The Hidden World of WTO Governance: A Rejoinder to Richard H. Steinberg

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Professor Steinberg responds to our article by re-asserting a familiar analytical paradigm – a comfortable Newtonian world dominated by large stable pieces known as states which operate on the basis of fixed interests categorically defined in advance. But that traditional paradigm no longer provides a satisfactory account of the operation of today's trade regime, particularly in the context of regulatory supervision. Its tenacious hold over contemporary scholarship needs to be dislodged. Our article attempts to do precisely that, by inviting more sustained analysis of the actual and potential operation of alternative modes of governance within two WTO committees.

Professor Steinberg's model of international trade politics is founded on his notion of 'intergovernmental bargaining'. Activities in the WTO are carried out by 'low level representatives of Member governments' who 'behave strategically and tactically' in ways designed to 'advance the interests of the states they represent'.[1] More specifically, they speak for and on behalf of the interests of export- and import-oriented firms based in the countries they represent.[2] This analytical framework has been and remains in many respects the starting point for virtually all analyses of the international trade regime.[3] There are good reasons for this: intergovernmental bargaining of this sort has always been one important mode of engagement within the trade regime, it has profoundly affected the operation of it over the course of its history, and continues to do so. We do not see ourselves as contesting that claim.

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1 Steinberg, 'The Hidden World of WTO Governance: A Reply to Andrew Lang and Joanne Scott', in this issue at 1069.

2 *Ibid.*, at 1069.

3 That said, we should also stress that we are hardly the first to suggest that trade diplomats are influenced to some degree by the norms and expectations of the Geneva-based community they join, see, e.g., R. E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993); Hudec, 'The GATT Legal System: A Diplomat's Jurisprudence', 4(5) *Journal of World Trade* (1970) 615; Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35(2) *Journal of World Trade* (2001) 191.

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Where we part company with Steinberg is that we do not think that this traditional model is a sufficiently complicated nor complete picture of the contemporary WTO, particularly in light of its 'new' (in relative terms) institutional infrastructure, and the new challenges it faces in regulatory areas such as food safety and services liberalization. The new forms of governance of the kind we describe – expertise-based, problem-oriented, and so on – have in fact become quite commonplace in many other sites of governance, whether national, regional or international. It would be surprising if they had not also come to make some impression on the WTO. We feel there is an urgent need to explore the possibility that a similar transition is occurring in the WTO context, and to consider its normative and theoretical implications. We are not suggesting of course that a clean break has occurred, but we do feel that scholars of the WTO need to destabilize their traditional understandings of the way that organization works, in ways which Steinberg seems not yet ready to do.

A more specific disagreement relates to Steinberg's suggestion that we offer a depoliticized vision of interactions within the WTO committees, portraying them as 'largely free of interest-based politics'.[4] In fact, we do explicitly note that discussions within WTO committees can be self-interested and strategic, though it is true that our emphasis is elsewhere. More importantly, however, we profoundly disagree with Steinberg's characterization of information exchange, knowledge production, and so on, as depoliticized. It is our view that these processes represent increasingly important *ways of doing politics* in international institutions, and it is precisely for this reason that we argue for further attention to be paid to them.[5]

Furthermore, it is not necessary to see intergovernmental bargaining and the processes we describe as mutually exclusive alternatives. We can accept that delegates seek to advance the interests of the states they represent, but that still leaves the prior question of how those interests are defined. Any answer to that question must pay close attention to the communicative and cognitive processes through which disagreements are framed, arguments are made, knowledge is produced, and ideas are disseminated. Our services case study provides numerous examples of precisely these sorts of processes. Part of our claim, then, is that important work is often done *before* we get to the stage of intergovernmental bargaining, and that the politics of international trade is found just as much in everyday routines of global economic governance as it is in its eye-catching moments. This is the 'background' world of discursive interaction which helps both to set the scene for formal decision-making and to shape how such decisions are implemented.[6]

Aside from his general emphasis on intergovernmentalism, Steinberg sets forth two main criticisms of our paper.

[4] Steinberg, *supra* note 1, at 1068.

[5] We agree, for example, with Koskenniemi's observation that international politics today is increasingly carried out in the mode of a 'politics of re-definition' or re-description: Koskenniemi, 'The Politics of International Law – 20 Years Later', 20(1) *EJIL* (2009) 7, at 11.

[6] We take this notion of the 'background' from Kennedy, 'Challenging Expert Rule: The Politics of Global Governance, 27 *Sydney J Int'l L* (2005) 5.

He argues first that a methodological limitation in our approach results in a data deficit and conceals a crucial feature of the committees under discussion; namely their intergovernmental nature. Second, he argues that we do not present sufficient evidence to support our claim that the committees perform important functions.

Starting with the data deficit,[7] it is indeed the case that our research was based in the main upon a close reading of many hundreds of pages of text.[8] As a result, we do not inquire into the relationship between committee members and their governments back home. This is a data gap which needs to be filled and Steinberg usefully highlights this and other areas that require further empirical research. But it is perhaps surprising that, notwithstanding this data deficit, Steinberg feels quite sure that committee members should be viewed as agents representing their principals back home. He supports this claim by reference to scholarship which does not focus upon these committees, and on the basis of suppositions about how we might expect an American in Geneva to behave.

In relation to Steinberg's second general criticism, we are a little bemused. He dismisses as irrelevant activities and findings which we consider important. Our differences seem to lie in large part in our different premises about what we view as important.[9] Thus, for Steinberg, procedural norms and soft law elaborations of the hard law obligations laid down in the WTO agreements can be readily dismissed. Likewise the only kind of agreement that seems to matter is that which succeeds in overcoming conflict or the consciously opposing views of states; rather than that which serves to operationalize vague but important norms. Finally, Steinberg appears not to attribute value to agreement on the meaning of a text which is pragmatic and problem-oriented rather than immediately generalizable.

Yet just as intergovernmentalism is 'well pedigreed' so too is there a growing body of literature which supports the proposition that procedural norms and soft law can count.[10] Again, we explicitly accept in our paper that there is a need to follow through and to chart the impact of the results of committee governance on the behaviour of Member States. But to dismiss measures out of hand merely because they are procedural, or soft in the language which they deploy, is to overlook a wealth of literature which attests to

[7] On Steinberg's serious but vague claim that our empirical findings are skewed to fit the analytic frameworks presented, we can simply report that the descriptive accounts were written well before we had settled on our choice of analytic frameworks or had even discussed the range of possibilities available to us.

[8] A small number of interviews were held in relation to the SPS case study, with a senior member of the SPS secretariat, the then US Chairman of the Committee, and with a relevant UK official; and also in relation to the services case studies with two senior members of the WTO Secretariat closely involved with services issues.

[9] Just occasionally our differences lie in simple misunderstandings. For example, we do not link the concept of Global Administrative Law to the work of the Services Council as Steinberg claims we do at 1066.

[10] This debate is particularly active in the EU in evaluating the impact of the 'Open Method of Coordination' which is procedurally based and dependent upon soft law. See, for a recent discussion, M. Heidenreich and J. Zeitlin, *Changing European Employment and Welfare Reform: The Influence of the Open Method of Coordination on National Reform* (2009). Indeed the line between hard and soft is further blurred when considering soft law elaborations of ambiguous hard law obligations.

the capacity of such norms to bring about attitudinal and behavioural change.[11]

Richard Steinberg is a distinguished and influential commentator on the dispute settlement system of the WTO. His starting point is that this has been a success, as evidenced by the 90 per cent compliance rates to which he refers.[12] He does not accept, on the contrary, that the committees we discuss can help to generate compliance with ambiguous treaty norms. We disagree. Our cholera example could be offered as one, relatively clear-cut, case. That said, we do not use the term 'compliance' in our article other than with reference to the role of the SPS Committee in facilitating the capacity of one state to comply with the domestic food safety standards put in place by another state. Our reluctance to use this term in relation to the WTO Agreement reflects the complexity of SPS regulation and the open-ended nature of the agreement's key norms. As a result, and as the relevant 'case-law' bears out, 'compliance' is difficult to assess.[13] We focus instead upon the contribution of the committee to the resolution of specific trade concerns. Here, we find that tensions are overcome not only as a result of autonomous adjustments on the part of the regulating state, but also as a result of the cooperation between states which flows from committee interactions. Our Mexican/US salmonella-in-cantaloupe-melons is a good example of this.

We are careful not to claim to know more than we do about what it is about the SPS committee which leads states to alter or abrogate regulations which they have provisionally or definitively put in place. We think that it is both interesting and important to report on the results of committee activities and on some of the forms of cooperation which take place therein. Needless to say we welcome and encourage further exploration of competing explanatory accounts.

It is important finally to note that Steinberg fundamentally misreads the meaning of our claim that this is a 'hidden' world of WTO governance. We are not suggesting that WTO committees exist in a space which is 'hidden from the state and particularistic interests', nor that what goes on in these committees is somehow not communicated to capitals.[14] We hope our meaning is clear: that this is a space of governance which has so far received insufficient attention from scholars and theoreticians of the WTO, and which is more significant than has so far been assumed.

[11] See generally, Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority', *German Law Journal* (2008), 1865.

[12] Of course this overlooks the question of developing country participation in formal dispute settlement. We highlight in our paper the relatively widespread use of the 'specific trade concern' procedure in the SPS Committee by developing countries. It is interesting to note that Steinberg stresses that the information generated in committees may be of particular value to developing countries.

[13] On the difficulties associated with this concept, including its necessarily theory-bound nature, see Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' 19(2) *Michigan J Intl L* (1998) 345.

[14] Supra note 1, at 1068. Steinberg quotes the phrase 'secret deliberations' from our paper, but the phrase was used to refer to the common criticisms made of transgovernmental networks, and in fact is specifically qualified in its application to the WTO committees.