2010

Canada's Implementation of the WTO Agreement

Chios Carmody
The University of Western Ontario

Follow this and additional works at: https://ir.lib.uwo.ca/lawpub
Part of the International Trade Law Commons

Citation of this paper:
https://ir.lib.uwo.ca/lawpub/169
CANADA’S IMPLEMENTATION OF THE WTO AGREEMENT

By Chi Carmody
Associate Professor and Canadian Director
Canada-United States Law Institute
Faculty of Law, University of Western Ontario
London, Ontario
CANADA N6A 3K7

Tel. (519) 661-2111 x 88437
e-mail: ccarmody@uwo.ca

Draft – please do not cite

SEPTEMBER 7, 2007
Canada’s Implementation of the WTO Agreement

By Chi Carmody

1. Introduction
2. The WTO Agreement in Canadian Law
3. Canada’s Implementation of the WTO Agreement
4. Canada and WTO Dispute Settlement
5. Canada and the WTO TPRM
6. Conclusion and Recommendations

1. Introduction

As Canada’s major international commitment in the economic sphere since 1995, the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) presents a compelling case for study of domestic implementation of international law. Canada’s economy is a mature and diverse one, and it is to be expected that a treaty the size and scope of the WTO Agreement would have a profound impact on the way in which the country’s economy is regulated. The treaty’s 26,000 pages of commitments, concessions and other obligations are extensive and could be expected to have an impact in every sector of the Canadian economy.

Yet as I will argue, the very breadth of the WTO Agreement makes any analysis of its implementation difficult. This fact is particularly true in the case of Canada, which had previously implemented the North American Free Trade Agreement (NAFTA) and which pursued a minimalist approach to WTO implementation generally. Nor are we not assisted by the WTO’s system of “passive compliance”, which effectively allows countries to remain non-compliant so long as no other country complains, or by Canada’s much-discussed record in WTO dispute settlement which, while demonstrating a certain enthusiasm for the shaping of international law, is no proxy for full domestic implementation. Indeed, it is my assertion in this paper that the partisan and politically-connected way in which Canada has exercised its rights and obligations under the WTO Agreement is linked to the suspicion and scepticism that many Canadians voice periodically about free trade generally. Simply put, they often see it as something “out there” – an elite project – and therefore something which is not adequately internalized either in Canadian law or in the Canadian psyche. This may present an interesting paradox in a country known for traditionally looking outward, but I will also suggest that it has an impact on the political sustainability of trade liberalization over the long-term. If we are concerned with safeguarding what has been achieved and with the WTO Agreement’s ability to further enhance welfare in Canada and abroad, then we need to bring it closer to Canadians. We are in need of renovation, a task which can be partly accomplished through the opening up of Canada’s WTO participation to greater democratic scrutiny, through the de-politicization of Canadian trade action, and through the inclusion of Canada’s WTO compliance as a regular agenda item for Parliamentary debate and consideration by the provinces. These actions should go some way to help legitimate the WTO Agreement and its values as part of Canadian law.

This article is divided into five parts. Part One provides an overview of the WTO Agreement and a survey of how Canada’s federal government chose to implement the treaty in domestic law. Part Two examines how that implementation has worked out in fact. Part Three looks at how Canada has reacted to cases brought against it in what has become the most visible aspect of the WTO, its

---

1 Associate Professor and Canadian Director, Canada-United States Law Institute, Faculty of Law, The University of Western Ontario, email: ccarmody@uwo.ca.
system of dispute settlement. Part Four then analyzes Canada’s performance in the process of bi-
annual reporting of the WTO Trade Policy Review Mechanism, which is currently something that
receives little public attention. Part Five concludes that Canada’s implementation of the WTO
Agreement is partly determined by the complex nature of the instrument but also by the
behaviour of its major trading partners, and that to enhance the treaty’s implementation action
needs to be taken to make Canada’s WTO action more democratically accountable in the
domestic legal order. In this vein it makes several recommendations for reform.

2. THE WTO AGREEMENT IN CANADIAN LAW

The WTO Agreement came into existence in April 1994 to extend and formalize arrangements
under the General Agreement on Tariffs and Trade of 1947. GATT was originally designed as an
interim arrangement pending the conclusion of the Havana Charter and the creation of the
International Trade Organization (ITO), but when both of these failed to come into existence in
the late 1940s due to U.S. opposition the treaty was left to operate alone without a formal
institutional structure.4

The core of GATT is the obligation undertaken by countries in GATT Art. II not to impose tariffs
on goods in excess of individually agreed “bound” levels.5 These bindings are supplemented by
rules on other trade-related topics such as subsidies and dumping, customs valuation, licensing
and technical standards. Over the next four decades GATT members met periodically in rounds to
negotiate lower tariffs and to conclude a number of side “codes” elaborating upon basic GATT
disciplines. Not all GATT members agreed to the codes, however, something that gave rise to the
treaty as a legal patchwork by the end of the 1970s.

The WTO Agreement came into being in 1994 in part to bring this diversity to an end. At the time
a “snapshot” of GATT 1947 was taken and transposed into the WTO Agreement as “GATT 1994”. GATT 1994 is legally distinct from GATT 1947, but nevertheless continues a number of
its practices, including decision-making by consensus.6

The WTO Agreement is a relatively brief document of 16 articles that furnishes the organization's
institutional framework. It provides for the organization's personality in international law, its
executive, legislative and administrative organs, rules on voting, amendment, and membership,
and certain miscellaneous provisions. Of particular note is Art. XVI:4 of the WTO Agreement
which provides that:

Each Member shall ensure the conformity of its laws, regulations and
administrative procedures with its obligations as provided in the annexed
Agreements.

Appended to the treaty are four annexes that contain most of the substance of the agreement.
Annex One contains three sub-annexes covering trade in goods, services and intellectual property.
This is where GATT 1994 is now found. Annex Two contains rules on dispute settlement. Annex
Three contains the TPRM, which is supposed to provide periodic surveillance of members trade
policies. Annex Four contains two plurilateral agreements - one on government procurement, the
other on trade in civil aircraft.

4 5
6 The reason for the change had to do with GATT 1947’s lack of a formal institutional structure and the desire to omit certain GATT
decisions and practices from the ambit of the new treaty. Article II:4 of the WTO Agreement makes clear that GATT 1994 is legally
distinct from GATT 1947.
The treaty’s integrity is reinforced by the WTO Dispute Settlement Understanding (DSU) in Annex 2. Under the DSU member countries can take each other before WTO panels where there is reason to believe that the laws of a member violate the WTO Agreement. If a panel finds a violation, it normally recommends that the wrongdoer bring its law “into conformity” with the WTO Agreement. This procedure can be followed by an appeal to the Appellate Body, which has the power to uphold, modify or reverse the panel’s legal findings and conclusions. Conformity is supposed to involve “a solution mutually acceptable to the parties and consistent with the covered agreements.” In the absence of any solution, however, the DSU goes on to specify that “the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measure concerned.” The wrongdoer is then given a reasonable time to comply, failing which the parties to the dispute can negotiate compensation for ongoing damage or, as a last resort, the plaintiff can request permission from the organization to retaliate. Retaliation usually consists of the suspension of trade concessions, something which had been authorized only 16 times by mid-2007. There are also a number of remedies that are specific to certain causes of action and sub-disciplines under the WTO Agreement.

Canada championed the creation of this elaborate framework and could be expected to have implemented it in domestic law with enthusiasm, but reality was different. As Debra Steger has pointed out, the federal government took a “minimalist” approach to implementation prompted by awareness that the WTO Agreement, like the Canada-U.S. Free Trade Agreement and the North American Free Trade Agreement before it, were politically contentious. Canada therefore signed the WTO Agreement at Marrakesh in April 1994 and implemented it in mid-December of the same year with little public debate or consultation. The WTO Agreement Implementation Act entered into force on January 1, 1995 just as the new organization began operation.

The legislation itself is an exercise in both vagueness and technicality. Instead of enthusiasm, it suggests a wariness borne of a realization that implementation could be difficult and often politically charged. Brevity was the best remedy. Article 3 of the Act says simply that “the purpose of the Act is to implement the Agreement” and Art. 4 that the Act is “binding on Her Majesty in right of Canada.” However, Art. 8 goes on to say that “The Agreement is hereby approved” and the remaining 220 articles of the Act give little idea of how that approval is to be transformed into domestic law. Article 13, for instance, gives the Cabinet the right to suspend trade concessions for the purposes of DSU Art. 22. Beyond this, most of the real detail of what the law does is buried in Arts. 14-220, which consist of a series of amendments and repeals to

---

8 Ibid., Art. 3.7.
9 A number of these can be found in Appendix 2 of the DSU, which contains special or additional rules and procedures applying to disputes that involve one or more of the Multilateral Agreements on Trade in Goods. They prevail over the DSU in the event of conflict. For instance, Art. 4.7 of the WTO Subsidies Agreement provides that if a measure “is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay.” Other particular remedies include DSU Art. 25 (arbitration, where the parties “shall agree to abide by the arbitration award”), DSU Art. 26.1 (in non-violation cases there is no obligation to withdraw the measure but “the panel or Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment.”), DSU Art. 26.2 (in situation complaints the panel is to circulate a report to the DSB addressing the complaint) and Art. XX.7 of the Agreement on Government Procurement (which requires signatory countries to provide challenge procedures in tendering situations with the possibility of “rapid interim measures to correct breaches”, decision-making on any allegation of breach and “correction of the breach … or compensation for the loss or damages suffered, which may be limited to costs for tender preparation and protest.”).
10 Debra Steger, Canadian Implementation of the Agreement Establishing the World Trade Organization in J. Jackson & A. Sykes (eds.), IMPLEMENTING THE URUGUAY ROUND 243, 245 (1997) (“The bills introduced in Parliament have also been minimalist in character, that is, they contain only the amendments necessary to bring Canadian legislation into conformity with the obligations of the international agreement. The government has avoided tacking on free riders or other major legislative changes that were not absolutely required to implement the treaty. This approach was perceived to be the most constitutionally defensible.”)
11 S.C. 1994, c. 47.
existing legislation. For instance, fairly substantial changes were introduced to Canada’s anti-dumping and countervailing duty regimes.  

The general impression from all of this change is one of legislative *legerdemain*. The implementing legislation says nothing about the relationship between WTO and Canadian law, and was passed quickly prior to the December holiday in 1994. The records indicate parliamentary debate about it was slight. In most instances one gets the impression that legislators believed what they were approving was already covered by NAFTA and that whatever else remained to be implemented was effectively a “done deal”.

Most important, however, from the point of view of democratic legitimacy is the implementing legislation’s position on a right of action. Articles 5-6 of the WTO Implementation Act deprive individuals of any private cause of action associated either with the treaty’s implementation in Canada or “that is claimed or arises solely under or by virtue of the Agreement.” This distancing may have minimized potential complications arising from continuing non-compliance, but it also removed any real sense that this body of law was “by, for and of” Canadians. Consequently, it was easy to regard WTO law as something malevolent and mysterious, an attitude which surely played into the hands of free trade sceptics.

What is still more noteworthy is the legislation’s silence on a number of key points. The law established no system of parliamentary review of Canadian involvement in the WTO, no input into Canada’s negotiating priorities, no examination of the results of WTO dispute settlement involving Canada, and said nothing about the need to regularly consult Canadians on these or other WTO-related points. To be fair, some of these points have been minimally addressed since then, but on the whole the legislation’s top-down approach is *dirigiste* and at odds with the general ethos of modern government towards transparency, inclusion and participation.

What else could we have expected? A look at parallel U.S. implementing legislation, the Uruguay Round Agreements Act (URAA), is instructive. The URAA s. 102 specifies the relationship between WTO law and U.S. federal and state law and specifically establishes a federal-state consultation process in dispute settlement. Section 122 provides for congressional input into implementation of the WTO Agreement and the functioning of the WTO, including very precise provisions on the modification of rights and obligations under the treaty. Section 123 establishes requirements for the review of WTO dispute settlement, including the notification of disputes, appeals, and requirements for agency action following decisions that are adverse to the U.S. Section 124-125 provide for annual reports on the WTO and reviews of U.S. participation in the organization, and sections 127-129 set out the need for the United States Trade Representative (USTR) to consult with congressional and sectoral advisory committees regarding WTO dispute settlement. These are extensive rights and they are enshrined in law.

One could differ with what has just been said in the sense that the U.S. system is centered around the actions of the United States Trade Representative (USTR), a Cabinet-level appointee, who has considerable discretion in U.S. law to determine what action will be brought on behalf of the U.S. in the WTO. Still, the very fact that such an official exists, that the Office of the USTR is frequently engaged in negotiations between the Executive and Congress over trade issues, and the

12 Contrast this with Art. 102 of the U.S. Uruguay Round Agreements Act providing for “the relationship of the agreements to United States law and State law.”
15 See Arts. 302-304 of the U.S. Trade Act of 1974 (U.S.C. ss. 2412-2414) regarding the initiation of petitions, consultation upon investigations, and USTR determinations.
The fact that she/he may be approach publicly by interests who have trade-related difficulties with foreign governments, provides a degree of access that is missing in Canadian law.

Again - to be fair - Canada’s federal government may have “developed an extensive, formal process for consultation and accommodation with the provincial governments and the private sector in the development of trade policy” 17, yet it is at the edges of this that one can become uneasy. For the most part these processes are not formalized in law and they take place at an intergovernmental or industry sectoral level that is effectively closed to the broader public. 18 There is still no requirement to debate WTO matters in Parliament and no requirement for the government to justify the action it takes in the exercise of Canada’s WTO rights. As I will discuss below, this has led to some anomalous results. Canadians remain poorly informed of Canada’s action in the WTO. All of this, I would submit, feeds into a latent sense of passivity, skepticism and disenfranchisement about what Canada is doing in the WTO. These observations are not a plea for American-style procedures to be adopted holus bolus into Canadian law. The U.S. scheme is a reflection of an explicit division of powers that has no precise counterpart in Canada’s political system. Still, some thought about the U.S. experience with implementation might be useful in internalizing WTO law as part of Canada’s domestic legal order.

3. CANADA’S IMPLEMENTATION OF THE WTO AGREEMENT

So what has Canada done to implement the WTO Agreement? To understand the answer to this question, it is important to appreciate the structural matrix of the WTO Agreement.

The WTO Agreement is essentially a “package” of rights and obligations – but a package with a twist. While we might consider the presumptive relationship between rights and obligations under the WTO Agreement to be one of correspondence - that is, each obligation is offset by a single right – in fact two features operate to modify the traditional jural relationship in WTO law. 19

First, the Most Favoured Nation (MFN) clause causes obligations owed under the treaty to become obligations owed to the entire WTO membership. This converts them into collective obligations. Second, the dynamic nature of trade-related behaviour works to change their tenor, being apparently reciprocal or interdependent in a few instances, but absolute in most others. 20

17 Steger, supra note ___ at 243.
18 The Department of Foreign Affairs and International Trade website lists Roundtables, the Small and Medium Enterprise (SME) Advisory Board, Expert Groups, and Sectoral Advisory Groups on International Trade as mechanisms of public participation, but these are, for the most part, filled with industry, trade group and academic representatives. Tellingly, no public information is provided regarding their membership or meetings.
19 The idea of a correspondence between rights and obligations was recognized by early philosophers but developed most insightfully by Wesley Hohfeld, who postulated that there are rights and that these are distinct from privileges, powers and immunities, and that they are matched by jural correlatives: duties, no rights, liabilities and disabilities. See Wesley Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS, AS APPLIED IN JUDICIAL REASONING AND OTHER ESSAYS (1919). Also William A. Edmundson, An Introduction to Rights 43 (2004) (discussing Edmund Burke’s contribution to the idea of right-obligation correspondence).
20 The tenor of obligations is an important and recurrent theme in the analysis of WTO law. The distinction between reciprocal, interdependent and integral obligations originates in the work of Gerald Fitzmaurice on the law of treaties in the 1950s. Fitzmaurice posited that bilateral treaty obligations would be bilateral and that multilateral treaties could be composed of obligations that were either bilateral (or what he termed “reciprocal”), interdependent (conditional upon the performance of other parties) or integral (unconditional) in character. See G. Fitzmaurice, ‘Third Report on the Law of Treaties’, UN Doc. A/CN.4/115 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1958 II) at 20. Fitzmaurice’s ideas later served as the basis for the scheme of the Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (1969). While Fitzmaurice’s typology is neat and therefore attractive, it overlooks the fact that a single treaty may be composed of different types of obligations and therefore more recent work, like the International Law Commission’s Articles on State Responsibility, has rightly focused on the nature of obligations. James Crawford, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 233 (2002). Elsewhere I have posited that one of the difficulties in analyzing the WTO Agreement in terms of Fitzmaurice’s typology is that WTO obligations possess a ‘chameleon’ quality. By this I mean that they appear bilateral and are therefore reciprocal in a few instances – like negotiation, renegotiation and suspension – but are also interdependent given the phenomenon of selective non-observance and the pre-occupation with “balance” in the treaty more generally. Formally speaking, however, WTO obligations are absolute, that is, they apply regardless of what other WTO members do: see WTO Agreement Art. XVI:4. See Chloé Carmody, WTO Obligations as Collective 17:2 EUR. J. INT’L L. 419, 442 (2006).
What this examination means in practice is that WTO obligations are unconditional in many instances, but conditional in some others. For example, we have already seen WTO Agreement Art. XVI:4 which requires conformity regardless of what any other country does, or does not, do. This can be regarded as an example of an absolute obligation. However, in certain instances such as retaliation and renegotiation under the WTO Agreement obligations are more evidently conditioned on the performance by one or more other countries. This can be regarded as an example of substantive reciprocity or interdependence.

Such hybridism has important consequences. It reveals the bivalent quality of WTO obligations. Countries may be tempted to observe their WTO obligations most of the time, but there may be a considerable penumbra of non-observance at the same time. Calculated disregard of the treaty obviously serves as a bargaining chip in future negotiations. Indeed, the experience of other countries such as the United States and the European Communities makes it apparent that in a synallgmatic (i.e. quasi-contractual) undertaking like WTO Agreement a degree of non-implementation can be useful, a conclusion which turns the underlying logic of this conference on its head.21

The second major point to be appreciated in the WTO’s legal matrix is the relatively passive system of implementation. The WTO system has no independent prosecutor that constantly surveys countries’ legal systems and identifies and pursues violations of the WTO Agreement. Instead, countries take action against each other in WTO dispute settlement in the manner of anactus communis since all litigation is presumptively about rights that all countries possess under the WTO Agreement. At the same time, the nature of WTO litigation does not mean that every violation will be caught, and in fact, appears to ensure the opposite. This means that there remains the possibility of substantial non-compliance with the treaty, something which is borne out in any casual review of country reports issuing from the WTO’s Trade Policy Review Mechanism.

Thus, in examining Canada’s implementation under the WTO Agreement it is worthwhile keeping in mind that perfect compliance is probably impossible and that any concrete assessment of Canada’s record needs to be sensitive to the particular context involved. WTO law is non-instrumental, meaning that it is “not designed to promote any particular enterprise, neither the satisfaction of any interests nor the securing of any particular substantive results.” Rather, as we see from this review, “the purpose of [WTO] law is to maintain conditions that enable people who do and believe in different things to live and work together in peace.”22 It is therefore not a context which is subject to careful scrutiny; as a set of ‘conditions’ it is a context in which a certain amount of non-compliance is to be expected.

Notwithstanding this imprecision, Canada’s performance in the field of international trade is impressive. In the period 1997-2005 merchandise imports and exports have increased some 63.4% and gains in the import and export of services have been still more impressive.23 But the fact remains that if we look at whether Canada’s implementation of its WTO commitments has been “good” or “bad”, we cannot do so by reference to statistics alone. Indeed, thought about carefully, they tell us almost nothing at all. We need to look elsewhere to identify if there are any other indications of Canada’s implementation and compliance with WTO law.

4. CANADA AND WTO DISPUTE SETTLEMENT

22
One of the most evident changes introduced with the WTO Agreement was a new, streamlined system of dispute settlement which, in light of the continuing stalemate over the Doha Development Round, has become perhaps the most visible aspect of WTO law. The greatest changes were the elimination of the consensus requirement in the adoption of dispute settlement reports and the addition of an appeal mechanism, an innovation which was meant to enhance the integrity and consistency of WTO law. Canada pushed for a strong dispute settlement system in the Uruguay Round and has been an active user of the system. In mid-2007 it had launched 28 cases and was a respondent in 15, proportionately more than most other countries of its size.

This record might be interpreted as a sign of faith in a rules-based multilateral system, but as noted, the prevailing political scheme has largely insulated any review of this action and led to Canada championing some anomalous causes internationally. Canada has been in the invidious position internationally of pursuing WTO action on behalf of producers of hormone-treated beef, asbestos manufactures and a single aircraft maker. Much of the rest of its actions have been with respect to raw materials, with softwood lumber and wheat accounting for more than half of the actions taken, the lingering predominance of industrial profile as a producer of raw materials.

Yet the actions taken do not deal with the more interesting question of implementation in cases that Canada has had to defend. After all, it is in the implementation phase of these that abstract WTO obligations become reality and it is at that point that Canada seeks to implement in a manner that meets WTO law and the demands of Canada’s trading partners and, more generally, of the WTO’s membership.

[to be completed ….]

5. CANADA AND THE WTO TPRM

Surveillance of national trade policies is a fundamentally important activity running throughout the work of the WTO. At the centre of this work is the Trade Policy Review Mechanism (TPRM) contained in Annex 3 of the WTO Agreement. All WTO members are reviewed, the frequency of each country’s review varying according to its share of world trade. While the TPRM has not evolved in the way that early observers suggested it might – in essence, acting as a forum to identify national deficiencies and as a prod to urge countries to implement more fully – it has had some success in serving as an overview of countries’ trade behaviour over time.24

The reviews focus on members’ own trade policies and practices. But they also take into account the countries’ wider economic and developmental needs, their policies and objectives, and the external economic environment that they face. These “peer reviews” by other WTO members encourage governments to follow more closely the WTO rules and disciplines and to fulfil their commitments. In practice the reviews have two broad results: they enable outsiders to understand a country’s policies and circumstances, and they provide feedback to the reviewed country on its performance in the system.

Over a period of time, all WTO members are to come under scrutiny. The frequency of the reviews depends on the country’s size. The four biggest traders — the European Union, the United States, Japan and China (the “Quad”) — are now examined approximately once every two years. The next 16 countries (in terms of their share of world trade) are reviewed every four

---

years. The remaining countries are reviewed every six years, with the possibility of a longer interim period for the least-developed countries.

For each review, two documents are prepared: a policy statement by the government under review, and a detailed report written independently by the WTO Secretariat. These two reports, together with the proceedings of the Trade Policy Review Body’s meetings are published shortly afterwards. In the TPRB process two discussants are chosen from the membership in advance of each review meeting. They act on their own responsibility, not as representatives of their governments.

In Canada’s case, the country has been the subject of six TPR reports, most recently in March 2007. This followed a four-year interval, a result of the fact that Canada had fallen in the TPRM’s order of priority due to the growth of other emerging economies, notably China. In its early reviews Canada was lauded for its “commitment to a strong rules-based multilateral trading system” and the report fully acknowledged the export-driven growth in the Canadian economy, the liberalization in certain sectors and the various initiatives to review and update trade policy mechanisms. However, a number of concerns were flagged. These include continuing high levels of protection in the agricultural sector, the large number of anti-dumping measures then in force, and the problem of ensuring that policies shaped at federal level were fully carried through at sub-federal level. Other issues that received emphasis were then-remaining restrictions in the services sector and the manner of implementation of the Agreement on Textiles and Clothing.

In Canada’s 1998 review, issues that were raised were Canada’s high dependence on a single market, complexities arising from the federal-provincial division of responsibilities and the possible trade diversion inherent in Canada's preferential arrangements. Concerns also persisted in relation to market access for developing countries as well as trade and investment barriers in sensitive sectors, particularly in certain areas of agriculture and textiles and clothing. While progress had “been achieved, delegations continue[d] to signal the scope for further improvements commensurate with Canada's leadership role in the multilateral system.”

the country’s sound economic policies and an outward-looking trade regime have allowed Canada to maintain economic growth in the face of the global economic slowdown in particular in the United States, Canada’s main trading partner.

However, the report also notes that, although change is under way, a number of activities remain subject to interventions and possible distortions, notably agriculture, textiles and clothing, steel, telecommunications, audiovisual, air and maritime transport, and insurance.

In the 2007 report the outward-looking orientation of Canada’s trade regime was praised as something which “has facilitated the economy’s successful adjustment to a number of external shocks, and helps explain Canada’s good economic performance during the last four years”. The 2007 report noted, however, that productivity growth was relatively slow, significant trade barriers still protect certain agricultural activities, and foreign investment restrictions remain in some areas such as telecommunications, audiovisual, and air transport. The report stressed that reform in these sectors could lower costs to Canadian taxpayers and consumers while increasing productivity and competition in the domestic market.

What becomes apparent from this review is that the TPRM is not identifying key deficiencies. On the surface Canada’s implementation look fine, but the reviews come at the question of critical assessment from the perspective of what is. They do not, for instance, question the framework of set-up of WTO action or participation, and while putting some emphasis on larger, macro-type
questions, they tend to focus on what is as opposed to what ideally should be. The kinds of issues identified in this conference – questions of direct implementation and need for democratic legitimacy that inevitably accompany them – are rarely asked.

[to be completed ….]

VI. CONCLUSION

Canada’s implementation of its obligations under the WTO Agreement presents a paradox. The paradox arises because of the way in which Canada has traditionally implemented international obligations, but also because of the nature of those obligations in themselves. It can be difficult, for instance, to discern ex ante what the obligation to treat foreign imports “no less favourably” means, and some of the pattern of Canada’s WTO litigation can be regarded as an attempt to come to grips with this very issue. Dispute settlement and its associated implication of non-compliance can be misleading. To say that Canada has been a defendant in 15 cases says little, if anything, about our implementation of WTO law because the tenor of so many obligations is vague from the start. WTO implementation and its associated concepts of compliance and effectiveness have to be understood, as Peter Gerhart observes, in terms of process rather than product.25

But even if this is true, can we do anything else to give greater expression to WTO obligations in Canadian law? I suggest that we can. If issues of democratic legitimacy are at the heart of implementation of international law today, then it seems that there is much that can be done about the reception of WTO law in the Canadian legal system.

To start with, there is a great need to open up Canada’s WTO participation to greater democratic scrutiny through regular reporting and consultation with Parliament. Some of this already takes place in terms the Annual Reports that the Department of Foreign Affairs and International Trade make, but more intensive review of these reports could take place before the relevant Standing Committees of the House of Commons, particularly with WTO TPRM and panel and Appellate Body reports in mind. Decisions that DFAIT now takes after receiving the sense of Cabinet, or indeed its orders, could be addressed to the Standing Committees. At the extreme, one envisages action taken only after parliamentary consultation and approval.

A second step that could be taken would be to de-politicize the use of Canada’s rights in WTO dispute settlement through the appointment of an independent mechanism to receive and consider petitions for trade action on Canada’s behalf. This possibility now exists in the United States and in the European Community, and while the relevant officials charged with exercising this function are given considerable discretion, it would at least remove the taint of politically motivated trade actions. One could envisage a system akin to changes made in 2002 to s. 75 of the Competition Act, when exclusive access to actions for refusal to deal, as well as exclusive dealing, market restriction and tied selling, were removed from the Commissioner of Competition’s sole discretion to prosecute. The amendment permits private parties to bring cases in their own name before the Competition Tribunal with leave where the conduct has or is likely to have an adverse effect on competition in a market.26 Of course, to create such a right requires a

---

26 This element differs from the general anti-competitive effects test found in other provisions of the Competition Act, which imposes a requirement that the behaviour complained of “substantially lessen” competition. The difference makes bringing a case under s. 75 much easier because virtually any refusal to deal, exclusive dealing arrangement, market restriction or tied selling, is at least presumptively likely to have some “adverse effect” on competition. The cumulative impact of these changes have been dramatic. Between 1976 and 2002, for instance, only five applications were brought to the Competition Tribunal respecting refusal to supply
mechanism to properly vet the applications made and, in all probability, one with a strongly worded privative clause in its enabling legislation in order to ensure that courts respect the mechanisms decisions. Some interplay with the wisdom of bring action in light of Canada’s foreign relations could be contemplated, but then DFAIT or the government would have to make a case for it.

A final recommendation in this instance is that Canada’s compliance with its WTO obligations needs to become a regular agenda item for parliamentary debate and consideration by the provinces, possibly through the vehicle of the new Council of the Federation. In some instances this is already happening, but it needs to be more regular and automatic. The ability to do this will help to stem disaffection that has as its roots marginalization, scepticism and even alienation of the Canadian public vis-à-vis free trade commitments. WTO obligations will loose their aura of mystery and therefore the suspicion that they are inimical to the national interest. In this way, WTO law and values will progressively come to be internalized in Canada’s domestic legal system.

whereas in the period since 2002 some 15 cases have been filed by private parties, although fewer than half of these cases have ultimately been granted leave by the Competition Tribunal and only one has reached the hearing stage: B-Filer v. Bank of Nova Scotia (2005), 44 C.P.R. (4th) 214 (Comp. Trib.).