treaty).

[19] See Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), art. 22.7.

[20] See Josef Grunzel, *Economic Protectionism* (Oxford: Clarendon Press, 1916) 192–99 (discussing 'Protection by Concerted Popular Action').

[21] International Convention for the Abolition of Import and Export Prohibitions and Restrictions, done at Geneva, 8 November 1927, 46 U.S. Statutes at Large 2461, arts. 4, 5 (not in force).

general exceptions[22] could produce a solution to his concerns about WTO legitimacy. Indeed, in two of the examples that he points to (asbestos and shrimp-turtle), the GATT Article XX(b) and (g) exceptions at issue did provide space for the national preference being challenged.

That Lamy has overlooked some of the important literature is also noticeable in his discussion of the 'interface' function. John H. Jackson presented the interface concept in his influential 1989 book *The World Trading System*.[23] Alongside an exposition of the basics of the traditional GATT safeguard, Jackson noted that 'In a world of increasing economic interdependence, there may be additional arguments which support safeguard programs'.[24] The situation Jackson was addressing at the time was the need to allow 'independent choice of economic systems for societies' and to 'prevent too much pressure for change of the domestic economic structure resulting from increased international trade originating in economies which are structured differently'.[25] The collective preferences considered by Jackson in 1989 are perhaps more structural than the ones being considered by Lamy today. Yet both boil down to the clash of national values and ideologies played out in the trading arena.

Other analysts have also suggested the need to expand the availability of a safeguard for national policies. In 1996, Dani Rodrik proposed a 'social-safeguards' clause for labor standards.[26] According to Rodrik, it is 'axiomatic that no nation has to maintain free trade with a country or in a specific product if doing so would require violating a widely held ethical standard or social preference at home'.[27] In 2001, the team of Nicholas Perdikis, William A. Kerr, and Jill E. Hobbs suggested the negotiation of a WTO Agreement on Trade Related Aspects of Consumer Concerns that would distinguish

[22] See General Agreement on Tariffs and Trade 1994 (GATT), Articles XX, XXI; General Agreement on Trade in Services (GATS), arts. XIV, XIV *bis*, Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Articles 13, 17, 30, 73. All of these exceptions can concern collective preferences. Several major World Trade Organization (WTO) agreements overseeing domestic policy do not contain general exceptions – namely, the Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Uruguay Round Agreement on Technical Barriers to Trade (TBT Agreement), the Uruguay Round Agreement on Agriculture, and the Uruguay Round Agreement on Subsidies and Countervailing Measures (SCM Agreement).

[23] John H. Jackson, *The World Trading System* (Cambridge: MIT Press, 1992). Jackson's attention to the 'interface' problem goes back at least as early as 1978. Ibid, at 378.

[24] Ibid, 218, 305.

[25] Ibid, at 152–53. See also John H. Jackson, 'Global Economics and International Economic Law', 1 JIEL 1 (1998), at 21 (discussing 'interface' as a principle of managing interdependence).

[26] Dani Rodrik, 'Labor Standards in International Trade: Do They Matter and What Do We Do About Them?', in Robert Z. Lawrence, Dani Rodrik and John Whalley, *Emerging Agenda for Global Trade: High Stakes for Developing Countries* (Washington: Overseas Development Council, 1996) 35, 62. Rodrik introduced the idea in 1995.

[27] Rodrik, above n 26, at 63 (emphasis deleted).

consumer-based trade restrictions from producer-based restrictions.[28] Such an Agreement could permit governments to impose trade barriers based on consumer concerns, subject to paying compensation set through compulsory arbitration. To assist governments in evaluating the existence and intensity of consumer concerns, the authors called for an international Commission on Consumer Issues and Trade. In 2004, Jagdish Bhagwati suggested that the WTO show more flexibility when the Appellate Body 'finds against legislative or executive actions that are virtually dictated by public opinion'.[29] In Bhagwati's proposal, the implicated government would 'make a tort payment to the injured industry' based on the profits lost by its exporters.[30] Lamy's paper does not consider any of these proposals.

II. VALIDATING COLLECTIVE PREFERENCES

One of the most interesting parts of Lamy's paper is his discussion of the identification and validation of collective preferences. Two dialogic processes are noted. First, a government wishing to use the new safeguard would have to conduct an internal review of the policy in dispute. The discussion in Lamy's paper is sketchy, but he seems to be saying that the government would instigate a reassessment of the collective preference to see whether it is a 'genuine' social expression and to see whether it is warranted.[31] If found to be 'unwarranted', then there would be an effort to educate people with a view to changing their preferences.[32] The second process is that a government would have to demonstrate to the WTO the genuineness of its collective preference by showing a coherent underlying social demand.[33] Lamy does not elaborate details for either process.

An implicit yet unexamined assumption in Lamy's paper is that a popularly-supported governmental policy has more international valence than it would without that support. In other words, Lamy seems to be saying that the WTO should show greater respect for broad and/or intense public opinion than for policies chosen through political representation, technocratic expertise, or judicial authority.

As applied to the WTO, this is a revolutionary concept. The self-perception of the WTO is an organization comprised of impermeable 'Members'. At home, the members might be a democratic state (e.g. France), non-democratic state (e.g. Myanmar), or a non-state customs territory (e.g. Taiwan). Yet inside the WTO, membership is homologous and those three categories

[28] Nicholas Perdikis, William A. Kerr and Jill E. Hobbs, 'Reforming the WTO to Defuse Potential Trade Conflicts in Genetically Modified Goods', 24 The World Economy (2001) 379, at 394–97.

[29] Jagdish Bhagwati, *In Defense of Globalization* (New York: Oxford University Press, 2004) 152.

[30] Ibid.

[31] Above n 2, at 8.

[32] Ibid, at 11.

[33] Ibid, at 10.

appear to lack relevance. As a consequence, no WTO rule or status hinges on the support of public opinion within a country.[34]

Lamy does not discuss the costs and benefits of piercing the unitary member with respect to state responsibility. The paradigm of WTO decision-making is that a government speaks for its citizens, and so the WTO does not normally peer inside the membrane of a government.[35] For example, the WTO does not require members to demonstrate parliamentary approval for joining the WTO or agreeing to a treaty amendment.[36] Consequently, Lamy makes an immoderate suggestion in saying that whether a collective preference ought to qualify for a safeguard depends on the objective existence of an underlying public demand. Typically in the WTO, a government's mere assertion of a position is conclusive even if the position fails to reflect popular will within that country.[37]

Lamy's paper elides this normative issue as well as the practical problems the WTO faces in validating a collective preference. Such validation will be difficult enough for the European Union or the United States, but how is it to be done for China or Cuba? Moreover, if citizen support is to be a precondition for a collective preference safeguard, then perhaps it should also be a precondition for a regular safeguard in the WTO.[38] In addition, I see no basis for having the WTO inquire about citizen preferences only in instances when trade rules are being violated, and not when trade rules are being negotiated.

[34] The closest that WTO law gets is Article 3.1 of the Uruguay Round Agreement on Safeguards, which calls for a 'public hearing' in which interested parties can present their views on whether a safeguard would be in the public interest. See also Uruguay Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Articles 5.1, 5.4 (requiring the initiation of antidumping investigation when proposed on behalf of the domestic industry, with no status provided for contrary public opinion), and the parallel provision in Article 11.4 of the SCM Agreement.

[35] A few contrary rules exist: One area where the member's veil has been lifted is the arbitral awards under DSU Article 21.3. That provision provides for setting the 'reasonable period of time' for implementation. A norm that has developed is that implementation requiring a legislative change is likely to get more time than implementation needing only an administrative change. See Pierre Monnier, 'The Time to Comply with an Adverse WTO Ruling', 35(5) Journal of World Trade (2001) 825. In other words, provisions of internal law can be justifications for getting more time to perform a treaty. Some veil piercing can also be seen in GATT Article XXVIII *bis* 3(a) (individual industries).

[36] See Marrakesh Agreement Establishing the World Trade Organization, Article X:1 (expressing no requirement for parliamentary approval of a member's acceptance of WTO amendment). This absence of a parliamentary approval requirement is consistent with that of other major international organizations. I am unaware of any evidence supporting the assertion by the WTO Secretariat that parliamentary approval of WTO 'decisions' is the norm. See WTO Secretariat, 'The WTO . . . In Brief', http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm (visited 8 January 2005) ('Virtually all decisions in the WTO are taken by consensus among all member countries and they are ratified by members' parliaments'.).

[37] See WTO Secretariat, 'WTO Policy Issues for Parliamentarians', at 13, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (visited 8 January 2005) ('If the claim that 'governments do not represent the interests of citizens' were true, then it is something that citizens need to correct at home. It is not something that an inter-governmental body like WTO can deal with'.).

[38] The Agreement on Safeguards, Article 3.1, requires governments to entertain comments from interested parties regarding whether the safeguard would be 'in the public interest'. No WTO caselaw has

Another practical problem in detecting public preferences is what to do about untoward government influence in shaping those preferences.[39] This concern was identified by the panel in *European Communities – Trade Description of Sardines*, and in particular its reference to 'self-justifying' regulatory trade barriers.[40] If government action has helped to create irrational yet strongly-held consumer preferences, should such preferences qualify for the new safeguard? Lamy does not explore that conundrum.

Lamy does not present details on how a WTO Member would show that a preference is based on an underlying social demand rather than on special-interest politics. As I understand his proposal, the mere existence of a law would not be enough to show a collective preference even if the law contains preambular statements expressing a collective preference. Lamy is demanding more validation, but he does not explain how to achieve it.[41]

Holding a referendum is one possibility; polling is another. If polling is used, it will be important to formulate the question carefully and to explain why the WTO ruled against the measure. An additional problem might ensue if the WTO conducts the poll, because nationalism might influence the results.

Lamy's suggestions for in-country validation are constructive. He hopes that a collective preference safeguard would lead to better dialogue within a polity as the government engages in deliberation with the public about a

suggested that a panel can second-guess whether a government properly decided whether a safeguard was in the public interest or enjoyed broad citizen support. In general, WTO rules do not require a government to take into account the costs of its own trade measure to its own economy. In *US – Gasoline*, the Appellate Body held that the US regulation violated the WTO because, *inter alia*, the US government had not taken into account the cost of its regulation on *foreign* producers. WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 28. No parallel jurisprudence requires governments to take into account homeland costs.

[39] See Howard F. Chang, 'Risk Regulation, Endogenous Public Concerns, and the Hormones Dispute: Nothing to Fear But Fear Itself?', August 2003, University of Pennsylvania Law School Public Law and Legal Theory Research Paper Series, No. 39, available on SSRN.

[40] See WTO Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R, adopted as modified by the Appellate Body 23 October 2002, para 7.127 (discussing the danger that WTO Members could shape consumer expectations through regulatory intervention). The same issue had arisen in a GATT case; see GATT Panel Report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, adopted 10 November 1987, para 5.9(b) (discussing government measures that may harden consumer preferences).

[41] Lamy could have strengthened his argument by taking note of the Appellate Body's decision in *EC – Hormones*, in which the Appellate Body reversed the panel's finding of a violation of Article 5.5 of the SPS Agreement. See WTO Appellate Body Report, *European Communities – EC Measures Concerning Meat and Meat Products (Hormones)* (*EC – Hormones*), WT/DS26,48/AB/R, adopted 13 February 1998, para 246. In its decision, the Appellate Body disagreed that there was 'discrimination or a disguised restriction on international trade' because, according to the Appellate Body, the record before it showed 'the depth and extent of the anxieties' and 'the intense concern of consumers' within the European Communities. Ibid, paras 242, 245. Thus, in that case, the Appellate Body seemingly identified a collective preference. The *Hormones* case is discussed in Reinhard Quick and Andreas Blüthner, 'Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling in the WTO *Hormones Case*', 2 JIEL (1999) 603.

particular collective preference.[42] The *EC – Hormones* case is an instance where a discursive process for clarifying social choice could have been useful in encouraging the public to reconsider the scientific evidence, or lack thereof, underlying the hormone ban. My impression is that the WTO's rejection of the European Commission's defense did *not* trigger any dialectic reconsideration within Europe as to the wisdom of the meat hormone ban. If Lamy's new safeguard would promote a more robust community dialogue, that could be a constructive contribution.

Rodrik's 1996 proposal provides some detail regarding validation at the national level. Rodrik suggests that individuals seeking a social safeguard would petition their government and then the government would hold a public hearing where all sides would express their views.[43] Following the hearing, the administrative agency would decide whether the claim for the safeguard has broad-based public support. Rodrik would *require* testimony from groups whose material interests would be adversely affected by the requested trade restriction. Unless such groups support the safeguard, it would not be imposed. Rodrik does not seem to address whether there is to be any validation at the WTO of the existence of the 'social preference'.[44]

In my view, there may not be a reliable way for the WTO to objectively verify the existence of a collective preference within a country. Moreover, the WTO might put itself on thin ice by seeking to distinguish between a duly-enacted law that reflects a collective preference and one that does not. The path of least resistance might be to accept self-certification of a collective preference combined with a minimum procedural requirement for dialogue.

Although Lamy's paper focuses on internal policy review within the country seeking to exercise a defensive safeguard, one can also imagine the value of public discussion in the country lodging a WTO complaint. For example, one wonders if Canada's loss in the *EC – Asbestos* case led to any social discourse or soul-searching within Canada about the practice of producing or exporting asbestos. My impression is that it did not. There could also be benefit in stimulating a public discussion before a government commences litigation in the WTO. In the *EC – Hormones* dispute, I do not know whether US public opinion would have supported lodging the case against Europe.

Social dialogue can be of great value in a defendant country losing a WTO case. This could occur if a special-interest provision is found to be WTO-illegal, and then public opinion gets provoked in favor of repeal. At present, WTO rules do not envisage any connection between the surveillance carried

[42] The importance of promoting deliberation was noted by Jan Tumlir in his Wincott Memorial Lecture in 1984. Jan Tumlir, *Economic Policy as a Constitutional Problem* (London: Institute of Economic Affairs, 1984) 12–13.

[43] Above n 26, at 63–65.

[44] Ibid, at 63.

out by the WTO Dispute Settlement Body (DSB)[45] and the domestic process for considering how and whether to come into compliance. By improving the transparency of the DSB, the WTO could tap into the power of public opinion. The greater ensuing public awareness might promote compliance if the public comes to understand why the contested regulation violates a WTO rule and why its government's defense at the WTO was rejected.

III. THE VALUE-ADDED OF A NEW SAFEGUARD

Lamy presents his proposal as a new initiative for the WTO, and yet it is worth asking exactly what is new. *EC – Hormones* shows that a WTO Member enjoying a collective preference can keep it, notwithstanding the WTO ruling against it. Furthermore, if the Community chose to compensate the countries affected by its hormone ban, it could remain in conformity with the rules of the WTO.[46] So what exactly does Lamy's plan add? Answering this question requires a discussion of the WTO rules regarding compensation and compliance.

A. Compensation

Although compensation can occur now, it often does not because trade compensation has to be performed on a most-favoured-nation (MFN) basis.[47] In other words, any trade concession granted to a complaining party would also have to be granted to all other WTO Members. This MFN rule makes the perceived cost of compensation high. Furthermore, the cost of compensation snowballs when one considers the need to tailor it to every co-plaintiff country and the buildup of transaction costs in negotiating such compensation.[48]

Take *EC – Hormones* as an example. Perhaps Europe could have negotiated trade concessions for the two complaining countries, the United States and Canada. But once compensation is promised, other countries can threaten to bring the same WTO case unless they are compensated with trade concessions that are different from the ones particularized for the United States and Canada. Each compensation package would then have to be granted unconditionally to other WTO Members. This gets expensive on a mercantilist metric, and may explain why negotiated compensation does not often ensue. Thus, the default – a SCOO by the complaining country(ies) – may be used because the defendant country can avoid liberalizing on an MFN basis and accruing the transactions costs for negotiating that liberalization.

Whether Lamy's plan cuts this Gordian knot is unclear. To the extent that Lamy relies on traditional trade compensation, the same practical difficulties

[45] DSU Article 21.6.

[46] See DSU Articles 3.3, 3.6, 3.7, 22.8 (settlement), 3.7, 22.1 (compensation as a temporary measure).

[47] See DSU Article 22.1, GATT Article I.

[48] A referee writes: 'If compensation is negotiated all at once, it would not be so impractical. There will not likely be a lot of major exporting countries'.

arise. Yet Lamy has a different plan. He suggests that the compensation go directly to 'affected exporters' and 'take the form of payment of a pre-set amount'.[49] Compensation of this sort seems not to have been contemplated by the drafters of the Uruguay Round agreements. Financial compensation to private economic actors is an innovative approach that may avoid the way in which MFN leads to overcompensation.[50] All victim countries would still have to be paid off, but only once. So the direct cost of compensation under Lamy's plan might be lower than the current system.[51]

Comparing the transaction costs is not as easy. Lamy says that compensation is to be 'pre-set'.[52] Yet he does not offer a methodology for such compensation.[53] Without an acceptable methodology, one is left with international arbitration. Consider *EC – Hormones* for instance; one can imagine an arbitrator determining how much the affected US meat exporters should be recompensed by the European Commission. Giving compensation directly to victims may be better than passing it down through a government.[54] Nevertheless, the proposition that governments are ready to accept state responsibility (within the WTO) to individuals seems dubious.[55] Moreover, arbitration itself entails significant litigation costs.

Lamy is not ready to go all the way for developing countries. Even though affected exporters in developed countries are to receive payments, exporters in developing countries apparently are not. For developing countries, Lamy prescribes 'complementary policies' such as trade-related technical assistance or capacity building.[56] Lamy does not explain why developed country exporters are to be given more favorable treatment than developing country exporters with respect to compensation.

[49] Above n 2, at 11.

[50] MFN leads to overcompensation because the compensation tailored for Country A is enjoyed by B, C, etc. and the compensation tailored for B is enjoyed by A, C, etc. Thus, A, B, and C get overcompensated.

[51] The 'budget cost' of Lamy's plan would be more expensive than traditional compensation.

[52] Above n 2, at 11.

[53] Lamy suggests that exporters are only to be 'partially' compensated, but does not explain why compensation should be less than 100 cents on the euro.

[54] See 'Bhopal: The World's Worst Industrial Disaster; Victims Still Wait for Compensation', *The Record* (Kitchener-Waterloo), 3 December 2004, A1 (discussing the slow distribution of funds from Union Carbide settlement with Indian government in 1989).

[55] The closest the WTO has gotten is *US – Copyright Act*, where the DSU Article 25 arbitrator estimated the amount of royalties that were not being paid to European right holders because of the US violation. Award of the Arbitrators, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/ARB25/1, circulated 9 November 2001. This award of €1.2 million became the basis for a temporary settlement in which the US government deposited three years of compensation into a special fund that is used to support and promote European musical artists. The monies did not go to the right-holding victims however. Instead, the funds are administered by the European Grouping of Societies of Authors and Composers which is spending the funds to combat piracy on the internet and to support copyrights. See http://www.gesac.org/eng/news (visited 8 January 2005).

[56] Above n 2, at 11.

Perhaps the reason is a presumption by Lamy that the injured exporters in the developed countries are not doing anything wrong while the exporters in developing countries probably are and so it would be unjust to compensate them directly. To take an example, the exporters in Myanmar[57] using forced labor do not deserve compensation, while the exporters in the United States using hormones arguably do because hormone use is not known to be unsafe. Whether or not this example is convincing to the reader,[58] it may demonstrate that while the conditions justifying compensation may not be present in Myanmar, no general justification exists for treating developed and developing countries differently with respect to compensation, as Lamy does.

In Rodrik's social safeguard proposal, compensation would be required for democratic countries but not authoritarian ones.[59] The logic is that when Country A enforces its collective preference against Country B, if B is democratic, then the conditions in B reflect the persisting preferences of B's electorate. So A should acknowledge the conflict in preferences by compensating B. Rodrik has offered a normatively appealing bright-line rule, but its workability depends on being able to determine which countries are sufficiently democratic.

The puzzle of *who* should get compensated is accompanied by the puzzle of *why* compensation should occur. Notions of 'international fairness and responsibility' justify compensation, according to Lamy. He explains that 'our trading partners pay a heavy price for some of our domestic choices'.[60] This gives the countries pursuing a collective preference the 'responsibility to bear the external cost of those measures'.[61]

Lamy's explanation implies that the rationale for the compensation is the transborder financial harm rather than the WTO-illegality of the collective preference. That would be a far-reaching justification for compensation because it would also apply to commercial policies such as tariffs and quotas. When the European Community imposes an import quota on meat, it is exacting a 'heavy price' on foreign producers just as much as when the Community imposes a ban on hormones. I doubt that Lamy means to suggest that governments using tariffs or employing trade remedies have a responsibility to compensate the frustrated foreign exporters. Nor is he suggesting that measures ostensibly taken for national security (and thus exempt from many WTO rules) should trigger compensation. So his argument for compensation, even though clothed as an injury claim, would seem to hark back to the

[57] Under US law, all imports from Myanmar are banned. 50 USCS § 1701 note (2005).

[58] Bhagwati offers the example of compensating producers of factory-farmed chickens. He says that 'the payment is likely to be regarded as paying sinners for not practicing vices!'. Bhagwati, above n 29, at 152.

[59] Above n 26, at 66–67.

[60] Above n 2, at 11.

[61] Ibid.

nature of the contested preference and its presumptive inconsistency with current WTO rules.

Finally, Lamy does not discuss the difficulty that lower-income countries would face in providing financial compensation. If Countries A and B both inhibit the same dollar value of trade with Country C, then both countries would owe C's exporters a commensurate amount of compensation. But if A is a high-income country and B is a low-income country, then B may be less able to pay the compensation, and thus less able to retain the collective preference. To me, this practical difficulty for low-income countries is a major deficiency of the proposal.

B. Compliance

Lamy contends that with his proposal, 'The outcome of conflicts involving collective preferences would be much the same as today but the existence of a safety net like a safeguard clause would enable the parties concerned to achieve that outcome without generating so much tension and friction'.[62] The avoidance of tension and friction would come, presumably, because the safeguard would legitimize the continuation of the contested trade measure notwithstanding WTO rules.[63] In other words, WTO Members could keep their community preference so long as they were willing to pay for it through compensation.

Given that description of Lamy's plan, the question arises whether it amounts to any tangible difference from current WTO law. After all, the WTO does not really 'strike down' national laws, even though commentators sometimes say that.[64] A WTO Member can refuse to lift a trade measure ruled to be a WTO violation, as Europe did in *EC – Hormones* and the United States did in the *US – Byrd Amendment* dispute. Everyone would agree that, ultimately, achieving compliance is a decision to be made by the scofflaw government.[65]

[62] Ibid, at 10.

[63] Lamy's paper does not explicitly state that a measure would have to be ruled WTO-illegal *before* the collective preference safeguard could be invoked. Indeed, one can imagine employing a safeguard to head off politically troublesome dispute settlement. In my view, however, recourse to a collective preference safeguard should be available only after an adverse WTO ruling because the ruling can then become a factor in the domestic debate inside the defendant country. The analysis and reasoning of the panel will serve to explain international trade law and why it is in tension with the national measure being challenged.

[64] See, e.g., Timothy M. Reif and Julie Eckert, 'Courage You Can't Understand: How to Achieve the Right Balance between Shaping and Policing Commerce before the World Trade Organization', 42 Columbia Journal of Transnational Law 657 (2004), at 710–11 (saying that panels and the Appellate Body 'strike down' national regulations).

[65] See Andrew G. Brown, *Reluctant Partners. A History of Multilateral Trade Cooperation* (Ann Arbor: University of Michigan Press 2003) 46 ('It is nothing new in history that nations have, if able, found ways to evade their treaty obligations whenever domestic political circumstances have appeared to demand it.').

Where there is disagreement is whether WTO rules give the defending government a formal obligation to comply or merely an obligation to accept retaliation should it not comply. John H. Jackson has championed the notion that governments do have an obligation to comply.[66] Warren F. Schwartz and Alan O. Sykes have ably argued that non-compliance may be an acceptable outcome.[67] In this debate, I have sided with Jackson,[68] and in my estimation, most of those who analyze the matter closely do so too.[69]

If one accepts that a government has an obligation to comply with a WTO panel ruling against it, then Lamy's proposal does make a significant change. The new safeguard would legalize an otherwise WTO-illegal act based on a genuine collective preference. Right now, the European Union is a scofflaw in the WTO because it has not complied with the *EC – Hormones* ruling.[70] This disconnect between the Community's legal responsibility and its internal political capacity to make the required change has proved embarrassing. The new safeguard would provide an honorable escape for governments in such circumstances.

IV. THE CHALLENGE OF OUTWARDLY-DIRECTED PREFERENCES

Lamy's paper does not discuss whether there are to be limits to the range of permissible preferences. Two types of preferences are at stake – (1) inwardly-directed preferences, for example, regarding food wholesomeness, and (2) outwardly-directed preferences, for example, to promote democracy in other countries.[71] Lamy discusses both types, so presumably he is not making a distinction between them. Among the outwardly-directed preferences he discusses are death penalty, forced labor, and child labor. He also states that 'Most of the difficulties with collective preferences arise when countries think that their choices should apply to everyone, not just to them'.[72]

[66] John H. Jackson, 'The WTO Dispute Settlement Understanding – Misunderstanding on the Nature of Legal Obligation' 90 AJIL (1997) 60; Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?', 98 AJIL (2004) 109.

[67] Warren F. Schwartz and Alan O. Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization', 31 Journal of Legal Studies (2002) S179.

[68] Steve Charnovitz, 'Recent Developments and Scholarship on WTO Enforcement Remedies', in Julio Lacarte and Jaime Granados (eds), *Inter-Governmental Trade Dispute Settlement: Multilateral and Regional Approaches* (London: Cameron May, 2004) 151, 161.

[69] See, e.g., Debra P. Steger, 'WTO Dispute Settlement: What Do You Win When You Win?, in Steger, *Peace Through Trade: Building the World Trade Organization* (London: Cameron May, 2004) 243, 245–46 (discussing the obligation to comply).

[70] In late 2004, the European Commission announced that Europe was now in compliance with the *EC – Hormones* decision. Chris Clayton, 'EU Assails Continuing Sanctions', *Omaha World-Herald*, 9 November 2004, 3D. Rather than seek a compliance ruling under DSU Article 21.5, however, the Commission is requesting an original panel to consider the lawfulness of persisting US retaliation. The non-use of Article 21.5 would seem to be a tactic to secure a new panel in order to avoid being judged by the original panelists.

[71] See Carlos Manuel Vázquez, 'Trade Sanctions and Human Rights – Past, Present, and Future', 6 JIEL (2003) 797, at 812–19 (discussing inwardly and outwardly-directed measures).

[72] Above n 2, at 12.

In my view, the distinction between inwardly- and outwardly-directed preferences is important. This distinction is not just a question of 'processes and production methods'[73] because so-called PPMs are used for both inward and outward preferences.[74] Rather, the distinction hinges on the purpose of the contested governmental measure. Food safety measures, like the Community's hormone ban, may set a standard for practices in the United States, but the ostensible purpose of the measure is to protect the health of European consumers. The distinction gets murky, however, because any outwardly-directed measure will have been stimulated by the volitions of individuals inside the regulating country. For example, the US law banning imports of dog and cat fur products is outwardly-directed, but the law also satisfies a demand inside the United States for taking this action.[75] Nevertheless, there is a difference between the two types of preferences, particularly in their interface dynamics.

The outwardly-directed measure is more problematic because of the potential clash in the collective preferences chosen by importing and exporting countries. The people of the United States may have a collective preference for preventing the slaughter of dogs and cats for fur, but the people of China (for example) may have a preference for engaging in such slaughter. This is not a conflict of law because the United States is not trying to make pet slaughter unlawful in China. Rather, it is a clash of collective preferences. Trade in dog and cat fur is being stymied by the collective preferences in the United States failing to match the collective preferences in China.[76] If the US ban were ever ruled WTO-illegal, Lamy's safeguard would allow the United States to keep the ban so long as it compensates the producers in China. Yet to echo Bhagwati's point, one wonders whether US public opinion would tolerate using US taxes to pay off Chinese animal skinners.

The dog fur example shows the complexity of the interface possibilities. For an inwardly-directed preference like meat produced without injected hormones, the clash between preferences is limited because European consumers can enjoy natural meat and US consumers can enjoy the hormone-treated meat. The trade dispute can be worked out if US producers ship non-hormone meat to Europe or if Europe compensates the United States.[77] For an

[73] For a thoughtful study of the fundamental issues in the PPM debate, see Douglas A. Kysar, 'Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice', 118 Harvard Law Review 525 (2004).

[74] For example, PPMs are used for food safety. See Gregory L. White and Roger Thurow, 'In Global Food-Trade Skirmish, Safety is the Weapon of Choice', *Wall Street Journal*, 15 December 2004, A1.

[75] See 19 USCS § 1308 (2005). The law states that the trade of dog and cat fur products is ethically and aesthetically abhorrent to United States citizens.

[76] The fact that the country of China produces and exports such fur shows that interests in China have a preference for the dog and cat killing. See Sarah Chalmers, 'The Sickening Trade in Dogs, Slaughtered by the Hundred to be Made into Fashion Accessories for the West', *Daily Mail* (London), 29 May 2003, 20. I have no idea what Chinese public opinion thinks about this practice, and the ensuing trade.

[77] Today, 11 US cattle producers are certified to raise cattle for eventual non-hormone beef shipments to Europe. Clayton, above n 70.

outwardly-directed preference like a ban on fur trade, there is a greater clash in preferences because if the US ban does not prevent the animal slaughter, then the United States cannot achieve that objective in China. The only benefit from the US ban would be to prevent US moral complicity.

For other outwardly-directed preferences, the interface will be more complex because it may not be possible for both sides to enjoy their preferences. These are the challenges where international collective action is needed. Take climate change, for example, where denizens of Europe may have a greater collective preference for taking action than do denizens in the United States. If Europe were to impose an emissions tax on US imports, and it does not induce US cooperation, then the tax will not accomplish anything for Europe toward satisfying its preference for preventing climate change. Unlike the dog fur ban, where there might be some dogs saved as a result of curbing demand, with climate change, little is accomplished by taxing carbon-intensive imports and then, in effect, canceling the tax through compensation.

The same situation exists for other issues where collective preferences need to be translated into international collective action, for example, fishery conservation or the prevention of nuclear proliferation. This category of issues is characterized by substantial transborder physical externalities and is sometimes referred to as 'global public goods'. The usefulness of the collective preference safeguard for global public goods seems doubtful.

Would the collective preference safeguard be more justifiable for inwardly-directed than outwardly-directed measures? If the WTO is to provide more space for broadly-held volitions, then perhaps this forbearance should be limited to preferences for choices being exercised on domestic matters. Of course, any outwardly-directed policy will have roots in a domestic volition. Still, I think there is an analytical difference between, say, a policy of excluding imported meat with hormones or antibiotics and a policy of using trade leverage to convince other countries to improve animal welfare conditions.

In addition, one should also consider an issue not addressed much in Lamy's paper – that is, whether WTO rules leave enough discretion for domestic measures. Lamy seems to think that WTO rules do. He states that the WTO Appellate Body 'has been a faithful guardian of "collective preferences" under the WTO system'.[78] This view is echoed by the WTO Secretariat which asserts on the WTO website that 'Compliance with WTO Agreements does not in any way reduce the right of a government to make laws for its own territories'.[79] In my view, such assurances may not be warranted. As WTO disciplines are interpreted and applied, the need for a collective preference safeguard may increase. Part V examines this issue.

[78] Above n 2, at 7.

[79] WTO Secretariat, 'WTO Policy Issues for Parliamentarians', 2001, at 11, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (visited 8 January 2005).

V. SUPERVISION OF DOMESTIC POLICY BY WTO RULES

WTO rules govern not only trade measures but also many domestic measures that may have implications for trade.[80] As the *Korea – Beef* panel stated, '... with the WTO Agreement the members have made a bargain and compliance with the WTO Agreement may sometimes require (costly) adjustments to domestic policies and laws'.[81] Table 1 below shows the many ways that WTO rules can potentially prevent non-protectionist domestic measures designed to achieve national preferences. The intent in Table 1 is to consider only inwardly-directed preferences. In a few instances, footnotes are added where the relevance to WTO law may be obscure.

Whether these rules actually do infringe legitimate domestic measures will depend on how they are adjudicated by WTO panels and the Appellate Body.

Table 1. Supervision of Collective Preferences by WTO Agreements

Potential Collective Preference	Key Governing WTO Provisions
Grants to Domestic Producers	Agreement on Agriculture, SCM Agreement,[a] Anti-Dumping Agreement[b]
Taxes on Domestic Persons and Products	SCM Agreement[c]
Taxes on Foreign Persons and Imports	GATT, GATS, SCM Agreement
Regulations applying to Imported Products/Services	GATT, GATS, SPS Agreement,[d] TBT Agreement
Regulation of Criminal Activity	Antidumping Agreement,[e]GATS, TRIPS Agreement
Information/Labeling Requirements	TBT Agreement
Stewardship of Global Commons[f]	GATT, GATS, TBT Agreement, TRIPS Agreement[g]
Delineation of Ownership	TRIPS Agreement

[a]The SCM Agreement is now less deferential to domestic autonomy than it was in 1995. Article 8 of the SCM Agreement identified certain subsidies that were to be non-actionable. These domestic subsidies were designed either to correct market failures or to promote distributive justice. Unfortunately, WTO Members allowed this provision to expire in 2000.

[b]See Anti-Dumping Agreement, Article 18.1 and the *US – Byrd Amendment* case.

[c]See SCM Agreement, Article 3.1(a).

[d]In *EC – Hormones*, the Appellate Body stated that the SPS Agreement is a carefully negotiated balance between 'the shared, but sometimes competing, interests of promoting international trade and protecting the life and health of human beings'. WTO Appellate Body Report, *EC – Hormones*, above n 41. para 177.

[e]Anti-Dumping Agreement, Article 18.1 and the *US – 1916 Act* case.

[f]Stewardship of the global commons is not solely externally-directed because every nation shares in the commons.

[g]See Sabrina Safrin, 'Hyperownership in a Time of Biotechnological Promise: The International Conflict to Control the Building Blocks of Life', 98 AJIL 641 (2004).

[80] See Sungjoon Cho, 'A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution', 7 JIEL (2004) 219, at 220 (explaining that the WTO must constrain domestic policies in order to achieve the WTO's institutional goal or telos).

[81] WTO Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161,169/R, adopted as modified by the Appellate Body, 10 January 2001, para 673 (internal footnotes omitted).

Without suggesting here that any of this jurisprudence was wrongly decided, let me briefly note several WTO decisions that have implications for the maintenance of domestic autonomy. In *United States – Anti-Dumping Act of 1916*, a longtime US antitrust law was found to violate the Anti-Dumping Agreement.[82] In *United States – Continued Dumping and Offset Subsidy Act of 2000* (known as the *Byrd Amendment* case), a compensatory payment to injured producers was found to violate the GATT and the Antidumping and SCM Agreements.[83] In *Australia – Measures Affecting Importation of Salmon*, a sanitary control restricting Pacific salmon was found to violate the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).[84] One violation was that the government's chosen level of protection against pathogenic salmon risks was inconsistent with its chosen protection against risks from comparable products (namely, herring, cod, haddock, eel, finfish, and other Canadian salmon), and that the regulatory distinctions being made by Australia were 'arbitrary or unjustifiable' and resulted in a 'disguised restriction on international trade'.[85] In *EC – Trade Description of Sardines*, a European food labeling regulation was found to violate the Agreement on Technical Barriers to Trade (TBT) because the regulation was not based on a relevant international standard.[86] The Communities lost the case notwithstanding its defense that the international standard was an ineffective or inappropriate means for fulfilling the European regulatory objective.[87]

The possible trumping of domestic social objectives by trade rules can also be seen in the WTO decisions on public policy exceptions where these provisions have been interpreted strictly.[88] One biting aspect of this jurisprudence is the use of a 'weighing and balancing' analysis in which three factors –

[82] WTO Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136,162/AB/R, adopted 26 September 2000. For critical commentary, see Mitsui Matsushita and Douglas E. Rosenthal, 'Was the WTO Mistaken in Ruling on Antidumping Act of 1916?', *BNA International Trade Reporter*, 13 September 2001, 1450.

[83] WTO Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217,234/AB/R, adopted 23 January 2003 (known as the *Byrd Amendment* case). For critical commentary, see John Greenwald, 'WTO Dispute Settlement: An Exercise in Trade Law Legislation', 6 JIEL (2003) 113, at 120–23.

[84] WTO Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998.

[85] Ibid, paras 139–78, 227–40. For supportive commentary, see Robert Howse, 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization', 98 Michigan Law Review (2000) 2320, at 2352–53.

[86] WTO Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002.

[87] Ibid, para 291. The ruling occurred even though neither the complaining country Peru nor any of the governments in the Communities had 'accepted' the international standard.

[88] Veijo Heiskanen, 'The Regulatory Philosophy of International Trade Law', 38(1) Journal of World Trade (2004) 1, at 22 (explaining that the Appellate Body has adopted 'strict scrutiny' in GATT Article XX cases).

(1) the contribution of the disputed measure to the country employing it, (2) the 'importance' of the 'common interests or values' protected by the measure, and (3) the impact of the measure on trade – are weighed against each other.[89] The weighing can occur in the context of determining whether the importing country's measure is 'necessary' under GATT Article XX(b) or (d).[90] In my view, all three of the Appellate Body's balancing factors are problematic.

The first factor – the contribution or expected effectiveness of the measure – has policy rationality on its side, and yet governments often act irrationally when it comes to trade. If WTO law seeks to mandate national policy effectiveness, I believe it odd to start with GATT Article XX rather than the other parts of the WTO system, such as special and differential treatment, that are notoriously ineffective if not counterproductive. Making effectiveness a prerequisite to qualify for some of the GATT's public policy exception will further restrict the availability of those exceptions.[91]

The second factor – the importance of the values being pursued – would seem justified because more important values should warrant more judicial deference as to their necessity. The problem comes in determining importance in a neutral way. So far, the Appellate Body has not explained how it measures the 'importance' of a national 'value'. The use of the term 'common' to qualify the 'interests or values' may suggest that a qualifying value has to be pursued not only in the defending country but also in the complaining country.[92] Yet nothing in the text of Article XX suggests that the values it covers have to be commonly held.

The third factor – trade impact – is even more problematic.[93] Making the trade impact or trade-restrictiveness of a public policy a factor in determining whether an Article XX exception is warranted seems misplaced because trade restrictiveness is not disqualifying in WTO provisions regarding the use of trade policy. For example, a government considering the imposition of an antidumping duty does

[89] See WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (*Korea – Beef*), WT/DS161,169/AB/R, adopted 10 January 2001, paras 162–66; applied to health measures in WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para 172.

[90] The Appellate Body has not presented an explicit methodology as to how to do the weighing. One scholar has proposed a formula for the Appellate Body's proportionality test. See Sarah H. Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility', 5 JIEL (2002) 133, at 169.

[91] See Tatjana Eres, 'The Limits of GATT Article XX: A Back Door for Human Rights?', 35 Georgetown Journal of International Law (2004) 597 (arguing that Article XX (a,b,d) requires measures to be effective and therefore does not allow trade restrictions to enforce human rights).

[92] Gabrielle Marceau and Joel P. Trachtman, 'GATT, TBT and SPS: A Map of WTO Law of Domestic Regulation of Goods', in Federico Ortino and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement System 1995–2003* (The Hague: Kluwer Law International, 2004) 275, 315–17.

[93] The Appellate Body seems to equate trade restrictiveness and market intrusiveness. See WTO Appellate Body Report, *Korea – Beef*, above n 89, para 172 (agreeing with the panel report). The Appellate Body was not clear on what it meant by market intrusiveness.

not have to take into account the resulting trade restrictiveness. Another problem is that the trade restrictiveness of a policy will vary among affected countries. If Country A's import ban on widgets affects Countries B and C, but only Country B is highly-dependent on widget exports, would it be legitimate for a WTO panel to decide the GATT Article XX issue one way for B and the other way for C? I don't think so, and yet such a different outcome could happen with a trade impact test. One should also note that the text of Article XX(b) and (d) says nothing about trade impact as a qualifier. Although analysts may differ on this point, in my view, a trade-restrictiveness factor for Article XX did not come into trade law until the Appellate Body's decision in *Korea – Beef*.[94]

Not only are there problems with each of the three factors, but there would also be a serious problem with the balancing of costs and benefits. If the availability of a GATT public policy exception hinges on the commercial impact of the measure on another country, then the WTO dispute system will be engaging in inter-country comparisons. For example, it will be weighing the trade harm to the exporting country against the health, environmental, or consumer gain to the importing country. Yet such normative judgments will be hard to make in a principled manner. It is one thing to weigh commerce versus health within a polity empowered to enact positive law in both areas (for example, the European Community), but quite another to do the balancing between sovereign countries that do not share common lawmaking.

As we have seen in over 16 years of GATT and WTO jurisprudence regarding General Exceptions, panels have a tendency to add new hurdles to the treaty text. In *European Communities – Conditions for the Granting of Tariff Preferences*, the 'weighing and balancing' technique was extended to determine whether the challenged measure was cognizable as a health measure under GATT Article XX(b).[95] The panel weighed the health benefits of the measure to Europe against what the panel perceived as the 'damage of the measure to the multilateral negotiating framework', and then decided that this alleged damage was enough for it to refuse to recognize the narcotics control effort as a health measure.[96] Here the panel was weighing the health benefit to Europe against the damage to the WTO. The panel went on to conclude that the European trade restriction at issue was not 'necessary' under Article XX(b) because it could be replaced by a policy of giving more financial assistance, technical assistance, and tariff reductions to drug-affected countries.[97]

[94] See WTO Appellate Body Report, *Korea – Beef*, above n 89, paras 163–64. Alan Sykes argues that the pre-WTO caselaw regarding 'necessary' in Article XX, which hinged on using the least-GATT-inconsistent option, was 'of course, just a linguistic variant of a least restrictive means test'. See Alan O. Sykes, 'The Least Restrictive Means', 70 University of Chicago Law Review 403 (2003), at 406–07. I do not agree with him, and believe that a substantial transformation has taken place.

[95] WTO Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted as modified by the Appellate Body 20 April 2004, paras 7.209–7.210.

[96] Ibid.

[97] Ibid, para 7.222.

Recently, a WTO panel transplanted the GATT balancing test into the rules on trade in services. In the first 'General Exceptions' case adjudicated under GATS, in 2004, the panel held that for a measure to be 'necessary' under the moral exception in GATS Article XIV(a), the United States was required to negotiate with Antigua to see if a way could be found to avoid the harm associated with the remote gambling services that Antigua's private sector was offering to US residents.[98] The fact that the United States had not entered into gambling negotiations was a decisive reason why it lost the case at the panel level. The panel went so far as to say that a US negotiation with Antigua was required even if the United States considered the gambling ban 'indispensable'.[99] Note that the panel did not suggest that seeking to negotiate was a principle of international law accepted by WTO Members. Instead, the panel discovered the requirement to negotiate by employing the Appellate Body's 'weighing and balancing' test.[100] I hope that the panel's rigid ruling is overturned and note that it may be inconsistent with a prior Appellate Body ruling regarding the balancing test.[101]

In surveying this Article XX jurisprudence, I do not mean to suggest that no national collective preference is safe at the WTO.[102] My point only is that developments in the application of WTO law should be a central factor in considering whether a new safeguard is needed. In contending that the WTO dispute system 'has been a faithful guardian' of collective preferences, Lamy's paper elides important legal and factual questions. Perhaps Lamy's view on guardianship is colored by a misunderstanding. For example, he sees the Appellate Body decision in *US – Shrimp* as 'departing' from a 'strict jurisdictional reading' of GATT Article XX(g), and his paper seems to favor that broader geographic scope.[103] In fact, however, the Appellate Body did not make that departure.[104]

[98] WTO Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (*US – Gambling*), WT/DS285/R, circulated 10 November 2004, paras 6.529–6.533. In reaching this conclusion, the panel found relevant a similar holding in the panel decision in the first *Tuna-Dolphin* case. Ibid, para 6.526 and n 980 (recalling the Appellate Body's dictum that panels might find unadopted GATT panel reports to offer useful guidance). In my view, any time a WTO panel follows the reasoning of the unadopted 1991 and 1994 *Tuna-Dolphin* reports, the results will prove as mischievous for the WTO as they did for the GATT. The *US – Gambling* report is under appeal and has not been adopted.

[99] WTO Panel Report, *US – Gambling*, above n 98, para 6.534 (suggesting that for the regulation to be 'necessary' under GATT Article XX, the United States should first pursue other appropriate measures such as diplomatic overtures or foreign assistance), para 6.562.

[100] Ibid, para 6.477.

[101] See WTO Appellate Body Report, *Korea – Beef*, above n 89, para 164 (suggesting that the balancing test does not apply to indispensable measures).

[102] One analyst has argued that 'The WTO agreements already provide members with safeguard clauses aimed at preserving collective preferences . . .'. Olivier Cattaneo, 'Has the WTO Gone Too Far or Not Far Enough? Some Reflections on the Concept of "Policy Space"', in Andrew D. Mitchell (ed), *Challenges and Prospects for the WTO* (London: Cameron May, forthcoming).

[103] Above n 2, at 7.

[104] See WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para 133; W. J. Davey, 'WTO Dispute Settlement Practice Relating to GATT 1994', in *The WTO Dispute Settlement System 1995–2003*, above n 92, 191, 205.

In my view, Lamy's proposed safeguard will become more justifiable if trends continue in the WTO to constrict the arteries of domestic regulation. Let me reiterate that the cases discussed in my analysis involve inwardly-directed preferences. The WTO jurisprudence on outwardly-directed preferences is another matter.

In summary, Part V has shown that WTO rules may thwart domestic policies in ways that are unpredictable and unwarranted.[105] Lamy's proposal, however, is not predicated on a supposition that panels may make mistakes or that WTO law itself is too strict. He seems to accept the validity of the caselaw, but still wants to find a way to evade it. In my view, the most compelling justification for a collective preference safeguard may be something that Lamy does not consider; viz., that panels and the Appellate Body may not always be infallible.[106] If an error is made, a collective preference safeguard may offer the defendant government a way out of its compliance obligation while giving the dispute system a chance to refine and correct the jurisprudence in future cases.[107] Thus, the escape valve proposed by Lamy can have systemic value for the WTO as well as value for society in the defendant country.

The uncertainty as to WTO rules is also an important consideration with respect to Lamy's other major policy suggestion. With regard to future trade liberalization, Lamy suggests that 'it is advisable not to push for integration in areas rich in collective preferences'.[108] Whether that advice is sound depends on the degree of strict scrutiny in emerging dispute practice. If WTO rules are applied deferentially to legitimate, non-protectionist national policy, then I would not agree that WTO negotiations should avoid integration in areas rich in collective preferences. For example, there are good political and economic reasons to continue with negotiations on agricultural support, free movement of natural persons, and fisheries subsidies, even though all of these areas may be rich in collective preferences.[109]

[105] See Robert E. Hudec, 'Science and "Post-Discriminatory" WTO Law', 26 Boston College International & Comparative Law Review (2003) 185, at 188 (noting that some of the new trade rules formulated during the Uruguay Round are 'calling for international tribunals to second-guess the rationality of a regulatory judgment at the national level').

[106] See Petros C. Mavroidis, 'The Trade Disputes Concerning Health Policy Between the EC and the US', in Ernst-Ulrich Petersmann and Mark A. Pollack, *Transatlantic Economic Disputes* (Oxford: Oxford University Press, 2003) 233, 243 (discussing wrong dispute outcomes).

[107] Of course, where judicial errors occur, the safeguard would only be available when the measure is based on a collective preference, not when the measure stems from legislative logrolling (e.g. the Byrd Amendment) or is dictated by expertise.

[108] Above n 2, at 9. In a footnote, Lamy says that this is true to a point because concentrating on easy integration eventually gives rise to an unbalanced structure.

[109] Furthermore, the WTO Agreement mandates for negotiations on agriculture and services recognize the sensitivity of non-economic considerations. See Agreement on Agriculture, Article 20(c); GATS Article XIX:2 (due respect).

CONCLUSION

In an interconnected world, value-free trade is a fiction. Individuals, groups, and governments are sure to have preferences about international commerce that will complicate voluntary transactions between buyer and seller. Recognizing this difficulty, Lamy wants the WTO to experiment with a new safeguard for collective preferences. Lamy is trying to safeguard certain democratic choices at the national level from being overridden in the WTO. Equally important, he is trying to safeguard the WTO from a mercantilist zeal that could undermine public support for the trading system. Lamy's aspiration is appropriate in my view.

Nevertheless, his plan is problematic. The most serious problem is that the underlying principle may be wrong. In other words, it may be wrong for a WTO-illegal law with popular appeal to lead to a different result than a WTO-illegal law not backed by vocal support. Both laws are products of democratic choice. Another serious problem may be that this escape would be more easily available to governments with budget resources to use for compensation than to governments lacking such resources.

On the other hand, the most common objection to Lamy's proposal does not seem especially salient – namely, that it would create an open season for new collective preferences. Although it is true that a new safeguard might slightly reduce the disincentive against violating WTO rules, the disincentives are already low enough to allow WTO-illegal collective preferences to persist, at least in large economies. Moreover, under Lamy's plan, governments have to compensate for a national collective preference.

Whatever the merits of Lamy's safeguard, I doubt the political practicality of adding that rule to the WTO. The difficulty is that many governments would oppose the idea and demand a high front-end payment for accepting it even though each recourse to the safeguard would entail a compensatory payment. Thus, I predict a continuation of the status quo in which powerful governments retain WTO-illegal collective preferences and suffer any ensuing SCOO.

Lamy's attention to the process of domestic validation has independent merit. Governments exposed to pressures for unwise collective preferences can do a better job engaging in deliberation and promoting public education. Expecting politicians to exhibit that leadership may be utopian.