

# CHAPTER III

## Sovereignty

108. Much of the public debate and commentary around the activities of the WTO focuses on a perceived loss of “sovereignty”. The source of this controversy is often that a dispute settlement finding has found a piece of trade “defence” legislation to be contrary to WTO obligations and, therefore, in need of elimination or amendment. At issue, may be a loss of freedom to impose elevated environmental standards on other countries or, at least, on their export products. Or it may be restrictions on the capacity of governments to block imports on purely political grounds. Sometimes it is a view that WTO rules restrict the policy space of developing countries and push them towards a single liberal market-oriented model of development. Broadly, there is a perception, often amplified in political or media circles, that states are progressively losing their ability to decide for themselves their own policy directions and priorities.

109. But is the notion of “sovereignty” real? Are countries and governments in a global economy not obliged to subjugate some level of domestic prerogative to international rules and disciplines? If so, is that a gain or loss to the well-being of societies? In short, in the context of the WTO, is the complaint over “sovereignty” a red herring and a cover for justifying annoyance over the rejection of special interest advocacy in the interests of a wider good?

### A. SOVEREIGNTY CONCEPTS AND THEIR MISLEADING USES

110. “Sovereignty” is one of the most used and also misused concepts of international affairs and international law. The word is often repeated more or less as a “mantra”, without much thought about its true significance. In fact, the word covers a large range of very complex ideas sometimes relating to the role of states in international organizations, other times relating to internal divisions of power (such as in a federal state), or the degree of government

authority towards its citizens. In each of many subjects, the concept of sovereignty is not unitary or “all or nothing.” It covers disaggregated “slices” of relationships.<sup>25</sup>

111. Acceptance of almost any treaty involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution. Generally this is exactly why “sovereign nations” agree to such treaties. They realize that the benefits of cooperative action that a treaty enhances are greater than the circumstances that exist otherwise. Indeed, the Appellate Body has commented<sup>26</sup> as follows: “The WTO Agreement is a treaty - the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.”

112. In the context of a globalizing world in which states acting alone cannot achieve important governance goals, only the processes of treaty-based cooperative action can overcome this growing inability to achieve those goals. This is particularly the case when it comes to economic affairs, which are often driven by global economic structures - global companies, global markets and global distribution networks - which individual states acting alone cannot effectively manage or regulate. Cooperation through a treaty institution may be the only way out. This has been the core of international trade for more than half a century and, therefore, the essential foundation of the GATT and WTO system.

113. But it is still recognized that the state is central to the current international law structure. Indeed there are strong grounds to believe that many important goals of societies, includ-

<sup>25</sup> An overview of some of these concepts can be seen in the article by Professor John H. Jackson, “Sovereignty Modern: A New Approach to an Outdated Concept,” *American Journal of International Law* 97 (October 2003): 782-802.

<sup>26</sup> *Japan - Alcoholic Beverages II*, p. 16, *Dispute Settlement Reports (DSR)* 1996:1, p. 97 at 108 (WTO documents: WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R).

ing democracy and human rights as well as the successful operation of markets, are still best protected by national governmental structures. International institutions often lack effective machinery to implement common goals as well as appropriate mechanisms to ensure “democratic legitimacy”. Unlike national governments, they cannot always furnish appropriate participatory opportunities for varied constituencies.

114. In the context of the WTO, these propositions are extraordinarily important. We often hear the strident invocation that “national sovereignty” is to be protected at all costs. Particularly so when some WTO treaty obligation is perceived to intrude too deeply into a particular nation’s internal governmental or economic processes, offending some special interest or creating shifts of authority or economic advantage from some groups to others. Thus it becomes important to better understand the costs and benefits of how an international institution carries out its mandate derived from the treaty acceptance of its members.

115. In the WTO context, there are numerous examples of how “sovereignty” is meaningfully discussed and argued. In the dispute settlement processes, for example, a major issue (discussed in Chapter VI) is the degree of deference which the WTO dispute settlement process should accord to national government decisions when they are challenged as inconsistent with WTO obligations. Likewise, there are “slices” of sovereignty involved in the general idea in the WTO (and other treaties) that the state retains the power to decide how to implement an adverse dispute settlement decision against it. In literally dozens of WTO dispute settlement proceedings, discussions have involved sovereignty ideas in the effort to apply various treaty standards to measures taken by WTO Members. Among them can be cited the “sovereign’s choice” of the degree of risk that it is willing to assume in its food safety

rules (in the text of the Agreement on Sanitary and Phytosanitary Measures), or the consistency of certain national government procedures in applying safeguard measures.

116. In addition, the method by which a WTO Member implements a ruling against it involves a judgment about a “slice” of sovereignty. Some WTO Members have a constitutional or other institutional structure that prevents a WTO dispute settlement ruling from automatically becoming part of their domestic law. Further domestic legislation or administrative actions may be required, thus preserving a degree of sovereignty that could provide meaningful “checks and balances” against irresponsible international intrusion into domestic offences. On the other hand, this “preserved sovereignty” can be utilized by domestic advocacy groups for special protectionist or other interests. Such failure to comply by domestic application does not, however, excuse the Member from its international obligation to comply (see Chapter VI).

## **B. WHAT IS SOVEREIGNTY?**

117. One observer has succinctly defined the concept and its problems: “Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together they offered a predictable foundation for world order. What is significant today is that each of these components - internal authority, border control, policy autonomy, and non-intervention - is being challenged in unprecedented ways.”<sup>27</sup>

---

<sup>27</sup> Richard N. Haass, former ambassador and director of Policy Planning Staff, US Department of State. “Sovereignty: Existing Rights, Evolving Responsibilities”, Remarks at the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, at 2 (Jan. 14, 2003).

118. In introducing his September 1999 Annual Report to the General Assembly, UN Secretary-General Kofi Annan said: "Our post-war institutions were built for an inter-national world, but now we live in a global world."<sup>28</sup>

119. There is a considerable amount of literature concerning the issue of "sovereignty," and the various concepts to which it might refer. Most of this literature is very critical of the idea of "sovereignty" as it has generally been known. Some authors have described sovereignty as being "of more value for purposes of oratory and persuasion than of science and law."<sup>29</sup>

120. Some of the discussion and practice about the role of "sovereignty" also focuses on the principle of "subsidiarity," which is variously defined. Roughly, it stands for the principle that governmental function should be allocated, among hierarchical governmental institutions, to those as near as possible to the most concerned constituents, usually down the hierarchical scale. Therefore, some believe that an allocation to a higher level of government - a multilateral institution like the WTO, for instance - requires a special justification as to why that higher governmental institutional power was necessary to achieve the desired goals.

121. In the area of trade policy, there are many specific instances of avoidance of "sovereignty concepts." A striking example was the criteria for membership of the GATT and now, the WTO. It was not, and is not, limited to a "sovereign entity," but instead<sup>30</sup> to a "State or separate customs territory possessing full autonomy in the conduct of its external commercial relations..."

122. The ambiguity, scope, and complexity of the term "sovereignty," has led some eminent scholars and practitioners to urge that the word be abolished. We take the view, rather, that the concepts associated with "sovereignty" must

be analyzed in a much more careful way than often has been the case.

### C. WHAT SOVEREIGNTY ANALYSIS REALLY SHOULD MEAN

123. So what does "sovereignty," as practically used today, signify? We offer a hypothesis: most (but not all) of the time "sovereignty" actually refers to questions about the allocation of power; normally "government decision-making power." So, when a party argues that a state should not accept a treaty because that treaty infringes upon its sovereignty, what is most often meant is that a certain set of decisions should, as a matter of good government policy, be retained at the state level or be devolved still further down the line. There should be no ceding to an international level.

124. Another way to articulate this idea in the WTO context is to ask whether a certain decision on trade should be made in Geneva or Washington D.C. Should such a decision be taken in Geneva, Brussels or Berlin? Similarly, one could ask the same question in connection with countries in all parts of the world.

125. There are various other dimensions of the "power allocation" analysis. Those mentioned above could be designated as "vertical," whereas there are also "horizontal" allocations to consider, such as the separation of powers within a government entity (legislature, executive, judicial, etc.) and division of powers among various international organizations (World Trade Organization (WTO), International Labour Organization (ILO), World Health Organization (WHO), Food and Agriculture Organization (FAO), International Monetary Fund (IMF), International Bank for Reconstruction and Development (IBRD) etc.).

126. In all those dimensions one can ask a number of questions that would affect the allocation issue. Questions of legitimacy loom

<sup>28</sup> Kofi Annan, as quoted in "State, Sovereignty, and International Governance" (Gerald Kreijen et al. eds., 2002) at 19.

<sup>29</sup> Stephen D. Krasner, "Sovereignty: Organized Hypocrisy" (Princeton University Press, 1999). The literature in this regard is extensive, see, e.g., Kreijen, supra note 3, and Neil Walker, ed, "Sovereignty In Transition" (Hart Publishing, 2003).

<sup>30</sup> Article XII of the Marrakesh Agreement Establishing the WTO.

large and often; therefore, there is a focus on “democratic legitimization”. This is frequently meant to challenge more traditional notions of sovereignty. Some say we are gravitating from ideas of “sovereignty for the benefit of the state” towards ideas of “sovereignty of the people”.

127. Clearly, the answer to the question of where decisions should be made will differ for different subjects. There may be one approach to fixing potholes in streets or requiring sidewalks, another approach for education standards and budgets; yet another for food safety standards, and still another for rules that are necessary in order to have an integrated global market work efficiently. Questions of culture and religion pose further important challenges.

128. Clearly, many values or policy objectives could influence consideration of the appropriate level or other (horizontal) distribution of power among a landscape of government and non-government institutions.

#### **D. WHY SHOULD WE FAVOUR GOVERNMENT ACTION AT AN INTERNATIONAL LEVEL?**

129. A large number of reasons could be given for preferring an international-level power allocation, including what economists call “co-ordination benefits.” This describes situations where, if governments each act in their own interest without any coordination, the result will be damaging to everyone. Matters can be improved if states accept certain, probably minimal, constraints so as to avoid the dangers of separate action. Likewise, there is concern about the so-called “race to the bottom,” in relation to government regulation and the worry that economic competition among countries could lead to a degradation of socially important economic regulation. International cooperation, including in the WTO, is more likely to discourage such a race than provoke it.

130. The subject area of the environment seems to be one that directly engages these issues of power allocation, and such issues as those involved in the so-called “global commons”. Actions that degrade the environment tend to have “spill-over effects” across frontiers and demonstrate the, often pressing, need for higher supervision. The extraordinarily detailed and profound discussion of these issues in the Shrimp-Turtle case<sup>31</sup> well illustrates the complexity and delicate balancing of policy objectives involved in these issues. That 1998 WTO case concerned a US regulation prohibiting imports of shrimp if they had been gathered in a manner that caused the death of endangered species of turtles. The first Appellate Body report in this case found the US measure to be deficient for a number of reasons, but after the US took administrative action to correct the deficiencies, the Appellate Body found that the US had adequately complied.

131. Many other policy areas are very controversial, and remain unresolved in this regard. For example, at what level should competition policy be handled? What about human rights? Questions of local corruption or cronyism might seem, to some of us at least, to call for a higher level of supervision.

#### **E. VALUES, GOALS OR CONSTRAINTS THAT SUGGEST ALLOCATING POWER MORE LOCALLY; THE PRINCIPLE OF “SUBSIDIARITY”**

132. Advocates of subsidiarity - a concept much discussed in the EU - note the value of having government decisions made as far down the “power ladder” as possible. One of the basic ideas is that by being closer to the constituents, a government decision can more reflect the subtleties and necessary complexity and detail that most benefits those constituents. The history of the US Constitution is filled with debates and struggles about the internal allocation of power, often with extensive reference to

---

<sup>31</sup> “US - Import Prohibition of Certain Shrimp and Shrimp Products”, Report of the Appellate Body, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

“sovereignty,” as can be seen in the Federalist Papers of 1787-88, the handling of Native American tribes, and, in recent years, many cases (many by 5 to 4 decisions) in the US Supreme Court. Many other countries or associations of states have similar problems.

133. Likewise, it is often said that the decision-making that is furthest down the ladder and closest to the constituent will be policed by a greater sense of accountability. Indeed, there are many illustrations of the dangers of distant power, including, of course, colonialism in general and the origins of the US, in its rebellion against England in the eighteenth century, in particular.

134. At times, however, the controversy over which level to place a government decision is truly a controversy over the substance of an issue. National leaders will use international norms and institutions to further policy that is otherwise difficult to implement because of the structure of their national constitution, or political landscape. In other circumstances, they will tend to keep decision-making powers on home ground to retain complete political control.

## **F. HOW IS THIS RELEVANT TO THE WTO?**

135. Based on the analysis of the previous sections of this chapter, it is apparent that a key question is how to allocate power among different human institutions. Advocates for market economics argue that the most efficient process of decision-making in an economy is reliance on the private sector to handle most of the choices, and to keep the government out. However, there is the well-recognized exception of “market failure,” and thus it becomes necessary to analyze what this failure entails.

136. Often, categories of market failures include monopolies and competition problems, asymmetries of information or lack of inform-

ation, public goods and free rider problems, and externalities. In each of those cases, one can see how the economics of a globalized, economically interdependent world operates. A certain judgment about the existence of market failure may be made if appraisal takes place at the national level. However, a quite different conclusion may be generated through analysis at a regional or global level. Judgments of corporate mergers and acquisitions, for instance, will depend acutely on how the “relevant market” is defined.

137. Even if there is a judgment as to the existence of market failure leading to a government response, the kinds of responses possible at the level of states differ dramatically from those at the international level. Most often, the international level institutions do not have powers to effectively tax, subsidize, or materially alter market mechanisms (such as setting up tradable permits). Another intergovernmental response is to have rules and prohibitions. This is virtually the only credible response at the international level. However, the key practical question is whether a particular rule or prohibition will be effective - that is, will it be observed - and therefore operate efficiently to correct market failure.

138. Obviously, the WTO can be seen as a significant example of the practical reality of the principles outlined in this chapter. Certainly some of the more intricate and elaborate (and some say controversial) examples of power allocation principles can be witnessed in relation to globalization, and the problems that accompany it, which are forcing the creation or adaptation of multilateral institutions that can cope. Naturally, the treaty obligations of such institutions - as is the case with the WTO - reach deeply into domestic policy-making fields, including economic regulation. This means that international cooperative mechanisms will, almost of necessity, clash with national “sovereignty,” and with special national interests whose

particular economic well-being will be affected, even damaged, by international obligations. It is not surprising, therefore, that the WTO is, at the same time, both a candidate for filling institutional needs to solve current international-level problems and a target to attack.

139. Nevertheless, increasingly often, states cannot regulate effectively in the globalized economy. This is particularly relevant to economic factors that are global and mobile (investment, monetary payments and monetary policy, and even the free movement of persons). Yet markets will not work unless there are effective human institutions to provide the framework that protects the market function. Thus, the core problem is the globalization-caused need for developing appropriate international institutions. If a thorough analysis would lead to a conclusion that the WTO is a good place to concentrate some of these cooperation activities, one could see the WTO becoming essentially an international economic regulatory level of government. This, of course, is a challenge to more traditional thinking about the sovereignty of states.

140. Yet it is possible - and more reasonable - to take a quite contrary and more favourable view. **In committing to the WTO and its procedures and disciplines, governments are returning to themselves a degree of "sovereignty" lost through the process of globalization. If governments are losing the capacity to regulate meaningfully at the domestic level, they are reclaiming some control of their economic destinies at the multilateral level.** If market failure needs to be avoided or treated then it will increasingly happen at the multilateral level. That is why the WTO plays such a crucial role - for developed and developing countries alike - and why arguments about loss of "sovereignty" are often ill-considered and misplaced.

141. This does not mean that the WTO, or any other multilateral institution, is warranted a role in every aspect of economic regulation, including those areas still clearly the prerogative of national governments. Far from it; the concept of subsidiarity is worth holding onto even in the area of international trade. However, it is difficult to deny some locus for the WTO in those many areas of domestic policy-making that impinge directly on the trading interests of others.

142. In summary, there are very few countries in the modern world where the notion that "sovereignty", however defined, must necessarily be shared, is denied. In some cases, the acceptance of the ceding of sovereignty goes very far - even to the point where a nation's own judicial organs can sometimes give judgments against their own governments based on obligations in an international treaty. The WTO does not interfere in sovereignty in that sense.

143. Yet the WTO does have competences and powers that were previously the monopoly of states. **Ultimately what counts is whether the balance between some loss of "policy space" at the national level and the advantages of cooperation and the rule of law at the multilateral level is positive or negative. Our view is that it is already a positive for all WTO Members and will increasingly be so in the future.**