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## **Non-trade concerns in WTO trade negotiations: legal and legitimate reasons for revising the 'box' system**

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**Abstract:** The extent to which non-trade concerns fit with the overall, long-term WTO Doha Agenda objective 'to establish a fair and market-oriented trading system for world agricultural trade' is considered from both a legal and economic viewpoint. Human rights guarantees in United Nations covenants related to non-trade concerns are evaluated in light of WTO rules. Proposals are presented for a non-trade concerns 'box' to be added in a final agreement on agriculture, in line with world-wide calls for food security and development of poor countries, and demands by developed countries for recognition of multifunctionality of agriculture as a way to protect their resources in a sustainable manner.

**Keywords:** agreement on agriculture; agriculture; development box; Doha; Doha Agenda; food; food security; human rights; human rights covenants; non-trade concerns; NTCs; security box; United Nations; UN; World Trade Organization; WTO.

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## 1 Introduction

This is a critical time at the World Trade Organization concerning agricultural trade, the lynchpin of the Doha Development Agenda of multilateral trade negotiations. One vexing issue is that non-trade concerns (NTCs), which are supposed to be taken into account in the negotiations regarding agricultural trade as set forth in the work programme adopted at the WTO Ministerial Conference in Doha, Qatar November 2001, are actually yet to be incorporated.

Agricultural negotiations are deadlocked, as key players such as the European Union (EU) and Japan call for 'well balanced' and 'realistic' proposals to bridge the gaps among the parties. Many other nations, particularly lesser developed countries (LDC), have their own reasons for wanting drastic changes to the proposals, as well as to the Uruguay Round Agreement on Agriculture (URAA) in general.

The deadlock in agricultural trade negotiations cannot be understood unless it is placed in context, as it is not an isolated phenomenon. Rather, the crucial issues at stake are part of the larger controversy over governance of globalisation so that domestic, social and political stability are maintained. This is the overriding issue of our time, and agricultural trade can be viewed as a case in point. Globalisation means liberalisation emphasising the benefits of the free flow of goods, capital and services. But the social concerns and tensions arising from this process must not be overlooked [1]. This is the point being made by the EU and Japan when they call for 'balance.'

The excesses of globalisation can be managed only by paying adequate attention to what are termed 'non-trade concerns' (NTCs), and the ultimate Agreement on Agriculture of the Doha Development Agenda will have to be balanced to achieve success. A balance must be struck in the WTO between liberalisation on the one hand, and NTCs on the other. The economic dimension of trade must be balanced with non-economic values. Simply ignoring NTCs is not an option. In our considered opinion, if this is done, the Doha negotiations will fail. Thus, it is crucial to deal with the NTCs issue in order to further the goal of trade liberalisation, both with respect to agriculture and other economic sectors.

NTCs are given explicit recognition both in Article 20 of the Agreement on Agriculture and in the Ministerial Declaration promulgated at Doha, Qatar in November 2001. Yet the role of NTCs has been minimised so far in WTO agricultural negotiations, for several reasons. First, there is no clear or even accepted definition of NTCs. Second, there are no accepted criteria for their use. Third, it is unclear how NTCs fit in with the 1994 Uruguay Round Agreement on Agriculture (URAA), which provides the point of departure for the current negotiations.

We address these problems in this paper and provide a legal and economic framework for balancing NTCs with economic efficiency and liberalisation. Discussion particularly focuses on how, and to what extent, non-trade concerns fit with the overall, long-term objective of WTO, which is ‘to establish a fair and market-oriented trading system for world agricultural trade.’ We will consider these questions from both a legal and economic viewpoint, and provide some guidelines about how countries desiring to incorporate NTCs in their negotiations strategies can do so.

Our thesis is that due regard for non-trade concerns is not inimical to the goal of establishing a fair and market-oriented trading system; rather, that it is a centrepiece of international calls for greater attention to societal anxieties about globalisation as witnessed by the debacle at Seattle in 1999 when an attempt failed at a WTO ministerial meeting to set an agenda for another round of trade negotiations. In brief, we argue that the key idea is to preserve a modicum of free trade, but that accomplishment of it requires policies that respond to social concerns.

## **2 Definition of non-trade concerns and non-trade values**

According to Article 20 of the Uruguay Agreement on Agriculture (URAA), non-trade concerns (NTCs) should be taken into account in the continuation of reform process. The preamble of the agreement recalls that the long-term objective ‘is to establish a fair and market-oriented agricultural trading system’ and notes that

“commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment; having regard to the agreement that special and differential treatment for developing countries is an integral element of the negotiations . . .”

In brief, Article 20 of the URAA only states that non-trade concerns will be taken into account; it does not provide any definition or indication of what they are.

The WTO Ministerial Declaration from the Doha Conference is not much more help in defining NTCs, for Article 13 merely states that

“We recall the long-term objective referred to in the Agreement (Article 20 in the URAA) to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions in world agricultural markets.”

There is also the statement that

“We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.”

The keywords, and we emphasise them, are the terms ‘fair’ and an ‘equitable way.’ These two terms are simple, but vital, for a plethora of countries are worried about how their small-scale, high-cost agricultural and food sectors will ultimately be affected by trade liberalisation. They are crucial to many economically developed countries bent on deciding for themselves how to organise their use of natural,

human and capital resources. In effect, NTCs are a first line of defence for both developing and economically developed food importing nations (and in some cases food exporters) to prevent unfavourable, and in many cases disastrous, outcomes of current and future negotiations.

Non-trade concerns have figured prominently in agricultural trade policy and negotiations since the first GATT round in 1947. The range has broadened since the Uruguay Round concluded to include food security, food safety and quality, rural development and animal welfare. Many of the NTCs attributes are bunched into the term 'multifunctionality'. We provide minimal discussion on it for the topic is covered extensively in many fine outlets such as [2–10], just to mention a few.

It is our view that many nations espousing multifunctionality as their primary NTCs position have done so out of frustration and a feeling of helplessness in the WTO system, and not because they are protectionist. In fact, the issue in many higher income countries that espouse multifunctionality is not necessarily from the viewpoint of protecting agricultural producers. Rather, it is from the viewpoint of consumers and citizens as a whole that truly are concerned about the effects of increasing levels of food imports on their country's security and natural resources.

It is important to realise that NTCs, and within it the multifunctionality concept, are widely recognised as being very important. For example, forty WTO members and observers met in Doha during the ministerial conference and held their own non-trade concerns ministerial (conference) from which a statement was released about the need to secure the coexistence of various types of agriculture, as foreseen in Article 13 of the Doha Declaration. Another major step was the 4th International Conference on Non-Trade Concerns in Agriculture at Ministerial Level, held in Rome June 14, 2002. This turned out to be a significant meeting, as 54 ministers and representatives from WTO members and observers attended and reaffirmed their support for non-trade concerns. Our view is that the NTCs issue (OECD and WTO have conveniently relabelled multifunctionality as NTCs) is not one of whether it is a legitimate matter, but rather how to legitimise it. This involves both paradigm and legal problems. Most important, we believe that NTCs are a murky and veiled, yet significant barrier, causing deadlocks in negotiations about agriculture and food.

### **3 Problems with incorporating NTCs in WTO paradigms and rules**

The problem of incorporating NTCs into agricultural negotiations is their vagueness, largely because of the wide variety of concerns that cut across so many different countries. In addition, many concerns are psychologically and philosophically oriented such as 'food is different than other commodities', and that most of society bases a substantial portion of their decision making on non-economic criteria much of the time. The vagueness of NTCs forces widely dispersed countries or groups of countries that want to take advantage of NTCs to prepare issues, target desired outcomes, and prepare and execute strategies to come up against a well-supported, established organisation (WTO) in one city (Geneva) in which the agreement underlying current rules and quantitative levels (URAA) is accepted as the floor or minimum of trade liberalisation. The idea of longer-term discussion on NTCs is generally seen as a regression to be abhorred. Also, accepted doctrine is that

agricultural trade rules should only be changed if they increase liberalisation. Nevertheless, NTCs cannot be shunted aside. They are official policy of WTO and it serves in everybody's interest to define them and to negotiate criteria for their application. In this paper we point out that multifunctionality is not specifically incorporated into the WTO legal framework, while arguing that defining NTCs and adopting criteria is the best way for even the most ardent free trader or export minded country to handle them because that way everyone knows what they are dealing with.

A second difficulty, and one that is almost overwhelming, is the wide variety of concerns and the limited resources countries espousing them have to make their case. Another difficulty is in finding a leader or group of leaders to stand up and take charge on what is essentially a defensive issue. It is the opposite of uniting exporting countries (such as the Cairns Group) that stand to benefit economically.

A fourth problem is that lobbying for specific or even general consideration of NTCs is a particularly daunting undertaking, considering that those who argue for regulation of imports through tariffs, quotas and the like have been labelled as 'protectionist'; a very bad badge to wear, because it smacks of backwardness and failure to take on global leadership and responsibilities. Unfortunately, to many trade specialists, the badge has become one of 'you are either for me or against me.' It means the argument is 'black or white,' and 'you are either a free trader or a protectionist.' It is also the de facto badge worn by those espousing NTCs.

A fifth problem with NTCs is that they are seen as an end, and not as a means to an end. One of our objectives is to show that incorporation of them into WTO rules can become a means to 'fair and 'equitable' world trade in food and other agricultural commodities. It is probably quite fair to say that trade theorists specialising in agriculture do not want the WTO to become a forum for introduction of non-economic values into equations for setting liberalisation targets. The trade paradigm is clear; so, do not mess with it. However, even the most basic classical economists, in what was once called political economy, were steeped in moral and ethical foundations, and it showed in their writings. Nevertheless, even today, in a world that largely holds to neoclassical economic thought, the common way to quantitatively write a decision-making expression is that the dependent variable (or goal) is some function of a series of independent variables, some of which (like NTCs) can act as constraints on the outcome. The battleground is over which variables to include.

Worldwide, it is generally accepted that increased trade and efficiency are desirable. However, most people (and certainly the protestors at Seattle during the failed attempt to set a new round) believe that other values should be taken into account since materialistic progress is just one aspect of maximising quality of life in this world. We argue that economic efficiency and comparative advantage are values, and that they are good values. However, ethically and legally they should be balanced against other values, and they should not violate human rights.

#### **4 Legal and human rights aspects of NTCs**

Proponents of NTCs, multifunctionality and the effects of globalisation on human and physical resources are united in feeling they are on the defensive. Most feel

marginalised with little recourse than the negative approach of public protests. There are, however, legal means like international covenants promulgated by the United Nations that offer an avenue for a legal framework that validate NTCs. The important ones are *The Universal Declaration of Human Rights*, and a later document promulgated by the United Nations called the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Several sections of the International Covenant brought into effect a quarter century ago pertain to present-day food production and WTO member proposals on multifunctionality. Article 1 states:

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. All Peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

The term ‘Peoples’ is legally different from nations. The idea is that the rights covered are group rights that do not depend on the nation-state for their validity and recognition. The term ‘Peoples’ has higher status than ‘nation states’ because it means that nation states cannot make derogations from the rights in covenants. The rights belong to the ‘peoples’ and thus are inalienable.

There is also Article 6, which says

“The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”

Common sense says improvement of economic welfare through international trade shifts will lead to losers in some countries and gainers in others. But this is different from worldwide imposition of regulations that could eventually emasculate a whole sector of a country’s economy, or at least most of it; an imminent situation faced by several countries if there are deep cuts in import tariffs or a failure to reduce export subsidies.

Article 11 deals specifically with food by saying

“The States Parties to the present covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”

Certainly the term ‘continuous improvement of living conditions’ must include the right to a nationally decided level of domestic food production as part of living a stress-free life, provided it is shown that the citizens want it. This aspect is further reinforced by Article 11 which also exhorts States Parties to take into account ‘the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of food supplies in relation to need.’ We believe this paper is enough to show that a ‘true level playing field’, (a term often used by the agricultural exporting countries bent on drastic market opening measures) should include, for example, the right for countries to set minimum domestic food production levels they want as an integral part of fair and equitable agricultural trade rules.

Much of the controversy swirling around the WTO centres on grave concern about globalisation leading to homogenisation of cultures, disappearance of

diversity, a feeling of helplessness and being controlled by powerful international forces. *The International Covenant on Economic, Social and Cultural Rights* states, in Article 25:

“Nothing in the present covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources.”

This article may be interpreted as ensuring the right of any country, no matter what its economic status, to organise and protect a minimal portion of its agriculture the way it wants to, even to the extent of maintaining high-cost, small family farms if that is its citizen’s choice. Virtually the entire developing world, and substantial aid agencies, support and promote small size farms in their development programmes.

There is a basis in the UN Charter that the human rights guaranteed in the Covenants have a special and higher status than other international agreements. Articles 2 and 55 of the UN Charter guarantee universal respect for human rights [11]. The UN Charter is a kind of international constitution and higher than the WTO agreements. Thus, all intergovernmental organisations must respect human rights’ principles.

A reasonable question is whether the human rights argument can be used for NTCs purposes; for example, the right of a country to set some minimum level of food self-sufficiency, or to set other restrictions on imports as is the case with countries espousing the multifunctionality concept. The answer is that, at present, there is no precedent set for using the Covenant to override other international agreements. The WTO and human rights covenants are two different legal regimes. They are autonomous and do not generally collide. There is no court or authority to rule on which is higher. The WTO is only concerned with ‘covered’ agreements, i.e. the WTO agreements [12].

There are no cases on food security under the International Covenants and it is unlikely that there will be. The covenants are enforced by each country filing a report with the UN Human Rights Committee. This group, as well as other UN members, can investigate to some extent and can always castigate a country for not living up to human rights norms. But, as can be imagined, no country nor the Human Rights Committee has ever criticised any country for importing too much of its food supply. Of course, any country can make this argument under the Covenants, but the Catch-22 is that there is no way to litigate it or assert it before any international tribunal.

The WTO dispute settlement apparatus does not have jurisdiction or the ability to decide such a human rights request because there is no provision in the WTO Agreement on Agriculture asserting a food security right. There is none, so a country or group of countries would have to assert a rights-related position during WTO negotiations and successfully have it included in a new agreement on agriculture.

The WTO has never addressed the food security issue although there is considerable discussion about a ‘development box’ and a ‘security box’ as well as other ways in which developing countries problems can be addressed, e.g. [13]. NTCs are only mentioned/referred to, and that is about all. In fact, it is impossible for a WTO member to assert or complain about lack of legislation related to food security or NTCs to the WTO Dispute Settlement Body because complaints only cover current rules. The upshot is that there is no international law on the issue of food security or non-trade concerns.

The problem is how to create the international law. The three agricultural pillars of market access, domestic support, and export subsidies have specific provisions and precise legal criteria governing them. NTCs have conveniently been forgotten, and always will be ignored or dismissed, unless and until specific criteria are developed and inserted into a WTO agreement.

## **5 Proposal to incorporate non-trade concerns into WTO law**

Debates about rights to non-trade concerns are one thing; changing enacted trade rules is another. The important point is that while WTO rules can be modified if there is sufficient sympathy for changes, they can be very difficult to enact in practicality. The fact is that even if a significant number of the WTO's current 146 members would like to make changes to WTO rules decided in the URAA, because they felt that their human rights guaranteed under an international covenant were being abrogated, they would have an extremely hard time bringing it about due to the great power wielded by the Cairns group and the USA. WTO rules are set by consensus and failing that by a vote. A majority vote is sufficient for general decision making, but a two-thirds vote is needed to amend an agreement. In practice, there must be a consensus in the WTO for progress to be made. This means that no member or group of members can prevail without compromise.

Ironically, one way to incorporate NTCs might be the 'box system,' a major mainstay of WTO rules. There continues to be considerable discontent about this system, and much discussion has taken place about amending it, with proposals ranging from minor modifications, to elimination of one or more boxes, to complete elimination of the system, and even the creation of a 'development box.' There is a long history of debate on a proposal by the EU for a 'food security box' for developing countries, which could be modified to include developed countries at risk of losing a significant portion of their agriculture from substantial tariff reductions. At present, food security is only mentioned in Annex 5 of the URAA, and then only as a vague concept.

We propose a 'non-trade concerns box' in which food security and the multifunctionality concept could be included along with a country's rights to decide how to use and preserve its natural resources. The following are proposed to ensure that essential community and social values are not sacrificed on the altar of economic efficiency and free trade. It is in this spirit of developing a method and principles to balance economic and non-economic values that the following five proposals, which can be incorporated into an NTCs box, should be considered

### *5.1 A principle of food security*

Any future WTO agreement should specify a minimum measure, in terms of calories consumed or some other objective measure, of domestic agricultural production that no WTO member will be asked to relinquish. For example, a country should have the right to produce domestically a certain percentage of the food needed to feed the population. This should be set, not only for security purposes, but also to ensure the social viability and existence of rural areas.

Such a food security requirement would be new for the WTO, but as described earlier is already present in the international human rights legal instruments; the *United Nations Universal Declaration of Human Rights* (promulgated in 1948 and amended in 1976), the *International Covenant on Economic, Social and Cultural Rights* (1976); and the *International Covenant on Civil and Political Rights* (1976) to which virtually all WTO members are parties. The WTO should respect these rights by defining a minimum level, to safeguard the right of each WTO member to maintain a food sector necessary for its own wellbeing, and to allow its peoples to pursue economic, social and cultural development.

### *5.2 NTCs be defined in any future WTO agreement*

We propose that a definition be rooted in welfare economics. An NTC is what economists term a positive externality; a positive benefit that is an associated consequence of a policy instrument. An NTC differs from the closely related concept of 'multifunctionality' in that the latter is equated with 'non-commodity outputs' of agriculture: negative as well as positive externalities [14]. We propose that a definition of NTCs be restricted to positive externalities. The concept of NTCs should also be defined as a positive externality that contributes to sustainable development, i.e. the use of resources so that the entire stock of capital is not diminished, and so that an indefinite stream of benefits can be maintained. Inclusion of these factors in a definition of NTCs would bring discipline to the vague assertions of NTCs by WTO members. It means that NTCs can be differentiated from sheer protectionism.

### *5.3 NTCs be quantified*

As a positive externality they must not only be specifically defined by a WTO member that seeks to rely upon it, but must also be susceptible to quantitative measurement using an accepted valuation technique. In the case of certain NTCs (those reflecting non-economic values), the WTO should specify an accepted valuation technique such as contingent valuation (e.g. [15–17]).

### *5.4 A causal link*

This means that a WTO member that relies upon a specific NTC to justify subsidising agriculture must demonstrate the causal link between the NTC and the domestic support programme in question. This requirement is also designed to ensure that the NTC is not simply an excuse for protectionism.

### *5.5 The relation between the NTCs 'box' and the current three 'boxes'*

One of the problems with the concept of NTCs is that there is no explicit connection between NTCs and the 'box' system of domestic support in the WTO Agreement on Agriculture. The 'box' system makes no mention of NTCs. We believe this should be corrected by establishing an explicit relationship between NTCs and the current 'boxes'.

We argue there should be an NTCs box that would substitute for a 'development box' or a 'food security box' as it would meet diverse needs of all developing countries as well as economically developed countries. In this way it would help reduce polarisation of the so-called 'North and South' countries. We propose a NTCs box be the fourth mainstay in the hierarchical box system arrangement, recognising that the three existing boxes reflect different categories and specific kinds of domestic support.

The current system is that Green box subsidies are considered permissible as non-trade distorting. Blue box subsidy programmes are permitted because they limit agricultural production. Amber box support is trade distorting because it is related to production. The heart of our proposal, and the conflict with current boxes, is the first principle: food security. In all likelihood NTC policies would fall in the amber box as they would not qualify for Blue box status given that measures would need to be taken that are trade distorting. Obviously, if the Blue box were enough to accommodate NTCs, as argued by defenders of the current system, why were there 40 supporters of NTCs at a mini-ministerial at Doha and 55 at the Rome meeting? One only has to examine the predicaments of the 'friends of multifunctionality' such as Japan, Mauritius, Norway, South Korea and Switzerland as well as a host of small island nations, not to mention many resource poor, small-farm-based developing countries that will (hopefully) develop, at which time they will be faced with loss of their developing country status, protection from WTO rules, and probably their agricultural sectors.

We propose that a WTO member employing an Amber box subsidy for the purpose of an NTC must carry the burden of showing that Green or Blue box subsidies are reasonably insufficient or ineffective in realising the benefit of the NTC desired. This requirement will further discipline NTCs programmes and differentiate them from protectionism.

## **6 Reality check: the WTO rule-making system**

WTO rules are set by consensus, and failing that, by vote. A crucial element during negotiations is to convince other members that proposals for new rules, or changes in rules, have validity and show just cause. Negotiators espousing the above proposals or alternative ones will have to build consensus among like-minded countries. One country, one vote can be enough to prevent adoption of a rule, although it is very awkward for one country to oppose a rule change that has strong backing by many countries as the recalcitrant nation is then accused of derailing a whole process, and that might be enough to make or break the entire round of negotiations. Negotiators at WTO rounds need skill. But equally, or more important, is a feeling they are supported by the whole country they represent and the entire group of countries with which they have banded. Leadership is needed to change NTCs from what is now basically a defensive position to an offensive one in which equity and fairness rather than power and economic benefit are recognised as primordial. Why, we might ask, should those espousing social concerns be on the defensive, particularly given the protection by UN human rights covenants?

## 7 Summary and conclusions

Debates about rights to non-trade concerns are one thing; changing enacted trade rules is another. We argue that international organisations should be a forum for discussion about problems of all countries and peoples and that the WTO should be a forum for fair and equitable trade, no matter how long it takes. That is the mandate for the WTO, and for this Doha Development Agenda. There is neither a crisis nor a good reason why there must be substantial agricultural liberalisation in this round of negotiations despite pronouncements by major food exporting countries to the contrary.

The NTCs debate is extremely important because, to a large measure, it will show the extent to which food and agriculture are recognised as somehow being different than manufactured commodities or services. It is very important to realise that while an agreement on agriculture (which is usually construed to mean farmers) is being sought; in reality the agreement is about food, consumers, and citizens as a whole; and about their psychological as well as economic well-being. Unfortunately, there are virtually no references to NTCs in the press, yet there are myriad protests about growing globalisation and its impacts on international society.

The debate on NTCs also serves as verification of whether a country, a union of countries such as the EU, or a trade bloc, or 'friends of multifunctionality' can exhibit their rights to control the future of their beliefs about food safety, their own food systems and agricultural sectors, and whether consumer and national sovereignty have a place in neoclassical trade theory and paradigms. It is a litmus test of the extent to which food importing countries of all kinds, large and small, economically rich or poor, and exceptionally or poorly endowed for agricultural food production, have the right to decide how they want to organise their societies and use their resources.

Most of the joint products of agriculture are public goods because they cannot be sold or traded. It seems reasonable that all citizens can, and should, have an interest in assuring that they have an input into deciding how, and in what form, the public goods related to food are used and maintained for future generations. That is one of the fundamental rights of every person. In summary, we have proposed criteria because this may be the only way to save this round. Maybe there are better ideas, but the bottom line is the issue has to be squarely faced, and in a fair and equitable way in which, unlike the Uruguay Round, the losers will be minimised.

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