

Policy Department External Policies

THE POTENTIAL ROLE FOR COLLECTIVE PREFERENCES IN DETERMINING THE RULES OF THE INTERNATIONAL TRADING SYSTEM

INTERNATIONAL TRADE



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Directorate General for External Policies of the Union
Directorate for Interparliamentary Delegations and Policy Department
Policy Department External Relations

The potential role for collective preferences in determining the rules of the international trading system

STUDY

Abstract:

The study examines the concept of collective preferences and their potential role in defining international trade rules. Based on the initiative of Pascal Lamy in 2004, the paper explores the extent to which current trade rules already reflect collective preferences and discusses the inclusion of the concept into international trade rules, including a temporary safeguard clause accompanied by a compensation mechanism. The main focus is on whether the concept of collective preferences can provide the multilateral system with better responses to societies' expectations and fears concerning globalisation. Following the state of the debate on collective preferences, the WTO legal framework is examined and European collective preferences are assessed.

This study was requested by the European Parliament's Committee on International Trade.

This study is published in the following languages: EN

Author: **Ms Laurence Tubiana**
**Institut de développement durable et des relations
internationales**
6, rue du Général Clergerie
75116 Paris, France

Publisher: **European Parliament**

Project Manager: **Mr Levente Császi**
Directorate-General for External Policies of the Union
Policy Department
ATR 08K060
rue Wiertz
B-1047 Brussels
E-mail: levente.csaszi@europarl.europa.eu

Manuscript completed in 23 May 2007.

The study is available on the Internet at
<http://www.europarl.europa.eu/activities/expert/eStudies.do?languageEN>

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Brussels: European Parliament, 2007.

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Executive summary

1. One of the most significant changes in international trade law over the last 10 years has been the inclusion of non-trade policies within the scope of trade negotiations. Some of these non-trade policies have been subject to harmonisation attempts at the WTO (like SPS policies), but some have not, like labour and production methods standards. Furthermore, global rules on global public goods tend to interfere with trade rules and domestic non-trade rules and make arbitration between trade and non-trade concerns more complex. Economic interdependence generates new needs for formal commitments that sometimes challenge the sense of national sovereignty

2. Against this backdrop, the then European Trade Commissioner Pascal Lamy organised a conference on “Collective preferences and global governance: what future for the multilateral trading system?” in September 2004. In his keynote address, Europe’s collective preferences were identified as including multilateralism, environmental protection, food safety, cultural diversity, the public provision of education and health services, precautions in the field of biotechnology and welfare rights. Pascal Lamy proposed a new, temporary safeguard clause to be added to the WTO Agreements, accompanied by a compensation mechanism.

3. Pascal Lamy’s initiative raised interest and provoked diverse reactions. His nomination at the WTO as Director General, and the considerable difficulties finalising the current round of trade negotiations, somehow left the debate on collective preferences unfinished. In the perspective of the inescapable reform of the WTO, the objective of this paper is to re-examine the case of the potential role of collective preferences in determining the rules of the international trading system. The question we focus on is whether collective preferences can help to provide the multilateral system with better responses to societies’ expectations and fears concerning globalisation as they are particularly expressed within the EU.

4. In a way, collective preferences are not a new concept either in economic theory or in the public debate referring to similar concepts, such as non-trade concerns or policy space. Nevertheless, the semantic orientation Lamy gives stresses the importance of maintaining heterogeneity among societies’ policies. The goal of increasing trade between different societies should not mean that societies must become similar. For Mr Lamy, “collective preferences are the end result of choices made by human communities that apply to the community as a whole”. The recognition of societies’ preferences is a reminder that societies have the right to *choose* their destiny, whatever the trade benefits they seek. Furthermore, the concept of collective preferences raises the need to identify shared values (or priorities) at the world level (and to shape multilateral cooperation to meet these priorities), and the relative values of each society (and to shape multilateral rules in accordance with their diversity).

5. Collective preferences refer to the relative priorities attributed by each society to public goods and moral values that are in principle reflected in public choices. Therefore, we propose methodological indications on how to assess EU collective preferences derived from the analysis of existing public policies, keeping in mind that policies arise from a complex system of preference aggregation, partly reflecting lobbying and bargaining. Indicators suggest that EU countries give relatively high priority to favourable working conditions, food

quality attributes based on origin and production methods, and public health care and education. Part of this priority relates to average income, and part has to do with collective “taste” and cultural heritage, which can be seen in the geographical homogeneity of legislation despite heterogeneity in income levels within the EU.

6. Trade rules can interfere very differently with collective preferences depending on the type of public goods at stake. To analyse this interference, we distinguish three types of collective preferences: (i) a society’s collective preferences for non-market goods affecting its own living conditions (SPS standards, domestic labour standards, local environmental standards, and all national public goods and services); (ii) a society’s collective preferences for non-market goods affecting other societies’ living conditions (child labour or the depletion of local resources in trading partner countries, etc.); and (iii) a society’s collective preferences for global public goods (climate change prevention, ocean pollution, global security, etc.). The latter could theoretically be interpreted as affecting domestic living conditions, but their fulfilment depends on other countries’ choices.

7. Clearly, the existing WTO rules include paragraphs that can be interpreted as relevant to dealing with cases involving preferences of the first kind. GATT article XX, for instance, provides a rationale for policies that are meant to protect non-trade concerns that can be read as collective preferences affecting national living conditions. In particular, such policies must be made so as to minimise trade restrictions and discrimination. Furthermore, if contested, these policies should be proven necessary for the non-trade concerns at stake. In the same spirit, the sanitary and phytosanitary agreement provides a rationale for setting SPS standards on imported goods.

8. Existing disputes give indications about the way the WTO deals with policies in favour of such non-trade concerns, which can be used to interpret WTO practices regarding collective preferences. It appears that the content of the preferences itself is not challenged, but the defendant country’s ability to make a proper assessment of its needs for the challenged policy is crucial to the panel’s decision. Although this requirement is highly understandable in the trade dispute context, it introduces an additional cost to preferences for high environmental or health standards. Many policies are recognised as useful from a national standpoint and unnecessary from an international standpoint. Many aspects of European living conditions are not strictly “needs”, but choices, and the related policies are not “necessary”, but useful. Should they be removed because their necessity cannot be assessed? Furthermore, the WTO ruling system evaluates whether external references (international treaties, science-based knowledge, or other government practices) support the “importance” of the “common interests or values” protected by the policy measure at stake. Some lawyers argue that this is overly restrictive of WTO Member States’ sovereignty, especially in the case of public morals.

9. As far as collective preferences for global goods are concerned, the interaction with trade rules is of a different nature. Public goods require international coordination (in the CCCC, within the Biodiversity Convention, etc.), requiring that countries make policies that may conflict with trade rules or interests. For instance, developing alternative energies may require subsidies, forest conservation may decrease trade, and climate change prevention may require production taxes that hinder trade. Whereas the WTO ruling system can challenge such policies that hamper trade (like import restrictions based on production methods that harm the global public good), it cannot challenge policies that affect common non-trade goals (lack of production taxes on polluting industries, etc.). Because of the more efficient enforcement of

trade principles over the enforcement of non-trade objectives by non-trade conventions, the collective preferences for global public goods are probably under-represented in today's policy choices. For this reason, a safeguard for collective preferences for global public goods should be envisaged, allowing countries to maintain a non-free trade-based policy if it is in favour of a global public good, recognised as such by a UN convention. In other words, the WTO should not rule in favour of an exporting country facing a trade restriction imposed by an importing country if the exporting country's low production cost arises from its non-compliance with a multilateral convention. The WTO ruling system should better account for trade impacts of free-riding on non-trade rules. The recent shrimp/turtle dispute settlement seems to indicate that there is a move towards such recognition at the WTO.

10. It may also be that countries simply do not wish for the same level of global public goods. If one country wishes for a higher level of global public goods than collectively agreed upon, and if this higher level cannot be achieved without the cooperation of foreign countries, specific measures (including safeguards) would be legitimate provided the foreign countries are compensated for the trade restrictions. For instance, if the EU wants Asia or Brazil to protect more biodiversity than requested by the Convention on Biodiversity, and if these countries' compliance to the CBD commitments can be established, import restrictions would not be authorised without compensating these countries.

11. "Moral" preferences concerning third countries' living conditions are clearly difficult to defend within today's trade rules. Attempts to integrate minimum environmental and social standards within trade rules have faced sharp opposition since the Seattle conference. Whether trade bans are an appropriate way to improve third countries' living conditions remains a controversial issue. For those countries where trade expansion rests on low standards, the creation of wealth is often a priority. And because increasing wealth is one determinant of the preferences for more public goods and higher environmental and social standards, many authors believe that trade bans would postpone the improvement in standards. Nevertheless, if EU countries are willing to pay for improvements in third countries' living conditions, the above principle of a safeguard for trade-restricting measures associated with compensation designed to achieve better living conditions in poor countries seems legitimate and could eventually create an incentive for the multilateral system to make trade and non-trade laws more compatible, and to help ensure non-trade rules are respected.

The potential role for collective preferences in determining the rules of the international trading system

Introduction

In September 2004, the then European Trade Commissioner Pascal Lamy organised a conference on “Collective preferences and global governance: what future for the multilateral trading system?”. In his keynote address, Pascal Lamy stressed that whatever its benefits, international market opening also had a destabilising impact on the economic and social fabric, and potentially on societal choices. He secondly argued that while efforts had been made to develop accompanying measures to deal with the effects of market opening on industry and employment, the threat to societal choices had so far not received proper attention. The challenge, in his view, was to design an open trading system that everyone accepts and that safeguards legitimate social choices.

Europe’s collective preferences were identified as including values like multilateralism, environmental protection, food safety, cultural diversity, the public provision of education and health care, precautions in the field of biotechnology and welfare rights. Eroding such values while further liberalising trade would appear as a loss for the EU, according to Pascal Lamy. Mr Lamy proposed a new temporary safeguard clause to be added to the WTO Agreements, potentially accompanied by a compensation mechanism aimed at those who would suffer from these safeguards.

Even though Pascal Lamy’s diagnosis of the fear and the threat roused by globalisation has been strikingly confirmed by the backlash against globalisation we face today, his proposition stirred up controversy among EU trade partners and stakeholders, and criticism among a few academics. Still, his nomination at the WTO as Director General, and the considerable difficulties finalising the current round of trade negotiations, somehow left the debate on collective preferences unfinished. In the perspective of the inescapable reform of the WTO, the objective of this paper is to re-examine the case of the potential role of collective preferences in determining the rules of the international trading system. The question we focus on is whether collective preferences can help to provide the multilateral system with better responses to societies’ expectations and fears concerning globalisation notably within the EU.

Trade can be a means for emerging countries to raise per capita income, which would in turn tend to raise social demand for non-traded goods such as education, health, environment and better social conditions. Thus, trade is not necessarily an obstacle to the fulfilment of the non-trade aspects of collective preferences. Nevertheless, it seems that domestic public choices are evolving more rapidly in compliance with international trade rules than in compliance with the non-trade rules of globalisation. Therefore, one may wonder whether the global legal system is able to ensure both the fulfilment of collective preferences for non-tradable goods and the provision of tradable goods.

We start by evaluating the current state of the debate on collective preferences. Part two provides a definition of collective preferences based on the economic definition of preferences and social choice. Part three explores the relevant WTO agreements and dispute cases to draw their main implications in terms of collective preferences. Part four suggests

possible methodological elements to assess European preferences in a selected number of issues. Key policy implications are outlined in part five.

1. The state of the debate on collective preferences

1.1. The core of the debate: common goals and heterogeneous collective preferences

The WTO expanded the GATT mandate by covering new sectors such as services and intellectual property rights, and including domestic policies like farm policies. Such an expansion towards “reserved domains” of sovereignty obviously generated friction and dissension among populations, NGOs and politicians. The NGO campaign against the GATS, on the grounds that it could disrupt the social contract on particular aspects of public services provision, united resistance to the WTO in the mid 1990s.

As long as only tariffs were concerned by negotiations, trade increase would occur at the expense of specific existing activities, but only political preferences¹ for these sectors were challenged. Citizens outside these sectors would not be affected by trade increase as long as governments were allowed to mitigate economic changes with unconstrained domestic policies. Now that negotiations deal with domestic policies, public choices regarding domestic issues are being made under the potential constraint of international trade rules. The fact that efficient public policy can be implemented in a non-trade distortive way whatever the policy goal (hence whatever the collective preferences) is a key issue for all negotiation sectors. But this overall requirement that public choices should not alter trade may be at the root of a growing feeling among citizens that they are losing control over their political destiny.

This feeling is not equally perceived throughout the world. In some countries, citizens do not necessarily have the feeling that governments are mandated to serve their collective preferences, or that governments actually serve these preferences in a reliable and efficient way. In such contexts, the perception of the WTO threat to public choice is limited because public choice itself does not necessarily guarantee the fulfilment of collective preferences. Furthermore, countries with low environmental or social standards face trading partners with higher standards, and, all else being equal, higher production costs. For them, the trade increase would not threaten these non-trade aspects of their collective preferences. Finally countries from the old world with long-standing traditions and cultural heritage may adopt the view that their identities and values have contributed to the sustainability of their society, and are reluctant to let them be challenged by the global trading system.

Nevertheless, many countries are facing potential contradictions between their willingness to cooperate to the multilateral coordination and their will to defend their citizens’ collective preferences. For instance emerging countries often have lower preferences for environmental concerns than OECD countries and see the perspective of CO2 limitations as a “threat” to their priorities. This threat will probably not be expressed in trade negotiations, but in multilateral environmental agreements. Conceptually, the need for emerging countries to comply with environmental cooperation in spite of the low weight of environmental concerns in their collective preferences is comparable to the need for OECD countries to comply with

¹ Political economics define collective preferences as the differentiated weights that a government attributes to social groups when maximising a social utility function.

trade rules in spite of relatively lower importance given to the increased availability of merchandise in their collective preferences.

Therefore, heterogeneity in collective preferences in a context of global cooperation is a global concern.

1.2. Is there a European specificity on collective preferences?

Even though his conception of collective preferences is rather universal – “collective preferences are the end result of choices made by human communities that apply to the community as a whole” – Lamy’s diagnosis mainly rests on European examples.

The EU perception of the issue indeed shows some specificity. Environmental and social standards and policies in Europe are higher than in most other countries, reflecting the average income and subjective values of Europeans. In comparison with most countries, expectations concerning global environmental and social goals in Europe are probably higher than those concerning an increase in the availability of commodities. This may explain why trade rules may be seen in Europe as a potential source of constraints on their collective preferences, whereas non-trade negotiations are mostly viewed as an opportunity (to meet their preferences for non-trade goals).

The role given by European citizens to their public institutions in mitigating the social effects of job losses is also important in the European perception of international trade. Recent debates on globalisation confirm that the perception of a threat in several European countries is real and that policy makers are somewhat shorter of political support for globalisation than one might have guessed when the WTO round was launched. Hence, in a survey on “Trade victims”, *The Economist* contends that “*Rather than affecting entire industries, or whole factories, global competition will affect individual jobs – skilled as much as unskilled. Such a shift helps explain the popular nervousness about globalisation. Many more workers are worried that their jobs will be at risk*” (*The Economist*, 20-26 January 2007: 31). The fear of lining up with the next WTO round’s losers pervades among the population.

Trade measures are sometimes considered as the last resort protection for those sectors that could not compete in a global economy. The budget expenditures required to compensate losers could increase in the short term in case of imposed liberalisation.

“In advanced countries with social welfare programs in place, it should be primarily spending on social security and welfare that is correlated with exposure to external risk (...)” (Rodrik 1998: 1019).

But increased public expenditure is not an auspicious development in a global economy either. Since increased public expenditures can have a negative effect on potential investments and productivity, trade liberalisation is considered by many as the end of the welfare states in Europe (see box 1).

Box 1: The political economy of globalisation and job insurance

Following Garrett (1998, 2001), we can distinguish two basic positions on the relationship between the dynamics of public expenditure and globalisation. The “efficiency” hypothesis highlights competitiveness pressures and exit threats by mobile asset holders. The “compensation” hypothesis, in contrast, emphasises the domestic dislocations generated by globalisation and the incentives for government intervention in the economy that these generate.

The efficiency hypothesis

The fundamental tenet of the efficiency hypothesis is that government spending beyond minimal market-friendly measures, such as defence, securing property rights and other fundamental public goods, reduces the competitiveness of national producers in international goods and services markets. Income transfer programmes and social services distort labour markets and bias investment decisions. Moreover, government spending must be funded either by borrowing or by increasing taxes. Income and consumption taxes reduce the profitability of work and investment in the country. Borrowing results in higher real interest rates, depressing investment. If this also leads to an appreciation in the real exchange rate, the competitiveness of national producers is reduced. Therefore, the efficiency hypothesis supports the idea that globalisation creates incentives for governments to reduce public expenses.

The compensation hypothesis

Short-term expansion of the scope of markets is likely to increase citizen support for government spending to compensate for increased inequality and economic insecurity. These are two strong political incentives to increase public expenses in response to globalisation that may offset the competitiveness pressures generated by market integration.

Source: Garrett (1998), Garrett (2001).

This is probably part of the reason why welfare states in Europe perceive the expansion of the WTO rules as a threat to the policy space of its different Member States. Assuming that the champions of globalisation are equally sensitive to the losers, expanding Trade Adjustment Assistance (TAA), as US Democrats did in winter 2006, is politically easier than hastening the process of reforming the welfare states. It may justify the EU’s need to postpone reforms under the umbrella of trade protection. The need for temporary safeguards is understandable in this respect.

1.3. A summary of potential and actual controversies raised by collective preferences

The political debate on the potential value of referring to collective preferences in trade negotiations is still at an early stage, and the scientific contribution to this debate as such is also limited.

Nevertheless, the question raised relates to existing debate on the role of the WTO in global governance. UNCTAD uses the concept of “policy space” to designate the decision margin countries should maintain in order to pursue social or economic goals, and highlights the risk of the erosion of this policy space by international trade. For UNCTAD, the concept of policy space is particularly relevant for Southern countries, whose development may require specific protection. UNCTAD highlights the potential constraints of trade rules and conditionality linked to loans or aid in particular. In this sense, the question of whether or not specific needs justify trade-affecting measures relates to that of whether or not specific collective preferences justify trade-affecting measures. UNEP has also indirectly provided useful

contributions to the debate, notably through its analysis of the relationships between multilateral environmental agreements and trade rules. UNEP urges for better cooperation between the WTO and the secretariats of multilateral environmental agreements (MEAs) to improve coherence between multilateral institutions and to strengthen the enforcement of MEAs. To some extent, UNEP's works can also be interpreted as an effort to better integrate collective preferences in multilateral institutions. In the same sense, the ILO aims at ensuring the fulfilment of globally accepted minimal labour rights in a context of increased competition. The ILO's works also sustains the debate on the need for balancing the collective preferences for social needs and economic growth.

This paper uses these works to address the question of whether collective preferences can be useful for the trading system, keeping as close as possible to the orientation given by Pascal Lamy. This orientation is a new one because it is non-thematic and because its purpose is to improve trade rules. According to Pascal Lamy's intuition, fears that social choices might be called into question by an all-powerful WTO were behind the rejection of globalisation. His main message to trade negotiators and policy makers was that whether or not these fears were justified, they should be met with a credible response (Lamy 2004:1). Even if the debate on collective preferences has not yet spread very far, this orientation seems promising in the long run. The aim of improving trade rules and the non-thematic orientation is likely to attract the interest of negotiators because each country has collective preferences to fulfil. The same does not hold for thematic discussions.

Pascal Lamy initiated the debate on collective preferences and the global governance of the world trading system as he approached the end of his term as European Commissioner for Trade. A non-paper on the same issue was drafted in November 2003 and first released by the Commission on 18 February 2004. The non-paper's first objective was to "justify different/higher and restrictive standards vis-à-vis trade partners" (EC Non-Paper, 2004:1). Its second aim was to react to information leakage after the Financial Times published an article on 6 February indicating that DG Trade had prepared a document on the issue. The official birth of the project was hence controversial in itself. Its original content proved controversial too². When this paper was completed and presented in Brussels on 15 September 2004, it did not receive the imprimatur of the Commission. Some of the most important possible reasons include the uncertainty on the precise meaning and implications of the concept, as well as fears of misinterpretation by trading countries. Since then, DG trade has not continued explicit work on collective preferences, partly because of these uncertainties and partly because of the priorities of the WTO agenda.

A follow-up to the conference took place within the framework of the DG Trade Civil Society Dialogue in Brussels in October 2004. Two months later in Paris, the French think tank "En Temps Réel" convened a meeting on Pascal Lamy and his proposition. A publication of Pascal Lamy's paper, as well as Charnovitz and Wyplosz's comments made during the December meeting in Paris, were published in 2005 (En Temps Réel, 2005). A synthesis of the reactions formulated during these three events highlights the three main objections as follows:

² 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.

Objection 1: Are collective preferences really an issue in the world trading system? Which issues could be better addressed through the concept of collective preferences than through the existing concepts of externalities, social choices and public goods? The novelty of the concept in the WTO framework and the specific problems addressed remained unclear.

Very few academics endorsed Pascal Lamy's diagnosis, and when they did, they took their distance from Lamy's proposals. The most notable example is Steve Charnovitz (2005), who stated that "*The problem Lamy addresses is real. Countries will often adopt different public policies, and, as Lamy says, trade becomes a 'natural point of intersection for different systems of collective preferences'. Clashing or distinctive collective preferences between governments have led to trade disputes (e.g. hormones), and will assuredly do so in the future. When WTO rules inhibit domestic autonomy, that can undermine public support for the trading system*" (Charnovitz, 2005).

Charnovitz mentioned that concerns similar to those raised by Lamy had been formulated before Lamy wrote his essay. Ironically, some earlier proposals were even made by some critics of Lamy's initiative, including Bronckers (2004) and Bhagwati (2004). Others dated back to a few years before, such as Rodrik (1996) and Perdakis, Kerr and Hobbs (2001), without Lamy's mentioning them. According to Charnovitz's analysis, Pascal Lamy's thoughtful diagnosis seems apposite, at least in academic terms.

To clarify this, it seems worthwhile going back to the economic meaning of collective preferences to understand its potential relevance in a multilateral trading context.

Objection 2: The concept and practical implications of collective preferences are unclear, including the compensation mechanism. What is the current legal status of collective preferences under WTO rules? What status changes seem to be needed? We investigate both questions, examining current rules, and possible future changes to these rules.

Objection 3: Taking into account collective preferences could reinforce asymmetry in the world trading system (in favour of rich countries) and trigger further protectionist policies. Collective preferences that would simply protect domestic producers from international competition would not be recognised as a sustainable policy at the WTO. The problem is that only governments know their own motives for implementing a policy, which may arise from both protectionist reasons and public interest. We investigate this debate by analysing actual policies in different countries in order to obtain some objective indicators of preferences.

2. Definitions and aggregation issues

Individual preferences are the implicit hierarchies established by each citizen for different possible states of the world. Economically, these states of the world are characterised in particular by the combinations of each private good purchased by this person and the level of each public good that affects his welfare³.

In simple terms, preferences reflect people's priorities regarding the way they allocate their resources across different uses, including the quality of private goods, their social expectations, and more generally the combination of public goods they expect, including the environment, public infrastructure and transportation, health care, education, military safety, civil safety, and local environmental characteristics. All these expectations and purchases are

³ Welfare is an ordinal measurement of satisfaction (or utility), depending on these goods and services.

subject to individual budget constraints that limit their private and social demands for these goods and services, and to subjective factors such as culture, information, living conditions and tastes.

An extended understanding may include political preferences, in other words the political support they agree to bring to each activity sector or social group.

Another extended understanding includes people's expectations regarding the characteristics of the world as a whole, in particular social and environmental conditions in other countries. These are referred to as outwardly-directed preferences (Charnovitz, 2004).

Collective preferences take the idea of individual preferences to the community level. Thus, collective preferences are the relative hierarchy that the majority of a community establishes between all possible states of the world. In the context of the world trading system, collective preferences are the scheme of priorities between different possible uses of resources that societies of different scales reflect in their public choices in order to improve their living conditions.

For non-markets goods and values, public intervention is generally needed to fulfil social expectations. The challenge for the government before delivering on public goods and protecting social values is to establish its own perception of the preferences of the society as a whole – the collective preferences of the community to which it is accountable. Democratic governments adjust to what they think are collective preferences in a given period through a complex decision making process (negotiations, surveys, elections, parliamentary initiatives etc.).

Three implications must be underlined. Firstly, the central government decision-making process can be interpreted as a means of arbitrating between individual preferences. This means that the current provision of public goods (through public policies) and the satisfaction of social values in a given society do not directly account for the collective preferences of the country, but merely reflect a particular choice in a given political context, that will be submitted to citizens' evaluation (through voting, polling, trade-union initiatives etc.). Collective preferences are not necessarily impaired by policy reforms, and they cannot justify all current policies in a given country.

Secondly, multilateral trade negotiations do enter the above-mentioned political process of democratic governments, helping willing governments to account for national collective preferences during the preparatory process of trade negotiations, or in their wake. For instance, collective preferences at the world level for fair access to generic medicines would not have been revealed without the TRIPS negotiations and backlash.

Thirdly, trade negotiations may improve some aspects of people's preferences, especially the availability of commodities, and neglect other aspects such as resource conservation and equity, etc. Therefore, trade influence on domestic policies does not mean that collective preferences are always threatened by trade (since trade may contribute to them); it means that the various elements of their preferences are not equally taken into account at the world level. At the national level, this leads to unequal pressure on policy reforms in favour of trade improvement over improvements in non-trade concerns.

3. The WTO legal framework and collective preferences

The dilemma of the multilateral governance system is to achieve common goals, which requires constraints and new directions for national policies, without limiting the possibility for national collective specificities. The goals of global governance themselves are supposed to improve the fulfilment of certain aspects of collective preferences that nations share at the world level. These include the freer-trade of commodities (WTO), the protection of biodiversity (CBD), and the prevention of climate change (Kyoto Protocol), etc.

The fact that multilateral disciplines impose changes in domestic policies does not necessarily imply that collective preferences are threatened, provided the trade negotiators have a sufficiently broad perception of their country's collective preferences. Nevertheless, the different aspects of collective preferences are unevenly represented in each negotiation because of the negotiation path itself, and this can create imbalance among the different elements of collective preferences for some countries.

3.1. The relevant WTO agreements to deal with collective preference issues

The WTO provides rules whereby non-trade elements of national collective preferences can be preserved through non-trade concerns, or “legitimate domestic measures”. Following Charnovitz, we identify four distinct mechanisms for this:

(i) National treatment

National treatment requires that countries offer foreign providers equivalent conditions to those offered to national providers. Theoretically, this leaves room for countries to set domestic policies to promote their collective preferences, as long as these apply without discrimination against like products.

For instance, in the SPS agreement, national treatment enables the protection of preferences for high sanitary standards⁴, provided it can be proved that the measure is justified on internationally recognised grounds. As shown in the beef hormone case (see annex), this does not allow countries to differentiate products if the necessity of this differentiation is not established on internationally recognised bases. In this case, states cannot regulate trade to reach their public objectives. For instance, individual citizens must reflect their private preferences for production methods – assuming their information enables them to do so – through their purchases. Economic theory can support this approach as long as the consumer is the only person involved in the purchase, but not when public aspects are involved in this consumption. For instance, the risk of viruses spreading after importation, if not scientifically established, cannot be prevented through trade regulation, which may be an obstacle to policy efficiency.

Furthermore, national treatment opposes upstream trade regulation for attributes such as

⁴ Higher than internationally-recognised standards, like those registered at the Codex Alimentarius.

- preferences for higher labour standards in trading partner countries;
- political preferences (to support and protect social groups that could be threatened by lower-cost imports);
- animal welfare (if not visible in the product's final characteristics).

Whether or not linkages between trade and such concerns are legitimate is a highly controversial issue that cannot be solved in a straightforward way. At this stage, it must be recalled that the spirit of the WTO national treatment principle is to prevent such linkages, in other words to prevent countries from using trade regulation in the name of these concerns.

But it is important to note that many sectors are not covered, or not fully covered, by the national treatment principle. Public services are not covered by this principle since they are partly or fully provided through the national public budget. Existing tariffs are a way to ensure the protection of political preferences in favour of national providers. Agricultural policies still ensure advantages for national farmers, etc.

(ii) Existing safeguards

In principle, temporary safeguards are not meant to promote collective preferences, but only to respond to a short-term necessity to cope with exceptional world trade circumstances. These safeguards consist in temporarily restricting imports (theoretically for four years at the most, exceptionally for eight years), if a domestic industry is threatened by a surge in imports. In theory, safeguard measures cannot be targeted at imports from a particular country. When a country restricts imports in order to safeguard its domestic producers, the exporting countries can seek compensation through consultations.

Such safeguards are often considered ambiguous because they potentially contain a protectionist effect in favour of targeted sectors.

For all these reasons, existing provisions for safeguards should perhaps not be considered as a tool adapted to collective preferences.

(iii) General exceptions

The general exceptions allow trade regulation for a limited set of motives and under condition of non-discrimination and unintended protection.

GATT article XX lists a number of non-trade concerns for which trade measures are allowed (see annex), provided the trade distortion they generate is minimal. Analysis of a number of conflicts shows how these provisions can be used effectively in defence of collective preferences for non-trade concerns, along with their limitations.

As long as the need for trade measures to meet non-trade objectives can be assessed, and as long as this assessment is validated by international criteria, there is potential for countries to use this article. However, in many cases, the appreciation of the legitimacy of trade measures is critical. A typical case for subjective non-trade concerns is the provision on the public

moral. The perception of policies that are necessary for moral reasons is of course very subjective, and difficult to assess in a multilaterally accepted manner. Even the provision on human, animal and plant health is no guarantee for countries with high standards. The appreciation of health risks themselves is very different in rich and poor countries for an equivalent level of physiological impact (section 3.2. and annexes).

GATT article IV on cinematograph films provides another example of a possibility for countries to use quantitative import restrictions to implement their cultural preferences.

The GATS agreement is another example of the WTO leaving room for the expression of collective preferences, partly because this is a new and complex issue to agree upon, and partly because many governments are very sensitive to their country's conception of public services. Thanks to the positive list approach, countries are allowed to choose the sectors they agree to open to foreign competition, with all other services sectors being exempt from multilateral liberalisation. For now, the collective preference for the public provision of any service can be preserved. In turns, the negotiation incentives might, however, lead countries to put these services on the table. If societies cannot chose the economic role they wish their government to play in services provision, the sense of a loss of sovereignty might be much stronger than it is now for commodity trade.

(iv) The Dispute Settlement Body ruling

The Dispute Settlement Body has the power to evaluate whether domestic policies are necessary to implement collective preferences (non-trade concerns). "Whether WTO rules actually do infringe legitimate domestic measures will depend on how they are adjudicated by WTO panels and the Appellate Body".

Possible infringements lie in the many ways WTO rules can potentially prevent non-protectionist domestic measures designed to achieve national preferences. Charnovitz gives a list of policies that could be challenged by the corresponding WTO agreements (see Table 1 in Annex 2).

The GATT laws themselves give few indications as to the legitimate non-trade concerns that could justify specific measures. Precedents on these concerns and appropriate policies are very recent and in the decades to come will reveal the boundaries between legitimate and illegitimate policies for non-trade concerns.

3.2. Examining DSB cases⁵

(i) The US-EU beef hormone dispute

The EU-US beef hormone dispute can be interpreted as an example where the EU ban on US beef was considered an unnecessary policy to defend EU collective preferences according to

⁵ Where reference is made to ongoing WTO cases, the situation described in the paper is that of 31 March.

the first ruling⁶. Since the EU assessment of the policy rationale based on the sanitary risk was considered unconvincing, it means that the alleged EU preference for hormone-free beef was not considered a good reason for trade restriction. The trade retaliation imposed by the US can be interpreted as the “price to pay” (for the loss of market share in the US) by the EU to maintain its policy for alleged European preferences. This indicates that countries can still defend their collective preferences in the absence of proven risk, but must suffer retaliation.

But after improvement of the EU assessment of the rationality of the import ban, the US should have ended its retaliation, which it did not. This indicates that the assessment of the need for the trade restricting policy may be more flexible than one might think.

The main insight we draw out of this case is that the content of the reality of the alleged collective preferences counts less than the efforts to use internationally recognised methods to justify the policy in favour of these preferences. The financial means and technology required to defend collective preferences in this case may be a barrier to their promotion.

Furthermore, we can infer from this dispute that no trade regulation of production methods would be allowed if it were not justified by risks, but rather by tastes or beliefs.

(ii) The shrimp/turtle dispute

In very simple terms, we can interpret this case as a conflict between the US and a group of shrimp-exporting Asian countries, the US having relatively higher preferences for the conservation of endangered turtles than Asian countries.

After an improvement of the US assessment of the need to maintain its ban on shrimp imports from a number of Asian countries, its alleged preferences were recognised as legitimate by the Appellate Body. The Appellate Body’s report explicitly refers to CITES (Convention on International Trade in Endangered Species) as an argument to legitimate the import ban under GATT article XX on general exceptions to trade rules. Below is an abstract of the Appellate Body’s report.

“All species of sea turtles have been included in Appendix I of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (the "CITES") since 1975 (...) In paragraph 7.58 of the Panel Report, the Panel noted: "The endangered nature of the species of sea turtles mentioned in [CITES] Annex I as well as the need to protect them are consequently not contested by the parties to the dispute.”

Most of the arguments in this dispute concern the assessment of the damage of fishing techniques on turtles. This means that international conventions can potentially be invoked as common objective (referring to global collective preferences), and the legitimacy of trade measures is discussed in reference to this common objective. In turn, the repetition of this type of dispute over trade interests and non trade purposes should contribute to refining the jurisprudence on trade rules and non trade rules in a more balanced way. However, it must be noted that although the WTO could have compelled the US to remove its ban in the case of a ruling in favour of the Asian countries, it cannot compel these countries to modify their fishing techniques in such a way as to meet conservation objectives.

Finally as in the previous case, the purpose of the policy is not so much at the core of the ruling as the assessment method used to establish the necessity of the policy.

⁶ It is of course questionable whether the EU communities effectively have higher preferences for hormone-free beef than the US, or if the EU simply needs new protectionist devices. However, our aim is not to judge countries’ real motivations, but the effects of the WTO practices if countries indeed have collective preferences for such concerns as hormones in beef.

(iii) Antigua and Barbuda - US Gambling dispute

After Antigua and Barbuda challenged the United States' ban on cross-border Internet gambling and betting on moral grounds, the US public moral defence argument was acknowledged as a legitimate objective of the US measures at stake. The conflict was not solved by resorting to a reference as to what the appropriate "moral level" should be. But the United States had failed to demonstrate that its prohibitions applied to both foreign and domestic service suppliers in a manner that did not constitute "arbitrary and unjustifiable discrimination", as required by the chapeau of GATS Article XIV on public moral defence exceptions. It would otherwise have won its case and made its own preferences for moral defences override Antigua's preferences for increased market access.

Again, even though the WTO does not challenge the content of collective preferences, the possibility of showing the necessity of a trade measure – which depends on this content – is the key element of the ruling.

(iv) Some insights from the cases examined

A generic conclusion we can draw from these precedents is that panels do not judge the substance of collective preferences, but the way in which countries assess their need for a specific measure. The improvement of the assessment method has even resulted in the panel making changes to its decisions (as with the shrimp and hormone cases). In both cases, this improved assessment has turned in favour of non-trade concerns.

Still, the condition that a measure must be necessary if it is to be allowed raises questions. According to basic principles of the public economy, a policy does not need to be necessary to be fruitful. Decision makers' intuitions or beliefs are probably the most common way of implementing policies in favour of a community. Existing policies are hardly ever "necessary" to achieve a given purpose. Alternative ways to achieve this goal always exist. It may be argued, for instance, that better labelling is more trade-friendly than import regulation, and still makes it possible for each consumer to choose whether they prefer higher quality purchases (with fewer sanitary risks) or whether they prefer cheaper purchases. In this sense, trade restrictions are not necessary to achieve a level of safety corresponding to each person's income and risk perception. But as long as the information is never complete and as long as the sanitary effects may not be limited to the consumer, trade regulation, while not strictly necessary, may be more efficient than trade-friendly policies to achieve the same objective of ensuring a satisfactory level of protection against sanitary risks. WTO precedents therefore tend to increase the cost of legitimating social choices in favour of public goods.

Nevertheless, these types of trade-related assessments of collective preferences provide very interesting input for the implementation of non-trade conventions. The US assessment of endangered turtles and the EU assessment of the hormone case can both contribute to improving explicit links between trade and non-trade conventions, and can feed the discussion in alternative fora.

3.3. Trade law and non-trade law relationships

According to our analysis, collective preferences encompass non-trade values and trade values, the relative weight of each differing across countries. The WTO rules in general are likely to increase demand for private goods, which are important elements of collective preferences, and this should not be neglected. Trade in this respect contributes to ensuring lower prices and increasing export earnings. These two aspects can improve people's living conditions and also increase the income share available for public goods. Health care, education and labour standards remain closely correlated with national income.

Still, as we have seen, trade dispute settlements enforce trade rules, and trade rules alone (with few exceptions). This progressively leads national short-term arbitration to favour trade-friendly policies at the expense of socially- or environmentally-friendly policies. The Kyoto Protocol is an example of a non-trade convention that is not widely implemented because of a weak application mechanism in relation to its ambitions. Thus, national arbitration between the willingness to regulate polluting industries – and meet Kyoto objectives – and the willingness to export typically turns in favour of the latter. The same is true of the Convention on Biodiversity. Therefore, in simple terms, private elements of collective preferences tend to be more easily provided than public elements. The whole governance system seems unbalanced and countries with higher collective preferences for public goods and non-trade concerns are probably more threatened than others by this unbalanced governance.

4. Towards an assessment of “European collective preferences”

Policies and preferences are not synonymous because policies are often inherited from a world in which interaction between countries was not as stringent as today, and where governments tended to satisfy people's expectations from the national perspective alone. Thus, policies probably ignore some of the potential value of coordination in terms of improving the fulfilment of collective preferences. Furthermore, policies arise from a complex interplay of lobbies and one can imagine that the welfare of silent groups is probably underestimated in existing policies.

Nevertheless because of selective democratic pressure on proposed policies, we still consider that existing policies are a reasonable starting point from which to draw elements of collective preferences.

Our aim is of course not to describe the complete collective preferences scheme, which would be impossible. Preferences being comparisons between observed and non-observed states of the world, one can at the most analyse the prevailing arbitration between different allocations of resources in the existing state of the world in the country under consideration.⁷ These

⁷ Describing all European preferences would imply being able to answer questions such as: what would be the average European willingness to pay to increase national education services by one unit (say one teacher), if average GDP per capita were 300 euros per year, 400 euros per year, etc. and if the existing level of education were 1 teacher for 1 million people, 2 teachers for one million people, etc., and if the average consumption of beef were 100g per year, 200g per year, etc. All this would give the European collective preferences scheme that could be compared to other countries' preferences schemes.

arbitrations are supposed to account for the social demand for each non-market good in question (the other parameters of the state of the world being taken as granted).

This illustrates the relative value attributed by the society to different non-market goods in comparison with the value attributed by other societies to these non-market goods *given the existing level of these non-market goods actually observed in these countries*, and given all other factors that may influence public choices. However, where possible, we do take account of the revenue effect on choices in order to avoid attributing to preferences what is actually due to income.

4.1. Labour rights

Legislation on labour rights can be used to reflect the arbitration between people's demand for higher income and their demand for non-consumption attributes like leisure. Among these labour rights, the legislation on working time could be compared between countries, provided parameters like legal holidays are considered. To avoid such a complex comparison, we compare the effective yearly working time – instead of the legislation – that gives another indicator of the preferred arbitration between leisure and income.

Figures and graphs presented in Annex 4 suggest that the EU has a relatively higher preference for leisure over income or consumption goods than most other countries. This preference for leisure over income is negatively correlated with the income level, but we can also identify regional effects. In particular the average yearly working time is very homogenous among European countries of different income levels, meaning that the regional influence overcomes the average income influence in Europe. The regional effect can also be highlighted by the comparison between the EU and Asian countries where the preference for leisure is lower than would be expected for non-Asian countries of the same income level.

All other things being equal, this implies that on average, increased consumption is not valued as highly in Europe as it is elsewhere, which provides another non-mercantilist explanation for the EU's prudent attitude towards the potential consumption-based gains obtained from further liberalisation.

4.2. Food quality

National legislations on food quality give indications of countries' preferences for quality attributes expressed in terms of income. Several indicators show that European preferences for food quality attributes are higher than in many countries, but they are also specific.

European legislation on geographical indications provides specific protection for product origin and production methods. Trademarks are not given the same protection. In comparison, US legislation provides similar protection for trademarks and geographical indications. The dispute between the EU and the US over EU legislation on geographical indications (see Annex 3.3.) seems to confirm the cliché whereby the European vision of quality is linked to the product origin and the conservation of traditional production methods, etc., whereas the American vision is based on innovation, science and the composition of products.

The recognition of origin as a quality attribute in the absence of any measurable difference in the product challenges the non-discrimination principle based on the like product criteria.

Again, this can also explain the EU's position at the WTO, which more readily recognises science-based preferences than tradition-based preferences.

4.3. Public expenditures

Public expenses are a major source of information on countries' collective preferences for different types of public goods and services. Apart from agriculture and regional development, most public expenses are left to national sovereignty. Efforts to harmonise agricultural expenses have shown how difficult it is to aggregate preferences at the regional level as soon as public good funding is involved, in spite of relatively similar development levels. Nevertheless, European national public expenses (as a share of GDP) indicate similarities between European countries, even in non-agricultural sectors.

We consider the relative income share given by each country to any public expense. This income share accounts for average collective preferences for a public good estimated for a given level of all other public goods and income levels.

European countries' preferences for public education over private expenses are relatively high, especially for university education (see Annex 4) and public health care, confirming Lamy's statement.

This could imply that for European citizens, public contributions to individual needs play a part in social welfare.

5. Policy implications

The risk of collective preferences being understood as a new *ad hoc* tool for protectionism in rich countries should not be ignored. Whereas we can broadly define protectionism as the defence of economic interest groups whose contribution to public goods is not widely backed by citizens, policies for collective preferences are aimed at fulfilling citizens' expectations, including public good provision. Among these policies, some can potentially have impacts on trade. Therefore, the risk of misinterpretation is real and must be addressed here. The following proposals are designed to minimize the risk of such an interpretation, and still sustain the debate on the long-term architecture of global institutions.

In principle, existing trade rules and dispute settlements do not remove the possibility for countries to design policies in favour of their collective preferences for public goods and non-market aspects of their own living conditions. One should not ignore the ability of the dispute settlement body (DSB) to take account of the variability of these non-market concerns among societies, provided they can be assessed. Precedents on environment, health, food safety and moral issues show that panels and the Appellate Body already arbitrate between conflicting preferences by assessing the "legitimacy" of collective preferences that have an impact on trade. To do so, they assess whether external references (international treaties, science-based knowledge, or other government practices) support the "importance" of the "common interests or values" protected by the policy measure at stake.

Nevertheless, the WTO judgement of these policies imposes a series of conditions that question the sustainability of non-measurable elements of preferences – like moral values – and that increase their cost. Some lawyers convincingly argue that dispute precedents, such as gambling, are overly restrictive of WTO Member States’ sovereignty because of the reference to external “common interest or values” and the unclear process of “weighing and balancing”⁸. They indeed demonstrate that current uncertainty in WTO rulings on these two aspects may thwart domestic policies in ways that are unpredictable and unwarranted⁹. They further recall that panels and the Appellate Body may not always be infallible, so that a collective preference mechanism may offer the defendant government a way out of its compliance obligation while giving the dispute system the opportunity to refine and correct the case law¹⁰. These objections are motivated by the possible infringement of social choices by WTO rules. Even though they do not all refer to collective preferences, they do provide support to the initiative.

Despite these biases, a safeguard for collective preferences in general would perhaps not serve the purpose of ensuring the usefulness of collective preferences in the trade context, if these preferences only concern national living conditions. We instead suggest the development of assessment rules in such a way as to account for heterogeneous preferences when the assessment of the necessity of the policy cannot be established on an international basis. A more flexible way of assessing the need for the policy would be to compare the level of public good achieved by this policy with the level achieved by other existing policies in comparable sectors in this country. For instance, in countries where public expenses for public health care are high, trade measures preventing imports with low sanitary standards should probably not be looked upon as protectionist measures.

When policy goals concern not only domestic living conditions, but also global public goods or foreign living conditions, the case for safeguards is potentially different. As long as the consistency between trade rules and multilateral non-trade rules is not established, collective preferences for non-trade concerns are potentially unfulfilled, and this bias is likely to become increasingly important in trade negotiations. It is true that trade rules can call upon international conventions to rule on a dispute, but since the international non-trade rules are still barely enforced, the bias in favour of trade purposes remains. Therefore, we suggest that a new type of safeguard should be negotiated for policies based on international conventions, in spite of the potential trade effect of these policies. Processes and production methods, including environmental and social criteria, may be part of import choices as long as they serve multilateral cooperation purposes. While trade bans are probably not the best way of enforcing UN conventions, trade policy removal can also act as an obstacle to such conventions – such as the climate change protocol – in the absence of the effective implementation of these conventions.

In practical terms, a safeguard for policies in favour of multilateral conventions seems legitimate, and could potentially accelerate the search for better coherence between international laws. As long as countries using such safeguards expect third countries to meet production standards that have been agreed upon in international conventions, these safeguards do not require compensation. If the expected standards exceed the level agreed upon in these conventions, compensation seems legitimate to help third countries to improve

⁸ See Marwell (2006).

⁹ Charnovitz (2005).

¹⁰ Id.

production standards. This potentially includes the case for minimal labour rights, biodiversity protection, resources conservation and climate change prevention. The implementation of such a safeguard implies increasing the availability of shared information on countries' production methods and standards. It is indeed hardly conceivable that a country would agree to finance compensation without a reasonable level of confidence in the actual fulfilment of its expectations regarding the trading countries' standards.

Such improved coherence is of course a long-term challenge at the multilateral level. In contrast, regional agreements are promising fields for countries to learn from each other's preferences when multi-sector arbitration is necessary. More ambitious conditionality to trade preferential agreements can be agreed upon at the regional level because a broader range of issues can be negotiated. Furthermore, regional and bilateral agreements seem the appropriate level at which to test the above compensation.

6. Conclusion

European collective preferences appear to be in favour of balanced development where environmental values and social values play a large part in public welfare. Europe's attention to its own environmental and social conditions is high, and its attention to other countries' environmental and social conditions is also increasing. The need for more consumption is not perceived in Europe as an essential priority for social welfare, as it is in many countries, partly because the essential basic needs of most people are satisfied, and partly for historical and cultural reasons.

Existing trade rules allow some degree of protection of national collective preferences for several societal concerns that could be threatened by unregulated trade.

Since the creation of the WTO, countries must be accountable for their collective preferences and their policies to implement them. Societies' fears of losing sovereignty over their social choices stem partly from this new international accountability requirement. Trade rules and case law on non-trade concerns and exceptions show that provided this effort for accountability is made, the DSB tends to allow some room for the heterogeneity of collective preferences, as far as sanitary and environmental standards are concerned.

Very often, public environmental or sanitary policies are implemented because governments feel they will be socially accepted and even desired, without any kind of assessment apart from continuous democratic regulation. Among countries' perceptions of the need for regulations, beliefs, habits and tastes play a major role in shaping adequate policies and the scientific need is only one determinant. The DSB ruling might introduce a long-term bias selection in favour of preferences for measurable risks at the expense of subjective elements of preferences. In particular, existing trade rules do not readily allow the defence of preferences for moral values through trade measures (like trade bans for unacceptable working or environmental conditions in third countries).

Furthermore, the advance of the enforcement of trade rules over that of non-trade rules at the multilateral level creates another bias: the multilateral incentives for national legislation to be reformed in such a way as to increase the availability of material goods and the multilateral

incentives for them to evolve in such a way as to integrate global non-trade objectives are unbalanced.

Therefore, the idea of a new safeguard for collective preferences has to be considered even if there is a risk of this insightful concept being immediately associated with rich countries' new rhetoric for protectionism. Using trade to promote environmental and social goals in third countries has never met with widespread support, either from economists or from Southern countries.

Nevertheless, assuming that collective preferences (hence willingness to pay) exist in Europe for raising these standards abroad, and as long as the lack of consistency between trade laws and non-trade laws on labour and environmental standards remains so striking, the claim for a temporary safeguard for policies in favour of outward-directed preferences seems interesting. The respect of basic human rights in foreign countries or heavy local pollution due to production methods in foreign countries are examples of this kind. If the living conditions in third countries expected by the importing countries are superior to the minimal standards agreed upon in international treaties, a safeguard would not be legitimate unless compensation is paid by the trade-restricting country. Consequently, international assessments of national standards should be registered and enforced by an independent body to alleviate the bilateral dispute procedures.

More importantly, as far as preferences for global public goods are concerned (climate change prevention, ocean pollution, the depletion of global resources, etc.), such a temporary safeguard should prevail according to the same rules. Temporary import restrictions on countries that do not respect international agreements on global public goods should be allowed and not compensated, as long as the link between the product and the non-respect of the global good provision rules is established. They would be associated with compensation if the standards expected by the trade-restricting country were higher than those agreed upon in international treaties. Compensation would then be used to improve these standards.

As far as collective preferences for local public goods are concerned (a society's collective preferences for its own living conditions), it seems that safeguards are not appropriate. The improvement of international recognition of different assessment methods for non-measurable aspects of preferences (like beliefs, customs, etc.) is probably more promising. An international organisation to provide consumers with reliable information about production methods would also be of great help.

For sectors like services, for which the negotiation process is still at an early stage, the effect of trade laws on collective preferences will potentially be considerable because today's heterogeneity in collective preferences is reflected by a huge heterogeneity in national legalisations. The services sector embodies societies' collective preferences for public services over private services and the legal duties of the latter. European citizens are probably not ready to allow access to health, education, energy, water, military security, information and transportation to be provided by the international market, even when these services are offered by private operators. Negotiations on countries' rights to ensure a certain degree of access to these services in a liberalised future are perhaps a prerequisite to the GATS negotiation on private services liberalisation.

For services, as for all subjective dimensions of collective preference, increased flexibility in WTO requirements regarding the evaluation of defendant countries' assessment seems necessary in order to integrate multilateral non-trade objectives in a more systematic way, along with non-scientifically assessable aspects of socially desired policies.

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Annexes.

Annex 1. The GATT article XX on general exceptions

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade” certain measures can be safeguarded because they are deemed necessary to protect public morals; to protect human, animal or plant life or health; to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies, protection of patents, trade marks and copyrights, and the prevention of deceptive practices; because they are relating to the products of prison labour; imposed for the protection of national treasures of artistic, historic or archaeological value; relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (...).

Annex 2. Summary of trade agreements and collective preferences

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 Commonsf	GATT, GATS, TBT Agreement, TRIPS Agreement g
Delineation of Ownership	TRIPS Agreement

source: Charnovitz, 2004

Annex 3. Summary of selected WTO cases

The WTO DSB's rulings indicate that most of WTO rules have been negotiated in a way that allow countries to protect their collective preferences conditionally with non discrimination and, depending on WTO particular agreements, with minimal trade restrictions. SPS for instance is a good example. DSB rulings can help designing further schemes for compensations for non negotiated rules.

The hormone-beef dispute

On 26 January 1996, the United States requested consultations with the European Communities claiming that the EU Prohibiting the Use in Livestock Farming of Certain hormones prohibit imports of meat from the United States, and are inconsistent with GATT Articles III or XI, SPS Agreement Articles 2, 3 and 5, TBT Agreement Article 2 and the Agreement on Agriculture Article 4.

On 25 April 1996, the US requested the establishment of a panel.

On 18 August 1997, the report of the Panel was circulated. It found that the EC ban on imports of meat was inconsistent with Articles 3.1, 5.1 and 5.5 of the SPS Agreement.

“3. 3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.”

“5. 1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”

On 13 February 1998, the Appellate Body report and the Panel report, as modified by the Appellate Body, were adopted by the DSB. The period for implementation was to expire on 13 May 1999. The EC undertook to comply with the recommendations of the DSB within the implementation period.

At the DSB meeting on 28 April 1999, the EC informed the DSB that it would consider offering compensation in view of the likelihood that it may not be able to comply with the recommendations and rulings of the DSB by the deadline of 13 May 1999.

On 3 June 1999, the United States and Canada, requested authorization from the DSB for the suspension of concessions to the EC and obtained

On 26 July 1999, the United States obtained from the DSB the authorization to retaliation (ie to suspend obligations up to the level of 116.8 million US Dollars per year, the equivalent of losses suffered by the United States).

On 29 July 1999 the United States introduced import duties in excess of bound rates to imports from the European Communities by imposing a 100 % *ad valorem* rate of duty on a list of articles that are the products of certain EC Member States.

On 22 September 2003, The EU adopted Directive 2003/74/EC amending the prohibition on the use in stockfarming of hormones. The new EC legislation is based on comprehensive risk assessments, in particular on the opinions of the independent Scientific Committee on Veterinary Measures relating to Public Health. The assessment concludes that the avoidance of intake of oestradiol is of absolute importance to human health and that, consequently, the placing on the market of meat containing this substance should be prohibited.

On 27 October 2003, the European Communities notified to the DSB the adoption, publication and entry into force of this Directive as well as the preceding scientific risk assessments, and stated that the United States' suspension of concessions vis-à-vis the European Communities were no longer justified.

The United States denied that the new Directive was based on science and maintained her retaliatory duties on certain products from the European Communities.

On 8 November 2004, the European Communities requested consultations with the United States, held on 16 December 2004 in Geneva.

The EU requests that a panel be established. The issues which the EC intends to raise in the consultations include:

- the failure by the United States to remove the retaliatory measures despite the EC's removal of the WTO-inconsistent measures;
- the unilateral determinations by the United States that the new EC legislation is a continued WTO violation; and
- the failure of the United States to follow DSU Article 21.5 dispute settlement procedures to adjudicate the matter.

The EC considers that the continued use by the United States and of retaliatory measures in this case, in the current circumstances, are violations of Articles I and II of GATT 1994, and Articles 21.5, 22.8, 23.1 and 23.2 (a) and (c) of the DSU.

27 January 2007: The Panel estimates that it will issue its final report to the parties in the course of June 2007

The shrimp-turtle dispute

On 8 October 1996, India, Malaysia, Pakistan and Thailand requested consultations with the US concerning a ban on importation of shrimp imposed by the US. This law was allegedly designed to prevent Asian fishing techniques that were dangerous for protected turtles species, based on the certification of nations fishery techniques. Violations of Articles I, XI and XIII of GATT 1994 were alleged.

On 9 January 1997, Malaysia and Thailand requested the establishment of a panel.

On 15 April 1997, the Panel was composed.

The report of the Panel was circulated to Members on 15 May 1998. The Panel found that the import ban in shrimp and shrimp products as applied by the United States is inconsistent with Article XI:1 of GATT 1994, and cannot be justified under Article XX of GATT 1994.

“XI.1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

“XX. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures (...),(g): relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; (...)”

On 13 July 1998, the US notified its intention to appeal certain issues of law developed by the Panel. The report of the Appellate Body was circulated to Members on 12 October 1998. The Appellate Body reversed the Panel’s finding that the US measure is not within the scope of Article XX of GATT 1994, but concluded that the US measure, while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX. The DSB as modified by the Appellate Body Report was adopted on 6 November 1998.

On July 1999, the US amended her public law in a way to (i) introduce greater flexibility in considering the comparability of foreign programmes and the US programme and (ii) elaborate a timetable and procedures for certification decisions. The US led a risk assessment for sea turtles upon different fishery techniques. According to this assessment, 16 nations have adopted programs to reduce the incidental capture of sea turtles in their shrimp fisheries comparable to the program in effect in the United States (including Thailand). Consequently, the ban was maintained for certain countries.

On October 2000, Malaysia claimed the US had not lifted the import prohibition and the DSB referred the matter to the original panel.

On 15 June 2001, the Panel concluded that:

- the measure adopted by the US in order to comply with the recommendations and rulings of the DSB violated Article XI.1 of the GATT 1994;
- the new US law as applied so far by the US authorities was justified under Article XX of the GATT 1994.

On 23 July 2001, Malaysia notified the DSB its intention to appeal report. Malaysia the US measure still constitute unjustifiable or arbitrary discrimination between countries where the same conditions prevail, and that it is therefore not within the scope of the measures permitted under Article XX of the GATT 1994.

On 21 November 2001, the DSB adopted the Appellate Body Report and the Panel Report, as upheld by the Appellate Body Report.

The US-EU dispute over geographical indications

On 1 June 1999, the US requested consultations with the EC in respect of the alleged lack of protection of trademarks and geographical indications (GIs) for agricultural products and foodstuffs in the EC. The US contended that EC Regulation 2081/92, *on the protection of*

geographical indications and designations of origin for agricultural products and foodstuffs and related measures does not provide national treatment with respect to geographical indications and does not provide sufficient protection to pre-existing trademarks that are similar or identical to a geographical indication. The US considered this situation to be inconsistent with the EC's obligations under the TRIPS Agreement Articles 3, 16, 24, 63 and 65.

On 4 April 2003, the US sent an additional request for consultations concerning the protection of trademarks and GIs for agricultural products and foodstuffs in the EC. According to the US, the EC Regulation limits the GIs that the EC will protect and limits the access of nationals of other Members to the EC GI procedures and protections.

On 17 April 2003, Australia requested consultations with the EC on the same issue. According to Australia:

- the EC measure seems not to accord to the nationals and like products of each WTO Member any advantage granted to the nationals and like products of national origin,
- the EC measure may diminish the legal protection for trademarks,
- the EC measure may not be consistent with the EC's obligation to provide the legal means for interested parties to prevent misleading use of a geographical indication or any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967),
- the EC may not have met its transparency obligations in respect of the measure, and
- the EC measure may be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

Australia claims that the EC measure appears to be inconsistent with the EC's obligations pursuant to Articles 1, 2, 3, 4, 16, 20, 22, 24, 41, 42, 63 and 65 of the TRIPS Agreement, Articles I and III of GATT 1994, Article 2 of the TBT Agreement and Article XVI:4 of the WTO Agreement.

On 23 February 2004, the Director-General composed the Panel.

On 15 March 2005, the Panel report was circulated to Members.

- the Panel agreed with the United States and Australia that the EC's GI Regulation does not provide national treatment to other WTO Members' right holders and products, because:

(i) registration of a GI from a country outside the European Union is contingent upon the government of that country adopting a system of GI protection equivalent to the EC's system and offering reciprocal protection to EC GIs;

(ii) the EC protection systems require other countries' governments product examination, in the same way EU countries do. Therefore, foreign nationals do not have guaranteed access to the EC's system for their GIs, unlike EC nationals;

- otherwise, there is *no* finding that the substance of the EC system of GI protection, which requires product inspection, is inconsistent with WTO obligations; and
- the Panel agreed with the EC that, although its GI Regulation allows it to register GIs even when they conflict with a prior trademark, the Regulation, as written, is sufficiently constrained to qualify as a "limited exception" to trademark rights. However, the Panel agreed with the United States and Australia that the TRIPS Agreement does not allow unqualified coexistence of GIs with prior trademarks.

The DSB adopted the Panel report on 20 April 2005.

At the DSB meeting of 19 May 2005, the European Communities stated its intention to implement the DSB's recommendations before 3 April 2006.

At the DSB meeting on 21 April 2006, the European Communities said that they had fully implemented the DSB's recommendations and rulings by adopting a new regulation which entered into force on 31 March 2006.

Australia and the United States disagreed that the European Communities had fully implemented the DSB's recommendations and rulings and invited the European Communities to take account of their comments and revise the newly promulgated regulation.

Antigua and Barbuda - US Gambling dispute

For the first ecommerce dispute to come before the World Trade Organization ("WTO"), the tiny twin-island nation-state of Antigua and Barbuda challenged the United States' ban on cross-border Internet gambling and betting on moral grounds. Measures at issue were various US measures relating to gambling and betting services, including federal laws such as the "Wire Act", the "Travel Act" and the "Illegal Gambling Business Act" ("IGBA"). Requests for consultation were received by the WTO on March 2003. The panel report and appellate body report were circulated respectively on November 2004 and April 2005. On May 2006, the parties informed the DSB that, given the disagreement as to the existence or consistency of measures taken by the United States to comply with the recommendations and rulings of the DSB, they had agreed to request new consultations under DSU. The second panel circulated its report in March 30th, 2007, concluding that the United States had failed to comply with the recommendations and rulings of the DSB in this dispute.

The key findings of the first panel/appellate body can be summarised as follows:

- Scope of GATS commitments: The Appellate Body upheld, based on modified reasoning, the Panel's finding that the US GATS Schedule included specific commitments on gambling and betting services. The Appellate Body concluded that the entry, "other recreational services (except sporting)", in the US Schedule must be interpreted as including "gambling and betting services" within its scope.
- GATS Art. XVI:1 and 2 (market access commitment): The Appellate Body upheld the Panel's finding that the United States acted inconsistently with Art. XVI:1 and 2, as the US federal laws at issue, by prohibiting the crossborder supply of gambling and betting services where specific commitments had been undertaken, amounted to a "zero quota" that fell within the scope of, and was prohibited by, Art. XVI:2(a) and (c). However, it reversed a similar finding by the Panel on state laws because it considered that Antigua and Barbuda ("Antigua") had failed to make a prima facie case with respect to these state laws.
- GATS Art. XIV(a) (public morals defence): The Appellate Body upheld the Panel's finding that the US measures were designed "to protect public morals or to maintain public order" within the meaning of Article XIV(a), but reversed the Panel's finding that the United States had not shown that its measures were "necessary" to do so because the Panel had erred in considering consultations with Antigua to constitute a "reasonably available" alternative measure. The Appellate Body found that the measures were "necessary": The United States had made a prima facie case showing of "necessity" and Antigua had failed to identify any other alternative measures that might be "reasonably available". With respect to the Article

XIV(c) defence, the Appellate Body reversed the Panel due to its erroneous "necessity" analysis and declined to make its own findings on the issue.

The Appellate Body modified the Panel's finding with respect to the chapeau of Article XIV. The Appellate Body reversed the Panel's finding that the measures did not meet the requirements of the chapeau because the United States had discriminated in the enforcement of those measures. However, the Appellate Body upheld the second ground upon which the Panel based its finding, namely that in the light of the Interstate Horseracing Act (which appeared to authorize domestic operators to engage in the remote supply of certain betting services), the United States had not demonstrated that its prohibitions on remote gambling applied to both foreign and domestic service suppliers, i.e. in a manner that did not constitute "arbitrary and unjustifiable discrimination" within the meaning of the chapeau.

The “non dispute” on the Kyoto protocol and trade competitiveness

Nobel laureate Joseph Stiglitz recently proposed that U.S. trade partners should use the WTO to charge the US for non joining the Kyoto protocol because U.S. steel and other energy-intensive products benefit unfairly from Washington's refusal to join the Kyoto Protocol limiting carbon and other greenhouse gasses. The supposed universal collective preferences for preventing global warming are not implemented by the US, creating an unfair competitive advantage and thus, distorting trade, as compared to a reference of the world where countries implement the Kyoto protocol. According to J. Stiglitz, the WTO ruling in support of a U.S. ban on the import of shrimp caught in Thailand using nets that killed endangered turtles is an example of WTO being used to make these CITES collective preferences respected. One could also think about other UN convention like the biodiversity convention, or ILO conventions, that could be invoked as compulsory standards for the competition to be fair. This would shift the property rights attribution in favour of higher public goods standards, and modify considerably the level of reference of undistorted trade.

A considerable difference however lies in the fact that Malaysia was a contracting party of the CITES convention, while the US never ratified the Kyoto protocol. Hence at first sight is the case different and the likelihood to use the WTO to advance an (allegedly) universal collective preferences rather weak.

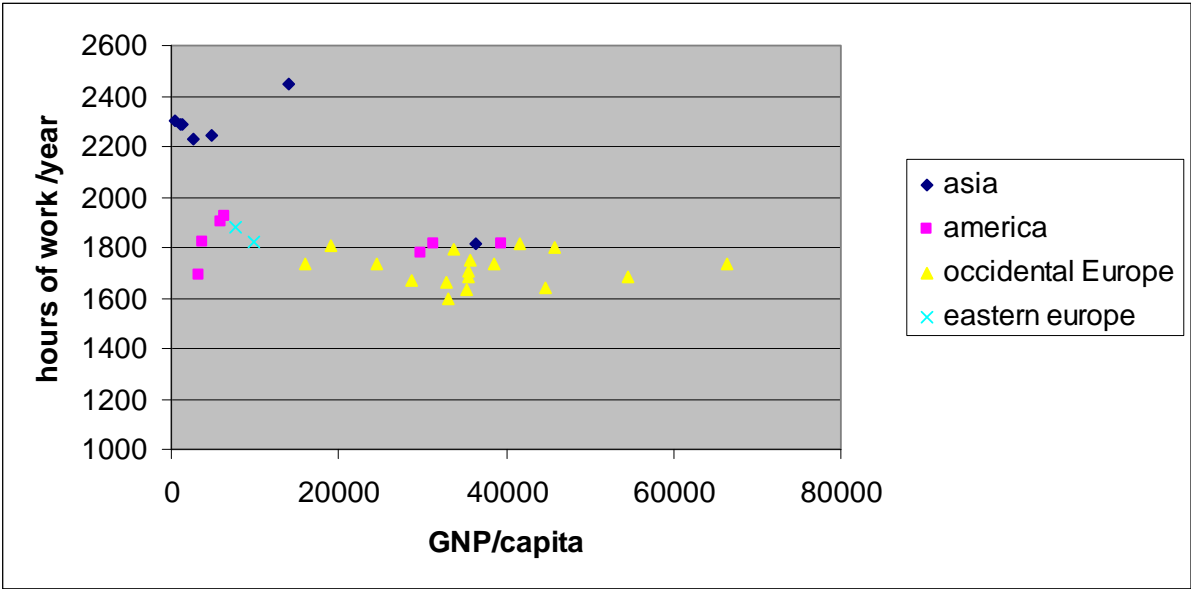
Annex 4. Examples of assessed preferences

4.1. Average working time and preferences for leisure over consumption

This graph uses a study by ILO on the yearly effective working hours averaged in several countries. This indicator accounts for both the legislation effect (legal maximal weekly working time in particular), and the individual preferences effect. We use these data which we relate to the GNP/capita and the geographical location. Each plot illustrates one country's GNP/capita and average yearly working time (for workers only).

We can derive two conclusions: in average, the richer the country, the higher the preferences for leisure over consumption, which is standard finding, but we also find a geographical influence on the working time, for a same level of average revenue, which probably accounts for geographical preferences for leisure/consumption.

For instance, people with an income around 5000\$ work around 1800 hours in American countries and around 2300 hours in Asia countries. More strikingly, we see that there is a relative geographical homogeneity in the yearly working time in spite of a wide range of revenue. Therefore, it seems that the geographical location plays a greater role in the working time than the revenue, which means that there probably is a geographical determination of the preference for leisure over consumption.



figures used (2001-2002)

country	GDP/capita	Working time
Bangladesh	393	2301
Sri Lanka	999	2288
Hongkong -China	1262	2287
Thailand	2547	2228
Japan	36285	1815
rep Korea	13973	2447
Malaysia	4916	2244
Canada	29866	1780
Australia	31421	1815
Brazil	3249	1689
Argentina	3831	1820
Chile	5888	1902
Mexico	6369	1921
US	39452	1815
Slovakia	7566	1881
Hungary	9964	1824
Portugal	15926	1735
Greece	19066	1808
Spain	24576	1732
Italia	28781	1672
Germany	32929	1661
France	33015	1599
Belgium	33754	1794
Netherlands	35183	1633
UK	35421	1685
Austria	35443	1709
Finland	35726	1752
Sweden	38480	1738
Denmark	44742	1639
Ireland	45707	1801
Norway	54467	1687
Luxemburg	66463	1731
island	41720	1815

Source:

<http://www.eurofound.europa.eu/eiro/2003/03/update/tn0303109u.html>

<http://www.ilo.org/public/english/employment/strat/kilm/kilm06.htm>

4.2. Education public expenses in selected countries (GDP share)

Denmark 8,5 %; Sweden 7,7%; Norway 7,6%; Israel 7,5%

USA 5,7%; Poland 5,6%; Canada 5,2%; France 5,6%;Hungary 5,5%;

Australia: 4,9%; Japan 3,6%;

Peru, Kasakstan, Armenia, Philipines: 3%