

Edited by
Ernst-Ulrich Petersmann

*Preparing the
Doha Development Round:
Challenges to the
Legitimacy and Efficiency of
the World Trading System*

conference report



**Robert Schuman Centre
for Advanced Studies
EUROPEAN UNIVERSITY INSTITUTE**

Preparing the Doha Development Round: Challenges to the Legitimacy and Efficiency of the World Trading System

Ernst-Ulrich Petersmann (ed.)

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**EUROPEAN UNIVERSITY INSTITUTE
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Challenges to the Legitimacy and Efficiency
of the World Trading System**

Conference Report

**Edited by
Ernst-Ulrich Petersmann**

**Conference sponsored by the BP Chair in Transatlantic Relations
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WTO Negotiators Meet the Academics: Foreword

This conference was the second opportunity provided by the Robert Schuman Centre for Advanced Studies at the European University Institute for academics and trade negotiators to exchange views and reflect on the WTO and the Doha Development Agenda (DDA). While the first conference focused on the WTO Dispute Settlement System, this year's one focused on the "Challenges to the legitimacy and efficiency of the world trading system."

Two months before the 5th Ministerial Conference in Cancun, this was not only a timely conference but also a well chosen subject. As a matter of fact some of the issues identified here in Florence as being core problems of the WTO as an organisation turned out to be among the stumbling blocks which contributed to the failure of the Ministerial Conference.

The question of the efficiency and legitimacy of the WTO is intimately linked to its capacity to adjust and modernise existing rules and to develop additional rules on new issues. Only in this way can the WTO fully respond to the challenge of globalisation. The very nature of the rules-based multilateral trading system requires a fair balance between trade liberalisation and rule making. One of the lessons of Cancun is that the present organisation of the WTO is not sufficiently equipped to meet the new challenges and pressures that the multilateral trading system now faces.

The exchanges between academics and trade negotiators were not only challenging and refreshing but very much to the point as well. Many questions raised in Florence resonated in my mind in those hectic days of the Cancun Conference.

On the question of how to reconcile the need for efficiency and the requirement for inclusiveness and transparency in the decision-making process there are both short-term aspects and more fundamental ones. In the first category there are such questions as how to prepare and conduct Ministerial Conferences in a more effective way: the roles of the Chair, of facilitators, of the Director-General and the WTO Secretariat and possible alternative structures to a Green Room process, like the establishment of an Advisory Group that would be able to combine representativeness with efficiency. A more fundamental question is the relationship between the WTO's executive branch (Director-General plus Secretariat), legislative branch (General Council, Membership) and its "judicial" branch (Dispute Settlement System). The concept of a purely Member-driven organisation is completely outdated and at odds with the very notion of efficiency if that means that nothing can be done unless and until all 146 Members agree on every last comma of a statement. Cancun was the proof of this.

Strengthening the role of the Director-General may be part of the solution but does not solve by itself the increasing incapability of the WTO to deal with rule making.

The GATT culture was inspired by a mercantilistic logic but this is not ideal for dealing with issues of a systemic nature. Nonetheless, there is an obvious need to update the existing rules and to develop new ones. Moreover, in today's WTO with 146 Members with wide gaps in their level of development, there are also objective reasons which render decision-making in rule making increasingly difficult. The principal impediment is not so much the lack of willingness but the lack of capacity to enter into new negotiations and a fortiori to implement new obligations.

Here again, the discussions in Cancun on the so-called "Singapore Issues" were a case in point.

If we cannot deal collectively with rule making we will need to consider alternative approaches of "géométrie variable" among WTO Members as is the case in an ever-wider European Union. If we fail to do so, we will see an increasing imbalance between

the legislative and “judiciary” branch which will put an unacceptable strain on the Dispute Settlement System.

I have picked two examples to point out the timeliness and urgency of some of the issues we discussed at the Conference in Florence. The other issues we addressed were of no less interest to the WTO in general and the DDA in particular.

On all these issues the interaction between trade negotiators and academics was a stimulating source of reflection and inspiration. I am looking forward to next year's conference and take this opportunity to express our thanks to the organisers on behalf of all WTO negotiators.

Geneva, 10 December 2003

Carlo Trojan

*Ambassador, Permanent Representative
of the European Commission*

Introduction and Summary

by

Ernst-Ulrich Petersmann

European University Institute, Florence

*Justice is the end of government.
It is the end of civil society. It ever has been
and will be pursued until it is obtained,
or until liberty be lost in the pursuit.*

James Madison, *The Federalist* (51)

In June 2003, the annual conference on *Preparing the Doha Development Round – WTO Negotiators Meet Academics* was held at the Robert Schuman Centre for Advanced Studies of the European University Institute (EUI) in Florence. The conference discussed “Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO.” As in the 2002 conference,¹ academic experts presented reports on subjects related to the Doha Development Round negotiations, and WTO negotiators commented on these reports, leading to stimulating discussions among WTO ambassadors, other practitioners from developed and less-developed WTO member countries, economists, political

¹ Cf. E. U. Petersmann (ed.), *Preparing the Doha Development Round: Improvements and Clarifications of the WTO Dispute Settlement Understanding*, European University Institute, Robert Schuman Centre for Advanced Studies, 2002.

scientists and legal academics. This short conference report, written by the workshop organiser, summarises the main arguments made during the discussions, without disclosing the identity of WTO negotiators since their statements presented their personal views and not necessarily their government's official position. The summary is followed by the twelve conference papers and four written comments that served as a basis for the discussions and which have been revised for this publication.

Less than 3 months after our discussions in Florence, the WTO negotiations launched in Doha in November 2001 stalled in the WTO ministerial conference at Cancun, Mexico. The Cancun Ministerial Statement of 14 September 2003 acknowledges that considerable progress had been made, and requests WTO Members to continue negotiations on the outstanding issues in Geneva. The decision by the Conference Chair, Mexico's Minister for Foreign Affairs, to close the conference when WTO Members reached an impasse over the "Singapore issues" (competition rules, investment rules, transparency in government procurement, trade promotion), was subsequently criticised as "premature" because the other parts of the revised draft Ministerial Declaration had not yet been discussed in the final negotiations and many WTO Members had indicated flexibility. The EU and the US voiced frustration because a compromise should have been possible in the final hours of negotiations, while many of the developing countries grouped in the "G-20" and in the "African Group" expressed disappointment that their priority issues (i.e. agricultural subsidies, market access, special and differential treatment, the cotton initiative) had not been discussed in the final negotiations because the Chair had chosen to place the controversial "Singapore issues" first on the agenda. Yet some developing countries had called the revised draft Ministerial text "unacceptable for any discussion," and the chairman justified his "judgement call" as based on his appreciation of what was possible in the light of previous consultations with WTO Members bitterly divided over all key areas under negotiation.

The set-back of Cancun—widely criticised in the press as another lost opportunity for mutually welfare-increasing trade liberalisation, due in part to inadequate regard to justice-related

claims of the majority of less-developed WTO Members—illustrates the political importance of the questions discussed at our 2003 conference: Can WTO rules and consensus-based WTO negotiations remain effective if they are perceived by WTO Members and civil society as unjust or lacking legitimacy? Does WTO law offer sufficient flexibility for enabling “plurilateral agreements” that are binding only for a limited number of willing WTO Members (cf. Articles II:3 and X:9 of the WTO Agreement)? Has the time come for establishing—as suggested in the report by *Prof. Blackhurst* and *David Hartridge* in this volume—a WTO Consultative Board with a smaller, representative membership so as to facilitate negotiations and consensus-building? Should the WTO establish—as suggested in the report by *Prof. Sampson*—a WTO Group on the Functioning of the WTO System (FOWTOS) which should also make recommendations on future collaboration among the WTO and UN Agencies? Should the traditional concept of a “Member-driven WTO” be limited by giving the WTO Director-General additional powers of initiative?

**I. Florentine Visions of Politics:
Lessons from Machiavelli for WTO Reforms?**

The city-republics in Italy during the Renaissance, notably in Florence, gave rise to debates of lasting historical significance about liberty and republican self-government, and the rival merits of princely rule. No wonder, then, that several WTO negotiators—given the Florentine setting of the conference discussions—referred to *Machiavelli* (1469-1527), for example in order to justify the political necessity that trading countries should not allow protectionist governments of WTO member countries to block welfare-increasing trade liberalisation in the WTO. Yet is Machiavelli’s hypothesis—described in his book *Il Principe* (1513), and illustrated by the book’s infamous hero Cesare Borgia—correct that necessity (“necessità”), occasion (“occasione”), fortune (“fortuna”) and virtue (“virtù”) require statesmen to disregard morality and justice in order to advance the “interests of

the state”)?² Is the long-standing alternative political tradition—dating from Plato, Aristotle and Cicero continued through James Madison (see the quotation above) to modern theories of justice (as formulated, for example, by the American philosopher John Rawls: “justice is the first virtue of social institutions, as truth is of systems of thought”³)—simply wrong?

The modern universal recognition of human rights has rendered the two premises underlying Machiavellian power politics even more suspect. First, contrary to Machiavelli’s assumption that, in relations between the individual and the state, the state interest must always prevail, human rights and democracy are based on recognition of inalienable human rights as primary values and constitutional restraints on all government powers. The rational self-interest of citizens in maximum equal liberty as the “first principle of justice”⁴ offers, also in the trade policy area, a more convincing definition of the “state interest” than power-oriented government discretion to restrict mutually beneficial trade. The WTO Agreement qualifies its guarantees of freedom and non-discrimination in international trade by so many “public interest exceptions” that every WTO Member remains sovereign to regulate and restrict trade if it is necessary for protecting other, more important public policy objectives.

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- 2 See the recent edition of *Il Principe*, with annotations by Napoleon, edited by Italian Prime Minister Silvio Berlusconi: *Il Principe di Niccolò Machiavelli, annotato da Napoleone Buonaparte*, Silvio Berlusconi Editore, Milano, 1993.
- 3 J. Rawls, *A Theory of Justice*, 1973, at 3. On the relevance of theories of justice for international economic policy see: E. U. Petersmann, *Theories of Justice, Human Rights and the Constitution of International Markets*, EUI Working Paper, Law No. 2003/17.
- 4 Cf. Rawls (note 3), chapter II, whose conception of “justice as fairness” for defining the basic rights and liberties of free and equal citizens in a constitutional democracy gives priority to maximum equal liberty as “first principle of justice.” Rawls’ “principle of fair equality of opportunity,” and his “difference principle” for protecting the needs of disadvantaged people, are recognized only as secondary principles necessary for socially just conditions enabling personal self-development for every citizen.

Second, the Machiavellian premise that the “national interest” has primacy over international law is inconsistent with the “golden rule” that equal treatment under the rule of law, in international relations no less than inside states, is of crucial importance for peaceful co-operation. In order to transform aggressive nationalism, trade protectionism and other forms of Machiavellian power politics into a mutually beneficial division of labour based on the rule of law, trade negotiators may learn more from other Florentine political philosophers than from “murderous Nick” (as Niccolò Machiavelli was nick-named by Shakespeare). Donato Gianotti’s book on “The Republic of Florence” (1534),⁵ for example, written in exile (after the overthrow of the Third Florentine Republic (1527-1530) by the Medici dynasty) with the intention of helping to avoid a repetition of the political and constitutional failures of earlier republics, offers inspiring suggestions for constitutional “checks and balances” on abuses of foreign policy powers in order to protect freedom, self-government, the rule of law and international trade as the major sources of the wealth of the Florentine city republics.

Though Machiavelli’s writings offer little inspiration for discussions on how to safeguard transnational freedom (e.g. of trade) and the rule of law, they remain important for understanding policy-making processes. Yves Mény, President of the EUI, referred the conference participants, in his welcome remarks, to Machiavelli’s insight that political resistance to change tends to be better organised than political support for change. The beneficiaries from future changes (e.g. from competition) tend to be dispersed and less well informed than those likely to suffer from the adjustment costs. Professor Quentin Skinner, one of the world’s leading historians of the gradual decline of Italy’s city republics (until—in the words of *Dante*—“all the cities of Italy became full of tyrants”⁶), has drawn attention to another political insight in Machiavelli’s *Discorsi* (1522): due to their rational egoism and limited altruism, self-interested people are prone to

5 Donato Gianotti, *Della Repubblica Fiorentina* (G. Silvano ed.), 1990.

6 Dante Aligheri, “Purgatorio,” in: *La Commedia* (G. Petrocchi ed.), 1967, p. 100 (“Ché le città d’Italia tutte piene son di tiranni”).

be self-deceived “by a false image of the good” and “very often will their own ruin.”⁷ In order to convert private vices (like selfish “rent-seeking”) into public benefits (like mutually beneficial trade), individual and collective freedom must be protected by constitutional restraints on abuses of power. How can the public good of a liberal (i.e. liberty-based) international division of labour be protected more effectively through WTO law?

II. The “Human Rights Approach” to International Trade Advocated by the UN: Is Benevolent Disregard an Appropriate WTO Response?

According to the first report by *Prof. Petersmann*, the contemporary world-wide recognition of human rights requires taking the “external challenges”—by citizens, parliaments and non-governmental organisations—to the legitimacy and efficiency of WTO rules and WTO negotiations seriously, much more than is often done in intergovernmental WTO bargaining among trade experts on the more than 20 “technical” agenda items of the Doha Development Round. This was illustrated by the recent report in the *Financial Times*⁸ on a mass lobby in front of the British Parliament calling for “Justice in International Trade.” As the traditional safeguards of “input legitimacy” (like human rights protection, democratic procedures) and “output-legitimacy” (like promotion of general consumer welfare) are not mentioned in WTO law, parliamentarians and public opinion often question the legitimacy of producer-driven WTO negotiations and threaten to reject the negotiation results. In contrast to the anti-market bias of an earlier report by the UN Commission on Human Rights that had discredited the WTO as “a veritable nightmare” for developing countries and women, more recent reports by the UN High Commissioner for Human Rights on the human rights dimensions of various WTO agreements call for making trade liberalisation and realisation of human rights

7 Machiavelli, quoted from Q. Skinner, *Visions of Politics*, Vol. II: *Renaissance Virtues*, 2002, at 164.

8 *Financial Times*, June 26, 2003, at 13 (“Justice in trade is not simply a moral question”).

more complementary. As every WTO Member has accepted one or more UN human rights treaties as well as other human rights obligations requiring *government by the people* (input-legitimacy) and *government for the people* (output-legitimacy), a positive WTO response to the UN proposals for a “human rights approach to trade” is desirable. Similar to the 1996 Singapore Ministerial Declaration on core labour standards (which affirmed the support by WTO Members for the ILO’s agreed standards and work in this field, and rejected protectionist abuses of such standards), a WTO Declaration to respect universal human rights—without creating new legal obligations or new WTO competencies, and without prejudice to the diverse human rights traditions in WTO member countries—could promote synergies between WTO activities and the work of UN human rights bodies. However, the WTO should remain an economic organisation and leave “human rights assessments,” and the interpretation and monitoring of human rights, to specialised human rights bodies and national governments.

Our discussions in Florence confirmed that there is very little interaction between human rights activists and the world of trade. While “development and trade” has become a controversial issue in human rights bodies, human rights are hardly ever mentioned in WTO deliberations. It was said by some participants that the flexibility of WTO rules renders conflicts with human rights most unlikely. Human rights resolutions (e.g. on the “right to development”) were no substitute for the often inadequate participation of developing countries (e.g. from Africa) in WTO negotiations. Just as proposals for mainstreaming core labour standards into WTO activities had been opposed by less-developed countries, the latter were also afraid of protectionist abuses of a “human rights conditionality” in trade law and policies. Attention was drawn to India’s WTO dispute challenging the “conditionality” in the EC’s Generalised System of Tariff Preferences, which illustrated the lack of consensus on how to mainstream human rights into WTO activities. Even the industrialised democracies in the EC became willing to include human rights into EC law only a long time after the completion of the EC’s customs union and common market. Trade sanctions are increasingly condemned as inappropriate instruments for

promoting human rights. Several discussants warned that trade liberalisation would hardly be enhanced by discussions on the very diverse concepts and traditions of human rights. Just as past WTO discussions on core labour standards had “poisoned the well,” WTO discussions on the contested meaning of economic and social human rights could endanger the consensus-based decision-making in the WTO, including the WTO dispute settlement system which offered no model for strengthening human rights. Others disagreed, arguing that, just as the WTO’s 1996 Singapore Declaration had helped the ILO to reach agreement on its 1998 Declaration on Core Labour Standards and to apply ILO dispute settlement procedures more effectively (e.g. vis-à-vis Myanmar), so a WTO Declaration confirming respect for universal human rights could lend support to the work of competent human rights bodies.

III. How Can Parliamentary Participation in WTO Rule-making and Democratic Control Be Made More Effective in the WTO?

The more WTO rules affect *domestic* rule-making, the louder are calls for parliamentary oversight of, and democratic participation in, intergovernmental rule-making and policy-making in the WTO. The two reports by *Prof. Shaffer* and *Prof. Hilf* show, and the comments by two former US Congressmen and a member of the European Parliament confirm, the different views in the US Congress and the European Parliament regarding parliamentary oversight of rule-making in the WTO. As the US Congress strongly influences US trade policy, US congressmen focus on the *national* level of parliamentary authorisation, control and implementation of WTO negotiations and rule-making. Inter-parliamentary meetings at the international level (e.g. in the Inter-Parliamentary Union and WTO) are sometimes considered as diminishing, rather than enhancing, US power and US “sovereignty,” for instance if foreign representatives in such meetings lack democratic legitimacy and do not effectively control trade policy-making. US congressmen fear that, because they are held accountable through national elections, they have to respond to protectionist constituencies and risk not being re-

elected if they devote too much attention to distant intergovernmental negotiations.

The report by *Hilf* criticises the inadequate parliamentary control of trade policy-making in Europe, compared with the “US model,” and emphasises the constitutional requirements (e.g. in Article 23 of the German Basic Law) of democratic control of foreign policy powers. In the discussion, EU trade diplomats emphasised that, in the EU, trade policy was an executive power assigned to the EU Commission (cf. Article 133 EU Treaty) rather than to parliament (as in the US) which, in the EU, had only limited “approving power.” The written comment by MEP *Erika Mann* draws attention to the new parliamentary powers in the trade policy area, if the Draft Treaty establishing a Constitution for Europe enters into force. Parliamentary involvement could balance the influence by non-governmental organisations (NGOs) that represent much smaller “constituencies.” According to *Mann*, inter-parliamentary co-operation and control at the international level offer better first-hand information. The positive experiences with supra-national governance mechanisms in Europe prompt European parliamentarians to support inter-parliamentary meetings at the WTO level as a means of complementing and strengthening their much weaker parliamentary control of trade policy-making (compared with the US Congress) at national and EU levels. Ms. *Mann* offered a positive evaluation of the inter-parliamentary meetings at the WTO Ministerial Conferences in Seattle (1999), Doha (2001) and Cancun (2003). The limited participation or absence of US congressmen in the Doha and Cancun conferences seemed to reflect their view that little may be gained from talking to foreign parliamentarians for advancing US negotiation positions in the WTO.

Prof. *Shaffer* suggested that proposals to create a WTO parliamentary body should be judged also in terms of their ability to enhance participation of the majority of less-developed WTO Members and their constituents. Parliamentarians from less-developed WTO Members feared that inter-parliamentary bodies would reinforce the power of developed over less-developed WTO Members in WTO negotiations, for instance because NGOs from developed countries were in a stronger position to lobby and

influence parliamentary bodies. Many parliaments in less-developed countries lacked the expertise and resources necessary for effectively influencing WTO negotiations.

The US view of the WTO as a “bureaucratic bargaining system” without the need for additional democratic legitimisation at the international level (or, in the words of *James Bacchus*, as a collective effort of WTO Members to increase their welfare through trade, whose legitimacy derives “from the individual legitimacy of each of the individual ‘nation-states’ that, together, comprise ‘the WTO’”) remained controversial in the discussions. Former Congressmen *David Skaggs* and *Bacchus* welcomed inter-parliamentary WTO meetings as a means for rendering “closed trade politics” more transparent and accountable, for building public support for non-discriminatory trade liberalisation (e.g. vis-à-vis one-sided “civil society” critics, protectionist pressures from industry and from local constituencies), and for more effective parliamentary oversight at the national level. European discussants emphasised that legitimacy of decision-making derived not only from popularly-elected bodies or democratic votes, but also from other “accountability mechanisms” holding decision-making processes accountable to those affected by them, notably consumers who benefit from trade liberalisation but often remain “rationally ignorant” vis-à-vis complex WTO negotiations. Inter-parliamentary co-operation in the WTO could offer additional information (e.g. on the impact of WTO rules abroad) and political control (e.g. of WTO bodies) that national parliamentarians lacked.

It remained controversial to what extent multilevel legal restraints (e.g. through WTO adjudication) and “transnational deliberative democracy” in distant intergovernmental organisations, far away from local stakeholders, offered additional “top-down legitimacy” by limiting abuses of multilevel trade policy-making. Others argued for stronger “bottom-up democracy” since democratic input- and output-legitimacy depend on *domestic* rather than international decision-making. NGOs representing special citizen interests had no more legitimacy than special producer interests, and their participation in the “world

opinion market” would not necessarily overcome existing “information asymmetries” in trade policy-making.

IV. Does the WTO Need “Cosmopolitics” (Pascal Lamy)? Transparency, Public Debate and Participation by NGOs in the WTO

The report by *Steve Charnovitz* on “WTO Cosmpolitics” comments on the proposals by EU Commissioner *Pascal Lamy* to promote “cosmopolitan constituencies” supporting welfare-increasing trade liberalisation and transnational market regulation through WTO negotiations. *Charnovitz* made a number of proposals for improving external WTO transparency and mainstreaming intergovernmental organisations, parliamentarians and NGOs into the work of the WTO’s functional committees and bodies; he also pleaded for better connection of WTO decision-making to national democratic processes inside WTO member countries. In his comments, former WTO ambassador and chairman of the WTO Appellate Body *Julio Lacarte* supported proposals to make the formerly secretive negotiation culture inherited by the WTO more transparent, for example by setting-up an advisory WTO Economic and Social Committee enabling a more representative civil society participation and closer WTO contacts with “the real world”; governmental prerogatives had to be respected but should be subjected to stronger “checks and balances,” notably regarding the sometimes one-sided influence of producer interests on WTO decision-shaping.

In the discussion, it remained controversial whether participation by diverse civil society groups (like producers, traders, consumers, NGOs, academics, eminent persons) should focus on *national* rather than *international* decision-shaping. Just as parliamentary meetings and most UN meetings were public and observed by NGOs, so public access to WTO meetings would not prevent legitimate confidentiality of certain negotiations. In the words of one discussant, transparency (“Protestantism”) could improve the public image and “grass root perception” of the formerly too secretive (“catholic”) GATT. WTO co-operation with NGOs needed to be regulated in a more equitable manner so as to limit “single interest pressures,” hold NGOs more accountable

(e.g. in case of misinformation and the sometimes one-sided influence of NGOs on small government delegations from LDCs), and protect the effectiveness of WTO decision-making processes. In view of its narrow mandate and limited institutional capacities, the WTO could not deal with many non-economic demands of environmental and other NGOs. Others argued that excluding NGOs could disrupt the WTO system; the additional administrative burdens resulting from consultations with NGOs could be outweighed by the political advantages of more inclusive WTO discussions and more inclusive WTO constituencies.

V. The WTO Objective of Non-discriminatory Conditions of Trade: Are Consumer Welfare, Producer Welfare and Total Citizen Welfare Adequately Balanced in WTO Rules?

The report by *Prof. Mavroidis* explains why, even though the basic WTO rules do not take a stance on the issue of whether producer-interests, consumer-interests, or a balancing of both should guide trade liberalisation, the dynamic of WTO negotiations tends to lead to progressive liberalisation of market access barriers promoting consumer welfare. As all agreements tend to be “incomplete,” it is a legitimate task of WTO judges to progressively clarify the WTO requirements of non-discriminatory treatment of like goods and of like services. The additional requirements, in the WTO Agreements on Technical Barriers to Trade (TBT) and on Sanitary and Phytosanitary Standards (SPS), to base restrictive measures on the “necessity principle” and on “scientific evidence” offer useful “double checks” for judicial identification of protectionist measures. While the WTO rules on non-discriminatory market access offer weak safeguards for consumer welfare, the WTO’s contingent protection instruments protect import-competing producers from “injurious competition” without regard to consumer welfare. Because of the importance of the overlapping safeguard, anti-dumping and countervailing duty instruments, *Mavroidis* concludes “that the WTO rules are producer-oriented” and need to be changed by governments committed to promotion of consumer welfare.

The complementary paper by *Prof. Messerlin* offers historical and economic explanations for why WTO rules (including also those on “special and differential treatment,” GATS provisions permitting “economic needs tests” and quantitative restrictions rather than price-based instruments) fail to take into account cost-benefit analyses based on welfare balances. In view of the difficulties of such cost-benefit analyses, as illustrated by the occasionally conflicting assessments of transatlantic competition restraints by EC and US competition authorities, *Messerlin* concludes that “it is hard to see the benefits of introducing a strong competition culture directly into the WTO system (other than through improved market access).” His policy recommendation is to shift away from antidumping and anti-subsidy protection towards safeguard measures and to subject such safeguard measures to reciprocal liberalisation commitments.

The discussants agreed with the producer-bias of WTO rules, which favoured producers in rich countries rather than in poor countries; due to the huge agricultural subsidies of OECD countries (more than \$150 billion p.a.), less-developed countries could not fully exploit their comparative advantages. While the TBT and SPS Agreements were more sensitive to social concerns, the Agreement on Trade-Related Intellectual Property Rights (TRIPS) suffered from a one-sided focus on producer interests. These and other biases undermined the legitimacy and efficiency of WTO rules. In view of the difficulties of calculating and balancing producer and consumer welfare, it was suggested to entrust the assessment of such welfare gains to independent authorities. Even though GATT rules on contingent protection (e.g. Article VI:2, XIX) allowed a balancing of producer and consumer welfare, this was actually done in only a few countries (e.g. the Australian Tariff Board) and in the context of a few regional trade arrangements (e.g. the Australia-New Zealand and the Canada-Chile Free Trade Agreements which had abolished antidumping duties). The proposal for rules requiring the establishment of independent authorities calculating a “welfare balance sheet” had been rejected in the Uruguay Round negotiations. “Public interest” requirements in some domestic anti-dumping laws (e.g. of the EC) were usually applied without proper balancing of producer and consumer interests. The WTO

rules on contingent protection had a political rather than economic rationale; the political rather than economic definition of the “national interest” was due to the political dependence of governments on support from industries and agricultural lobbies. The protection of *foreign consumer interests* by trade negotiators demanding access to foreign markets was indirect and likewise driven by producer interests (export industries). The “trade-liberalisation conditionality” of World Bank and IMF assistance was sometimes more focused on consumer welfare. Perhaps, other international or national organisations (e.g. regional and national competition authorities) could help to bring a “competition culture” to the WTO. The “producer biases” and lack of competition culture were among the most abusive elements of the WTO.

VI. Is There a Need for Additional WTO Competition Rules Promoting Non-discriminatory Competition, Competition Laws and Competition Institutions in WTO Members?

The report by *Prof. Souty* gives an overview of past academic proposals, as well as of the recommendations of the WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP), for negotiating international competition rules in the context of the WTO. *Souty* also points to the increasing empirical evidence of the very considerable costs imposed by international cartels on less-developed countries, often dwarfing the administrative costs of introducing a competition law and setting-up an antitrust authority. According to *Souty*, WTO competition rules should focus on prohibiting hard core cartels, providing technical assistance for less-developed countries, the institution of a WTO Competition Committee for “peer reviews” of trade-related national competition rules and policies, and continued clarification of trade-related competition problems in the WTO.

In the discussion, there was broad support for a WTO role in assisting less-developed countries to introduce competition laws and a competition culture. More than 30 countries were currently preparing the introduction of competition laws, and almost

one hundred countries had introduced such laws. It was noted that WTO Members did not yet agree on whether a prohibition of “hard core cartels” should include export cartels, nor was there agreement on bringing antidumping laws into conformity with competition policy principles. More than 71 countries had now introduced antidumping laws; as a result of the increasing use of antidumping duties against imports from the EU and the US, domestic pressures for limiting abusive antidumping measures might increase in the EU and in the US. The WGTCP had so far worked well, even though it had refrained from discussing certain anti-competitive practices like anti-dumping measures. Continued work by the WGTCP was important for introducing more “competition culture” into the WTO itself. As the applicability of the WTO national treatment requirements to competition policy had so far not been tested and was difficult to secure (e.g. in the case of mergers), domestic competition authorities retained broad discretion regarding investigations and sanctions in competition policies. The large number of international cartels illustrated that competition authorities were far from perfect. Yet there was broad agreement in the WGTCP that individual decisions of domestic competition authorities should not be subject to WTO dispute settlement proceedings.

VII. Is There a Need for Additional WTO Investment Rules on Market Access and National Treatment of Foreign Investors?

The report by *B. Bora* and *E. M. Graham* examines the progress made since 2001 in the WTO Working Group on Trade and Investment. The report concludes that the Working Group’s current mandate was so broad that the outcome of slow progress towards a Multilateral Framework on Investments (MFI) was to be expected. Further progress could only be determined in the context of negotiations where true “bottom line” positions would be exposed. Any future mandate for the Working Group should be more precise and exclude certain issues (such as investor-state dispute settlement procedures) which were no longer on the table. The discussions about the feasibility and architecture of an MFI should not delay current commitments and disciplines

on investment-related issues such as in the Agreement on Trade Related Investment Measures (TRIMS), the Agreement on Subsidies, and “mode 3 commitments” in the context of the General Agreement on Trade in Services (GATS). For example, the needed disciplines on investment incentives should be negotiated in the context of the Subsidies Agreement or TRIMS Agreement. And the needed extension of the TRIMS Agreement to additional trade-related investment measures should be negotiated in the context of the TRIMS Agreement rather than in the context of a future MFI.

In the discussions, doubts were expressed as to whether the WTO was the appropriate forum for regulating foreign direct investments (FDI); whether the existing networks of bilateral investment treaties were not adequate; whether WTO dispute settlement procedures were appropriate for foreign investment disputes; and whether a “plurilateral MFI” might not offer more flexibility and prove more acceptable. One view was that, as foreign investments were closely linked to trade, WTO rules promoting market access and security for FDI could better ensure synergies among trade and investment rules than OECD rules. Others doubted whether WTO market access commitments and national treatment commitments would actually result in liberalising and increasing FDI. In addition to the seven issues clarified by the Working Group, other issues had emerged as relevant and controversial, such as the relationship between an MFI and the GATS. As major proponents supporting an MFI were heavily protecting their domestic agriculture (e.g. in the EU, Japan and Korea), a consensus to start negotiations would depend on a package deal offering liberalisation of market access for agricultural products. The proposal to launch simultaneous negotiations on all four “Singapore issues” remained controversial among the majority of WTO Members. The EC claimed to support MFI negotiations and WTO competition rules for “systemic reasons” rather than for purely economic reasons. The application of a “GATS approach” to market access commitments, national treatment commitments and additional commitments for FDI would remain fundamentally different from the OECD’s “MAI approach” and would not adversely affect the regulatory and policy autonomy of capital-importing countries.

VIII. Are the Competition Rules in the WTO Agreement on Trade-related Intellectual Property Rights Adequate?

The report by *Prof. Abbott* gives an overview of competition rules in the TRIPS Agreement (notably Articles 6,8:2 and 40), which leave each WTO Member substantial discretion in the development and application of competition law with regard to intellectual property rights (IPRs). He concludes that there are no compelling grounds for changing these TRIPS rules (e.g. in the context of a WTO framework agreement on trade-related competition rules). However, as a “down-payment” in the Doha Development Agenda, developed WTO Members should agree to reform their competition laws such that anti-competitive conduct undertaken by their enterprises in foreign markets is no longer exempted, tolerated or encouraged.

In the discussion, it was recalled that Articles 8 and 40 of the TRIPS Agreement explicitly recognise the need to forestall anti-competitive abuses of IPRs. The Doha Declaration on the TRIPS Agreement and Public Health illustrated that TRIPS rules were flexible enough to deal with development and competition problems caused by IPRs (e.g. undue restrictions on transfer of technology and other anti-competitive practices in contractual licences). Both IPRs and competition rules aimed at promoting innovation and general consumer welfare and should be applied in a mutually compatible manner. There was no compelling need to change the competition rules in the TRIPS Agreement. Export cartels and other restrictive business practices tolerated by developed countries often produced anti-competitive effects not only to the detriment of less-developed countries but also in developed country markets. The lack of competition laws and of effective competition authorities in many less-developed countries could, however, entail that anti-competitive abuses of IPRs were not effectively constrained in those countries. There was inadequate evidence on whether, and how, the “positive comity” obligations in Article 40:3 of the TRIPS Agreement had been used so as to prevent anti-competitive practices in contractual licences. The WTO Working Group on the Interaction between Trade and Competition Policies could assist the TRIPS Council in clarifying the need for better co-operation among competition

authorities and IPR authorities in controlling anti-competitive abuses of IPRs, which adversely affect international trade.

IX. How to Improve the Capacity of the Intergovernmental and Administrative WTO Institutions to Fulfil Their Mandate?

The report by *Prof. Blackhurst* and *David Hartridge* starts from the widely accepted premise that the WTO's "legislative" bodies are working very poorly, if at all. The report draws attention to fundamental weaknesses of "green room debates and negotiations" relying on "inner circle meetings" of some WTO Members preparing draft texts for subsequent consensus-decisions by all 146 WTO Members. As large and influential developing countries are regular participants in green room meetings, the needed reform of the WTO's decision-making process is *not* a North / South issue but rather an insider / outsider issue, with the industrial countries and "important" developing countries on the inside, and the other 110 or so WTO Members on the outside. *Blackhurst* and *Hartridge* conclude that, if green room meetings cannot accommodate all WTO Members wishing to participate, the WTO should have recourse to a new WTO Consultative Board that needed to be composed in a transparent and legitimate manner for the purpose of discussing and negotiating draft decisions that can be put to the entire membership for adoption. Whereas the largest trading countries would have permanent seats, the remaining WTO Members would be divided in groups, each with one seat to be shared among the members of the group on a rotating basis. The transparency, consultative character and accessibility of such a Board to all WTO Members would facilitate its political acceptability and consensus-building efforts. The so far "disenfranchised outside WTO Members" should insist on establishing such a WTO Consultative Board, since the "insiders" might not take such an initiative limiting their own privileges.

Several speakers expressed doubts as to whether a proposal for establishing a WTO Consultative Board could still be inserted into the agenda of the ongoing Doha Round negotiations. One view was that, just as the negotiations of the WTO Agreement

had become an agenda item at a late stage of the Uruguay Round, the negotiation of a multiplicity of Doha Round agreements might prompt WTO Members to also review the existing institutional and procedural WTO provisions. Others said that the current *ad hoc* system of restricted informal groups, open-ended information and consultation of outsiders, and the already existing right of WTO Members to be joined to formal groups had enabled a “géométrie variable” that seemed not to function too badly. As a result of the more active and assertive participation of African developing countries, and of the focus on development issues, the current Doha Development Round negotiations involved 80-100 negotiators (compared with up to 40 negotiators in the preceding Uruguay Round of negotiations). Trade-offs had become more difficult. Attention was drawn to the practical difficulties of limiting the participants in negotiations on subjects such as agriculture, for which more than 80 negotiating proposals had been submitted on behalf of some 100 WTO Members in the Doha Round.

It was also said that, among the 146 WTO Members, only a dozen or so were committed to free trade. Negotiations on new WTO institutions and procedures could prove to be much more difficult than, e.g., in the International Monetary Fund, because WTO matters tended to be politically more controversial than subjects discussed in the IMF’s Interim Committee. In view of the limited commitment of many WTO Members to reciprocal trade liberalisation, a predominant influence of trading countries willing to engage in reciprocal liberalisation had helped to conclude previous GATT Rounds successfully. One ambassador defended recourse to “power-oriented Darwinism” by the real trading powers as a necessary and justifiable element of the “torture politics” inevitable in international trade in order to overcome resistance from protectionist rent-seekers.

Most speakers endorsed the idea of a WTO Consultative Board as a desirable, long-term proposal in order to narrow the existing gap between legitimacy and effectiveness of WTO negotiations provided such a Board would be based on regional groups enabling each WTO Member to represent the group on a rotating basis. Others emphasised the need to ensure, prior to any formal

amendment of the WTO Agreement, additional consensus-building mechanisms at WTO Ministerial Conferences (e.g. by asking chairpersons and members of sub-groups to act as “consensus facilitators” regularly informing and consulting outsiders) so as to promote “inclusive decision-shaping” offering every affected WTO Member a chance of contributing to the consensus-building. One speaker referred to the need to select the permanent members of a new Consultative Board not only on the basis of their respective share in world trade because some large less-developed countries (e.g. India) were likely to insist on their permanent seat notwithstanding their comparatively small share in world trade. Others said that a “group system” had to take into account that strategic alliances changed depending on the issues concerned (e.g. the “Singapore issues”); hence, it could not be based only on regional groupings. Reference was made to the Executive Council of the International Labour Organisation as an example for well-functioning, inclusive decision-making; yet, there were other international organisations (like UNEP) whose Executive Councils did not work satisfactorily.

Another speaker suggested that the often different negotiating priorities of the WTO majority of poor countries required a different approach to negotiations. The particular interests of small groups had to be represented by one or several (self) elected member(s) of the group. Top-down approaches (e.g. proposals pushed forward by “free trade coalitions” or by LDCs) had to be supplemented by “bottom-up approaches” giving incentives for smaller countries to work together and to avoid “cartelisation” of the agenda of the negotiations; apart from giving more leverage to smaller countries, bottom-up approaches could help to preempt the blockage of decisions by those who had been excluded from the elaboration of “top-down proposals.”

X. Can the WTO Dispute Settlement System Deal with Competition and Investment Disputes?

The report by *Prof. Ehlermann* and *Lothar Ehring* describes how WTO rules (e.g. on national treatment) and the WTO Dispute Settlement Understanding (DSU) are already applicable to trade-related competition rules of WTO Members and to individual

decisions on their application by competition authorities. The proposals to extend the application of the DSU to a future WTO framework agreement on trade-related competition policies would therefore not lead to a *qualitative* innovation. Yet, the discussions in the WTO Working Group on the Interaction of Trade and Competition Policy have revealed reservations against application of the DSU, notably against review by WTO dispute settlement bodies of individual decisions applying future WTO competition rules. According to *Ehlermann* and *Ehring*, only some of these reservations are justified in view of certain weaknesses of WTO dispute settlement procedures (e.g. inadequate panel procedures for access to and protection of confidential business information, limited fact-finding capacities of *ad hoc* panelists). The standard of review set out in Article 11 of the DSU could also be appropriate for trade related competition rules. Even though the full application of the DSU to future WTO competition rules should not present major problems, and some problems could be dealt with in the current negotiations on reforms of the DSU, restriction of dispute settlement provisions in a future competition agreement to review of laws as such might be a necessary price to pay for reaching political consensus on such an agreement.

In the discussion, it was recalled that there had been comparatively few GATT and WTO panel findings of an inconsistency between national laws as such and GATT / WTO rules. In WTO disputes concerning individual administrative decisions (e.g. on anti-dumping and countervailing duties), the panel practice of drawing negative inferences if information requested by a panel was not submitted, could be problematic in the case of confidential business information; the Doha Round negotiations on improvements of the DSU offered an opportunity for negotiating additional DSU rules protecting confidential business information. If a future WTO competition agreement would be limited to the introduction of certain competition rules, then the problems of judicial review of individual decisions and of *de facto* discrimination in the application of competition rules might not arise in WTO dispute settlement practice at all. Some speakers criticised the Canadian proposal to provide for political “peer review”—instead of legal review by WTO dispute settlement

bodies—of national laws implementing future WTO competition rules and considered such an exclusion of the DSU as a step backward from the “WTO acquis” of general applicability of the DSU to all WTO agreements. Other speakers pleaded for flexibility and said that a WTO agreement on competition rules would remain important even if it did not provide for applicability of the DSU. As existing WTO rules (e.g. in the Safeguards Agreement and GATS Protocol on Telecommunications) prohibiting government support for cartels were of limited scope, additional WTO competition rules prohibiting trade-related cartels (e.g. export cartels) and their judicial enforcement remained economically and legally important.

It was said that, just as the comprehensive competition rules in the GATS Protocol on Telecommunications had been necessary in view of the widespread existence of monopolies and dominant suppliers of telecommunications services, GATS market access commitments and national treatment commitments in other service sectors might remain ineffective without additional commitments to competition rules. The very long duration of the first WTO dispute under the GATS Protocol on Telecommunications, in which the United States had invoked the various competition rules in Mexico’s GATS commitments, seemed to confirm the view that fact-intensive competition disputes may require longer time-periods than those prescribed in the DSU. The WTO practice of appointing part-time, temporary *ad hoc* panel members living in different continents could be inadequate to ensure a coherent and convincing WTO jurisprudence in competition disputes.

As regards trade-related investment disputes, it was recalled that several such disputes had already been settled under GATT 1947 (e.g. the *FIRA case*), under the TRIMS Agreement and under the GATS. In view of the very limited legal remedies available in WTO dispute settlement proceedings (e.g., no reparation for injury, no restitution in kind), it was questioned whether investment disputes over private investor rights could be settled through recourse to WTO dispute settlement procedures. There seemed to be agreement in the WTO Working Group on the Relationship between Trade and Investment that “mixed” investor-state arbitration should continue outside the WTO (e.g.

arbitration proceedings under NAFTA Chapter 11 and in the International Centre for Investment Disputes, or ICSID). The legal and procedural interrelationships between trade-related investment disputes inside the WTO and investment disputes in other *fora* (such as the International Court of Justice, ICSID, NAFTA, the International Chamber of Commerce) raised many legal and procedural questions that remained to be clarified.

XI. Is There a Need for Restructuring the Collaboration among the WTO and UN Specialized Agencies so as to Harness Their Complementarity?

The report by *Prof. Sampson* shows that the WTO and UN agencies pursue common goals, like “sustainable development,” and could mutually benefit from closer co-operation among the WTO and UN bodies. *Sampson* identifies specific areas (such as protection of intellectual property rights, traditional knowledge, genetic resources, the environment, public health, labour standards, human rights, the rule of law) in which a “bottom-up approach” to collaboration should be pursued complementing the numerous “top-down” political commitments to mutual co-operation among WTO and UN agencies. As Article V of the WTO Agreement requires the WTO Council to make appropriate arrangements for effective co-operation with other intergovernmental organisations and NGOs that have responsibilities related to those of the WTO, *Sampson* recommends more specific co-operation arrangements between the WTO, UN agencies and NGOs similar to the successful WTO co-operation with intergovernmental and non-governmental environmental organisations. The need for deviations from WTO rules for non-economic policy reasons should be clarified by WTO Members collectively (e.g. as done in the WTO Decisions on the TRIPS Agreement and Public Health) rather than through WTO litigation. A WTO Group on the Functioning of the WTO System (FOWTOS) should be set up to make recommendations on how to bring greater coherence to policy-making at the global level and improve collaboration among the WTO and UN agencies.

The discussion focused on the different approaches applied to promotion of human rights, international labour standards, multilateral environmental agreements, monetary stability, international trade and development aid, respectively. One discussant said that incoherence among these different approaches, and the predominant influence of developed countries on the drafting of WTO rules, had contributed to the unequal impact of globalisation: while developed countries seemed to benefit from globalisation, many less-developed countries suffered from increasing economic marginalisation. The mercantilist logic of producer-driven WTO negotiations had to be balanced by the broader logic underlying UN institutions. The proposed “balancing” of WTO rules by social norms should, however, not be pursued inside the WTO if the social norms remained contested, for instance if their focus on developed countries’ priorities (e.g. to subsidise “animal welfare” and the agricultural landscape) could undermine the export opportunities and the poverty reduction priorities of poor countries. Other speakers replied that gains from trade depended on active participation in the international division of labour, and that the often ineffective WTO rules on special and differential treatment for less-developed countries, and their sometimes protectionist and harmful trade effects, had been introduced at the request of less-developed WTO Members. The focus of the Doha Round on development needs should help to promote positive synergies in the capacity-building assistance of WTO and UN agencies.

Many speakers emphasised that the existing “compartmentalisation” of global governance in specialised organisations had to be overcome by broadening the discussions with a view to enhancing the coherence and efficiency of the global system. The various recent “summit conferences” (e.g. in Monterrey, Johannesburg and Doha) had not succeeded in transforming the objective of “sustainable development” into reality. For example, finance and trade ministers rarely worked together in joint efforts at deepening the international division of labour. The UN Economic and Social Council had failed to integrate economic and social policies effectively. Co-operation between WTO and UNCTAD had improved. Other UN agencies, including the IMF, the World Bank and the ILO, should examine how to support

trade liberalisation in the WTO and tailor their development programs more closely to the adjustment needs resulting from trade liberalisation. Yet, international policy coherence had to begin with better policy coherence at home among trade, finance, agricultural, development and other ministries in national capitals. It was regretted that the human and financial resources of the WTO for capacity-building assistance (e.g., in the field of trade-related competition policies) remained so much smaller than those of UN institutions (e.g., UNCTAD). As long as WTO Members could not agree on better rules on the numerous “interface problems” of the world trading system, academic and procedural initiatives—such as the WTO Consultative Board proposed by *Blackhurst* and *Hartridge*, the WTO FOWTOS Group suggested by *Sampson*, or the “soft law recommendations” elaborated by the WTO Committee on Trade and the Environment—remained all the more necessary. The idea of convening a “globalisation summit” appeared, however, premature. The identification and extension of areas for “bottom-up cooperation” among WTO and other intergovernmental and non-governmental organisations, as in the field of “TRIPS and public health,” remained urgent and more practical.

It was noted that, the more public opinion became concerned with WTO issues, the more it was necessary to conduct WTO business in a way that is comprehensible for outsiders and taking into account legitimate public concerns in discussions inside the WTO. Transparency and publicity of WTO meetings (e.g. by means of television) were indispensable for winning public confidence and for responding to the widespread distrust vis-à-vis producer-driven negotiations and one-sided reliance on market solutions without adequate regard to social adjustment problems. Just as the European concept of a “social market economy” took into account that lack of social solidarity could reduce economic efficiency and weaken public support for market competition, reciprocal trade liberalisation in the WTO had to be complemented by social adjustment assistance for the losers in economic competition. Even though all economics had become global, politics remained local, and the functioning of the WTO depended on domestic political support. In order to maintain this political support and to keep the social costs of

international trade and globalisation politically acceptable, the current WTO Round had been designed as a “Development Round” focusing on the needs of the majority of less-developed WTO member countries. The EU and the US had to lead by example in order to successfully conclude the Doha Development Round.

PART ONE

**CHALLENGES TO THE POLITICAL LEGITIMACY
OF THE WTO SYSTEM**

**The “Human Rights Approach to
International Trade” Advocated by the UN
High Commissioner for Human Rights and
by the International Labour Organization:
Is It Relevant for WTO Law and Policy?**

by

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I. Introduction and Summary

The today universal recognition of human rights implies that the legitimacy and legality of all government measures, including rules and decisions of intergovernmental organizations, depend also on their respect for human rights as defined in national constitutions and international law. This contribution shows that the universal human rights obligations of every Member of the World Trade Organization (WTO) pursue objectives (like protection of personal autonomy and freedom of choice) that complement those of liberal trade and may be legally relevant context for the interpretation of WTO rules (chapters II to III). The human rights approach to international trade advocated by the UN High Commissioner for Human Rights (chapter IV) could, like the 1996 WTO and 1998 ILO Declarations on core labour standards (chapter V), promote synergies between the, so far, separate fields of human rights and GATT / WTO law. The “basic rights approach” to trade liberalization in European integration (chapter VI), as well as the GATT, WTO and EC dispute settlement jurisprudence (chapter VII) confirm that, on the level of

principles, human rights and liberal trade rules do not conflict with each other. The emerging “human right to democratic governance” requires, however, more effective parliamentary involvement, citizen participation and “deliberative democracy” in WTO matters (chapter VIII). A WTO Declaration (1) renewing the commitment of WTO Members to respect their existing human rights obligations in all policy areas; (2) affirming their support for the progressive development of human rights through the competent UN and other human rights bodies; and (3) welcoming the UN initiatives for harnessing the complementarity of WTO rules and human rights for welfare-increasing co-operation among free citizens, could enhance the “input-legitimacy” as well as the “output-legitimacy” of WTO negotiations—without creating new WTO obligations or new WTO competencies. However, in view of the limited mandate of the WTO, its consensus-based decision-making processes, and the divergent human rights concepts and traditions in WTO member countries, the WTO should leave the interpretation of human rights to specialized human rights bodies outside the WTO (chapter VIII).

II. Should the WTO Pledge Respect for the Human Rights Obligations of WTO Members?

The today world-wide “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family (as) a foundation of freedom, justice and peace in the world”¹ entails increasing challenges to the democratic legitimacy of multi-level market regulation by intergovernmental organizations (such as the WTO) and multinational corporations. The end of the cold war has led to universal recognition in the Vienna Declaration of the UN World Conference on Human Rights (1993)² that “all human rights are universal, indivisible,

1 This quotation from the Universal Declaration of Human Rights (UDHR) was confirmed e.g. in the 1966 UN Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Human Rights (ICESCR) as well as in the 1989 UN Convention on the Rights of the Child (ICRC) ratified by more than 190 states.

2 The Vienna Declaration was adopted by consensus and is reproduced in *The United Nations and Human Rights 1945-1995*, UN 1995, at 450.

and interdependent and interrelated” (section 5); that “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing” (section 8); and that there is a need also for “international organizations, in co-operation with non-governmental organizations, to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights” (section 13). Every WTO member state has ratified one or more of the major world-wide UN human rights conventions and has obligations to respect and protect human rights both under the UN Charter and general international law.³ Human rights activists, non-governmental organizations and UN institutions therefore claim that the WTO—like other world-wide organizations (e.g. the UN, ILO, FAO, WHO, UNESCO) and regional organizations (e.g. the EU, OAU and OAS)—could enhance its democratic legitimacy by explicitly recognizing the existing human rights obligations of all WTO Members as relevant “legal context” for the interpretation and application of WTO rules. Such an explicit recognition (e.g. in a WTO Ministerial Declaration) could—without introducing any new legal obligations or new WTO competencies—increase the “input-legitimacy” of WTO negotiations and of WTO dispute settlement proceedings by allaying the widespread fears that—in negotiating and applying WTO rules—WTO bodies risk “trading away human rights” and neglecting non-economic values. As human rights and liberal trade rules pursue the same basic objective of empowering individuals by increasing their legal autonomy and freedom of choice, regional economic integration agreements increasingly

3 In the Barcelona Traction judgment (ICJ Reports 1970, 32) and the Nicaragua judgment (ICJ Reports 1986, 114), the International Court of Justice (ICJ) has recognized that human rights constitute not only *individual rights* but also, in case of universally recognized human rights, *erga omnes* obligations of governments based on the UN Charter, human rights treaties and general international law. The ICJ has also recognized (e.g. in its Advisory Opinion of 25 March 1951 on *WHO v. Egypt*) the applicability of general international law rules to intergovernmental organizations. The European Court of Justice and the European Court of Human Rights have likewise recognized that general international law and human rights may be binding also on intergovernmental organizations.

refer to human rights.⁴ A WTO Declaration pledging respect for the human rights obligations of WTO Members within the limited trade policy mandate of the WTO could facilitate the political acceptability of new WTO commitments, promote democratic participation by non-governmental organizations, and help to mobilize “cosmopolitan constituencies” supporting the welfare-increasing division of labour based on WTO rules.⁵

In line with their limited trade policy mandate, WTO diplomats and WTO bodies have so far avoided official positions on the proposals by the UN High Commissioner for Human Rights (UNHCHR) to adopt a “human rights approach” to international trade.⁶ As views on the contents of human rights (such as the “right to development”) and on their relevance for inter-governmental organizations differ widely, also the 2001 Doha Declaration on the Agreement on Trade-Related Intellectual Property Rights (TRIPS) and Public Health includes no reference to human rights.⁷ Trade experts fear that a “human rights approach” will unduly complicate WTO negotiations in view of the fact that e.g. the 1966 UN Covenant on Economic, Social and Cultural Human Rights has not been ratified by more than 30 WTO member countries including the United States. Just as UN human rights conventions do not refer to international

4 See e.g. the references to human rights in the EC and EU Treaties, in some 50 bilateral treaties concluded by the EC with third countries, the Cotonou Agreement among more than 90 countries in Europe, Africa, the Caribbean and the Pacific, and in the negotiations on a Free Trade Area for the Americas among more than 30 American states.

5 For a discussion of the proposal by EU trade commissioner Pascal Lamy to improve global governance—also in the WTO—by new forms of “cosmopolitics,” see S. Charnovitz, “WTO Cosmopolitics,” *New York University Journal of International Law and Politics* 34 (2002), 299-354.

6 The proposals by the UNHCHR are described and discussed in section IV below.

7 WTO Ministerial Conference, *Declaration on the TRIPS Agreement and Public Health*, adopted on 14 November 2001, WT/MIN(01)/DEC/2. The follow-up WTO Decision of 30 August 2003 on the implementation of paragraph 6 (compulsory licensing for exports of medicines to countries without manufacturing capacity for such products) of the Declaration on the TRIPS Agreement and Public Health likewise avoids references to the human right to health.

division of labour, "market freedoms" and property rights as essential conditions for creating the economic resources needed for the enjoyment of human rights,⁸ so WTO law does not explicitly refer to respect and protection of human rights as necessary means for realizing the WTO objectives of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services" (WTO Preamble). Notably, less-developed WTO Members have voiced concerns that labour standards and human rights risk being abused for protectionist import restrictions that may undermine the comparative advantages of developing countries and aggravate their development problems. Less-developed WTO Members therefore insist that core labour standards and human rights should be left to specialized organizations like the ILO and UN human rights institutions, and trade policies and human rights should remain separate.

III. Legal Relevance of Human Rights for WTO Law and Policies

There are three major legal, political and economic reasons why human rights are legally and politically relevant for WTO law and policies and why WTO Members should offer convincing answers to the UN requests to adopt a "human rights approach" to international trade.

A. *Human rights may be legally relevant context for the interpretation of WTO rules*

In Article 3:2 of the Dispute Settlement Understanding (DSU) of the WTO, "Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements

⁸ It is only in the context of the right to work (Article 6) that the ICESCR of 1966 refers to the need for government policies promoting "development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual" (Article 6:2).

in accordance with customary rules of interpretation of public international law.” The WTO Appellate Body has consistently held that international customary law and Article 3:2 require an interpretation of WTO rules “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,” including “any relevant rules of international law applicable in the relations between the parties.”⁹ In view of the human rights obligations of every WTO Member,¹⁰ it seems only a matter of time that—just as the EC Court of Justice had to construe EC Treaty rules in light of the human rights obligations of EC member states long before human rights provisions were included into the EC Treaty—WTO dispute settlement bodies will have to respond to legal claims or questions such as the following:

- Are the “General Comments” adopted by the UN Committee on Economic, Social and Cultural Human Right (UNCESCR) on the human rights to food and health “relevant legal context” for interpreting the WTO Agreement on Agriculture, for example its “green box provisions” on food security programs, food aid, natural disaster relief programs and infrastructural services like water supply facilities? Following the emphasis placed by the UNCESCR on the need to “ensure that in international agreements the right to food is given adequate consideration”,¹¹ a recent WTO submission by Mauritius referred to the right to food as being particularly relevant for future WTO negotiations on the provisions of the Agreement on Agriculture dealing with “non-trade concerns” (e.g. Article 20), such as the human rights obligation to take “affirmative action” in order to deal with serious adjustment

9 Article 31:1 and 31:3(c) of the 1969 Vienna Convention on the Law of Treaties, which, according to WTO jurisprudence, reflect customary rules of international law.

10 See above note 3 and related text.

11 UNCESCR, *General Comment No. 12 on the Human Right to Food*, E/C.12/1999/5.

problems caused by subsidized agricultural imports for competing local subsistence farmers.¹²

- Are the human rights obligations of WTO Members relevant legal context for the interpretation of the numerous "general exceptions" in WTO agreements, and for their references to "measures necessary to protect human life or health" and "public morals" (Article XX, a, b GATT)?
- Can WTO Members limit their GATT- and GATS-commitments on market access to foreign goods, services and service providers whose production processes comply with ILO labour standards and human rights (e.g. on prohibition of child labour and discrimination of women)?
- Are trade sanctions in response to human rights violations abroad (such as the Burma sanctions adopted by the US Congress in 2003), the "human rights conditionality" of trade preferences (e.g. by the EC and US) for developing countries, or politically motivated private demonstrations blocking freedom of transit (Article V GATT)¹³ compatible with WTO law (e.g. the "necessity" requirement in GATT Article XX), especially if sanctions are applied without a prior "human rights assessment" of their possibly adverse impact on poor people?
- Are the human right to health (e.g. access to essential medicines) and "the right of everyone to enjoy the benefits of scientific progress and its application" (Article 15 ICESCR) relevant legal context for an examination of the need "to prevent the abuse of intellectual property rights by right holders" (Article 8 of the TRIPS Agreement)? Can the requirement of the TRIPS Agreement (Article 2 in connection with Article

12 Cf. WTO document G/AG/NG/W/36/Rev.1 of 9 November 2000. Certain adverse impacts of liberalization of agricultural trade on vulnerable groups in less-developed countries are documented in the FAO study on *Agriculture, Trade and Food Security: Issues and Options in the WTO Negotiations from the Perspective of Developing Countries*, FAO, 2000.

13 Cf. the recent EC Court judgment of 12 June 2003, case C-112/2000 *Schmidberger v. Austria*, in which the EC Court accepted the invocation of freedom of expression (Article 10 ECHR) and freedom of assembly (Article 11 ECHR) as justification for a restriction of free movement of goods inside the EC (Article 28 EC).

10bis of the Paris Convention)—that WTO Members must protect nationals from other WTO Members against false, misleading or discrediting allegations that constitute “unfair competition”—be examined by WTO dispute settlement bodies without regard to freedom of speech and other human rights (like freedom of information)? Why is it that human rights courts tend to interpret freedom of commercial speech in a broader sense than trade courts?¹⁴ Why has the Appellate Body of the WTO construed WTO rules in a more flexible manner in favour of domestic policy autonomy (e.g. to restrict imports of dangerous asbestos products and of hormone-fed beef) than WTO panels?

- Do the WTO prohibitions of “nullification or impairment” of treaty benefits also protect “reasonable expectations” that the competitive benefits of WTO market access commitments for goods and services shall not be impaired by prohibitions of advertising and limitations on freedom of speech? Or that the property rights of holders of “trade quotas” and patents, or of service providers, shall not be nullified by discriminatory “regulatory takings”? Or that GATS commitments for free movement of natural service providers should be construed in conformity with human rights to respect for family life?

The increasing references to such human rights dimensions of trade rules in the jurisprudence of the EC Court of Justice suggest that—also in WTO disputes over free movement of goods, services, persons, capital and related payments—dispute settlement bodies cannot always avoid examining claims that worldwide, regional or national human rights instruments may be “relevant context” for the interpretation and application of WTO rules. The need to respect the “margin of appreciation” of each country regarding the interpretation of its national and international human rights obligations, and the legitimate diversity among national and international human rights rules, will fur-

14 See e.g. the judgment of the European Court of Human Rights of 25 August 1998 in *Hertel v. Switzerland* (published in Reports 1998-VI) which concluded that restrictions on freedom of speech imposed under the Swiss Unfair Competition Law, and upheld by Swiss courts, were in violation of Article 10 of the European Convention on Human Rights.

ther raise procedural questions as to how far WTO bodies should take into account the jurisprudence and "general comments" of specialized human rights bodies, especially if not all the parties to the WTO dispute are parties to the human rights conventions invoked by a WTO Member. Are third WTO Members legally required to accept interpretations of WTO rules referring to international human rights conventions if they have not ratified the conventions concerned? In view of the political delicacy of setting the limit beyond which "human rights interpretations" by WTO dispute settlement bodies risk "adding to or diminishing the rights and obligations provided in the covered agreements" in violation of Article 3:2 of the DSU: Would it not be more appropriate for the "political branch" of the WTO (e.g. its Ministerial Conference) to determine the relevant scope of human rights obligations of WTO Members rather than to leave, once again, the controversial clarification of WTO rules to the judicial branch of the WTO?

B. Utilitarian "output-legitimacy" may no longer be enough for democratic approval of WTO agreements

International trade liberalization under GATT and WTO continues to be justified mainly in terms of utilitarian economics and politics. Welfare-economists explain why liberalization of discriminatory market access barriers (e.g. tariffs) may enable each member country to increase its "total welfare" through trade.¹⁵ Yet, even though maximization of general consumer welfare (rather than of the welfare of rent-seeking producers) would require open markets and non-discriminatory competition rules, trade policies in the WTO remain "producer-driven," subject to numerous discriminatory trade distortions, without adequate disciplines on anti-competitive practices (e.g. cartels), and are often abused for welfare-reducing protectionism. Many GATT / WTO rules serve powerful producer interests (e.g. in the agricultural, textiles, clothing and pharmaceutical sectors in developed countries) and leave the "just distribution" of the gains

¹⁵ E.g. by increasing the quantity, quality and variety of low-priced goods and services, promoting competition and economic efficiency.

from trade, and the social adjustment problems of international competition (e.g. for subsistence farmers, poor and sick people dependent on access to cheap medicines), to the discretion of governments. Apart from GATT / WTO rules on special and differential treatment of less-developed countries, questions of “social justice” are discussed only rarely in WTO bodies and, if so (e.g. in the Doha Ministerial Declaration on Access to Medicines), usually without reference to the “benchmarks” used in modern “theories of justice” (e.g. human rights, democratic procedures, general consumer welfare, satisfaction of basic needs enabling a life in dignity).

In most WTO countries where the more than 25,000 pages of the Uruguay Round Agreements were discussed by national parliaments in 1994, the parliamentary debates were all too often limited to a few hours and did not lead to changes in the internationally agreed treaty rules. Yet, since the US Reciprocal Trade Agreements Act of 1934 and GATT 1947, there is increasing recognition that reciprocal trade liberalization agreements—far from circumventing democracy—can be essential for protecting general citizen interests in limiting “government failures,” as in the case of the infamous Smoot-Hawley-Tariff Act of 1930 when “rent-seeking” protectionist coalitions and log-rolling in the US Congress led to a dramatic increase in import protection triggering a breakdown of the international payments and trading system, ushering in widespread unemployment and World War II. *Constitutional economics* explains why not only mutually agreed trade transactions within given rules, but also agreements on changing the basic “rules of the game” may be mutually welfare-enhancing, for instance if the rules limit “market failures” and contribute to the provision of “public goods” (like open markets). Compared to previous GATT Rounds, WTO negotiations have become more transparent for the general public and are widely reported and discussed in newspapers. Yet, similar to the utilitarian justification of GATT rules by welfare economics, political justifications of GATT / WTO rules by their “domestic policy functions” for limiting “government failures” fail to address important human rights concerns: For instance, is the broad trade policy discretion of governments (e.g. to restrict welfare-increasing trade transactions, to treat citizens as mere

objects of trade policies, to avoid references to human rights in WTO rule-making and trade policies) consistent with their human rights obligations to also respect, protect and fulfil human rights and basic human needs in the trade policy area?

C. Human rights and liberal trade rules serve complementary functions

The UN Development Program¹⁶ and modern economics¹⁷ demonstrate that protection of human rights can make citizens not only "better democrats" but also more effective "economic actors," and that much of the poverty in less-developed countries is due to inadequate protection of legal security, property rights and other human rights as incentives for savings, investments and division of labour. They criticize that, in contrast to the "market freedoms" recognized as "basic individual rights" in European integration law,¹⁸ UN human rights conventions tend to ignore the fact that liberal trade is necessary for creating the economic welfare needed for enjoying human rights.

Consumer-driven competition and trade enable producers, investors, traders and consumers to increase their welfare through division of labour at home and abroad and to force producers to take into account consumer preferences and offer goods and services at the lowest prices. Human rights and liberal trade rules empower individuals by protecting personal autonomy (e.g. freedom of profession), equal basic rights and satisfaction of basic needs necessary for personal self-development in dignity. Without the economic resources created through division of labour and trade, the human rights objectives of protecting personal autonomy and human dignity cannot be achieved. And without legal protection of individual rights, the legal security

16 See: *Human Development Report 2000: Human Rights and Human Development*, UNDP 2000.

17 Cf. e.g. E.-U. Petersmann, "Constitutional Economics, Human Rights and the Future of the WTO," *Aussenwirtschaft* (Swiss Review of International Economic Relations) 58 (2003), 49-91.

18 See section VI below.

needed for investments, division of labour and for exchange in property rights of traded goods, services and related payments cannot be realized. At national and regional levels, the welfare-increasing functions of trade law, and the rights-protecting and distributive functions of human rights, are increasingly integrated in order to enhance the incentives for savings, investments and decentralized division of labour as well as “social justice” in the distribution of the welfare gains and in dealing with the social adjustment problems of international competition (e.g. for poor and vulnerable people). Respect for human rights and for the basic needs of the “losers” in market competition enable a “social market economy” whose social cohesion and solidarity may also enhance economic growth.¹⁹ The more than one hundred less-developed WTO Members, national parliaments and civil society representatives may reject new WTO rules if such rules are not seen to take into account the social dimensions of world-wide competition and the basic needs of the two billion people living on less than 2 dollars per day.

IV. The “Human Rights Approach” Advocated by the UN High Commissioner for Human Rights

Fulfilment of most human rights (e.g. to food, health, education) depends on access to scarce goods and services (e.g. drinking water, cheap medicines, health and educational services). Also enjoyment of civil and political human rights (e.g. personal freedom, rule of law, access to justice, democratic self-government) requires economic resources (e.g. for financing democratic and law-enforcement institutions). The widespread, yet unnecessary poverty, health problems and legal insecurity (e.g. among the 1 billion people living on less than 1 dollar a day) bear witness to the fact that UN law has so far failed to realize, in many of the more than 190 UN member states, the UN objective of “universal respect for, and observance of, human rights and fundamental freedoms for all” and “creation of conditions of stability and well-

19 On this European concept of a “social market economy” see e.g., W. Röpke, *A Humane Economy. The Social Framework of the Free Market*, 1998.

being which are necessary for peaceful and friendly relations among nations" (Article 55 UN Charter). Recent UN resolutions recognize the potential synergies of human rights, consumer-driven competition and citizen-driven democracies for empowering citizens and forcing producers and governments to respect general citizen interests (as defined by human rights) and consumer welfare.²⁰ Yet, even though international trade is essential for increasing the availability and quality of scarce resources, UN human rights bodies, until recently, tended to ignore GATT and the WTO or, as in a report for the UN Commission on Human Rights of 2001, discredited the WTO as "a veritable nightmare" for developing countries and women²¹—without prior consultation of WTO experts and without regard to the WTO's flexible "public interest exceptions" enabling WTO Members to meet their human rights obligations in conformity with WTO law.

In response to the widespread criticism of the anti-market bias of such "nightmare reports," the UN High Commissioner for Human Rights (UNHCHR) has recently published four more differentiated reports analyzing human rights dimensions of the WTO Agreements on Trade-Related Intellectual Property Rights (TRIPS),²² the Agreement on Agriculture (AOA),²³ the General Agreement on Trade in Services (GATS),²⁴ and of international

20 See e.g. above notes 2 and 6.

21 *Globalization and Its Impact on the Full Enjoyment of Human Rights*, ECOSOC document E/CN.4/Sub.2/2000/12 of 15 June 2000, at paragraph 15. Apart from a reference to patents and their possibly adverse effects on pharmaceutical prices (depending on the competition, patent and social laws of the countries concerned), the report nowhere identifies conflicts between WTO rules and human rights.

22 *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, E/CN.4/Sub.2/2001/13 (27 June 2001).

23 *Globalization and Its Impact on the Full Enjoyment of Human Rights*, E/CN.4/2002/54 (15 January 2002).

24 *Liberalization of Trade in Services and Human Rights*, E/CN.4/Sub.2/2002/9 (18 June 2002).

investment agreements.²⁵ The reports call for a “human rights approach to trade” which:

- (i) sets the promotion and protection of human rights as objectives of trade liberalization, not exceptions;
- (ii) examines the effect of trade liberalization on individuals and seeks to devise trade law and policy to take into account the rights of all individuals, in particular vulnerable individuals and groups;
- (iii) emphasizes the role of the State in the process of liberalization—not only as negotiators of trade law and setters of trade policy, but also as the primary duty bearer of human rights;
- (iv) seeks consistency between the progressive liberalization of trade and the progressive realization of human rights;
- (v) requires a constant examination of the impact of trade liberalization on the enjoyment of human rights;
- (vi) promotes international co-operation for the realization of human rights and freedoms in the context of trade liberalization.²⁶

The High Commissioner differentiates between obligations to respect human rights (e.g. by refraining from interfering in the enjoyment of such rights), to protect human rights (e.g. by preventing violations of such rights by third parties), and to fulfil human rights (e.g. by taking appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights). As enjoyment of human rights depends on availability, accessibility, acceptability and quality of traded goods and services, the relevance of WTO rules for the collective supply of “public goods” (like access to low-priced goods and services), for limitations of “market failures” (e.g. in case of essential services), and for protection and fulfilment of human rights is acknowledged and discussed. The reports underline that, what are referred to—in numerous WTO provisions—as *rights* of WTO Members to regulate, may be *duties* to

25 *Human Rights, Trade and Investment*, E/CN.4/Sub.2/2003/4 (draft of May 2003).

26 Document E/CN.4/Sub.2/2002/9, p. 2.

regulate under human rights law (e.g. so as to protect and fulfil human rights of access to water, food, essential medicines, basic health care and education services at affordable prices). The UNHCHR suggests that the promotion of human rights should be recognised as an objective of the WTO; to encourage interpretations of WTO rules that are compatible with international human rights as progressively clarified e.g. in the “General Comments” adopted by UN human rights bodies; to carry out “human rights assessments” of WTO rules and develop intergovernmental protection of human rights so as to ensure that trade rules and policies promote the human rights and basic needs of all.²⁷

The four reports by the UNHCHR identify potential tensions between “existential” human rights and “instrumental” WTO rules (e.g. on protection of intellectual property rights and investor rights). They explain potential advantages of “human rights assessments” by human rights bodies of trade rules and policies, and the need for actively promoting mutually coherent interpretations of WTO rules and human rights. Yet, they do not identify concrete conflicts between human rights and WTO law. In view of the “constitutional function” of WTO rules for limiting welfare-reducing government policies (e.g. discriminatory market restrictions), for enhancing domestic policy autonomy for non-discriminatory policy instruments,²⁸ and for protecting the priority of non-economic values (as reflected in the numerous “public interest clauses” in WTO law), conflicts between the often flexible WTO rules and human rights appear unlikely at the level of international principles. Yet, this general compatibility of WTO

27 The report on TRIPS (above note 22) notes that “the commercial motivation of IPRs means that research is directed, first and foremost, towards ‘profitable’ disease. Diseases that predominantly affect people in poorer countries—in particular tuberculosis and malaria—still remain relatively under-researched [...] questions remain as to whether the patent system will ensure investment for medicines needed by the poor. Of the 1,223 new chemical entities developed between 1975 and 1996, only 11 were for the treatment of tropical disease” (para. 38).

28 National policy autonomy is safeguarded e.g. by GATT Articles III, XVI and XXVIII, GATS Articles VI and XIX, Articles 8, 30, 31, 40 of the TRIPS Agreement and by the numerous WTO “exceptions” and safeguard clauses.

rules and human rights in no way precludes that human rights obligations are not adequately taken into account in the legislative and administrative implementation of WTO rules and in their application (or disregard) by domestic courts.

Also the UN Commission on Human Rights calls increasingly upon all 112 states parties to the ICESCR to “ensure that the Covenant is taken into account in all of their relevant national and international policy-making processes.”²⁹ The UN Development Program³⁰ likewise emphasizes the mutually reinforcing functions of human rights and of market competition which, in a world of scarcity, inevitably emerges in order to meet consumer demand for private and public goods. Economic markets, like political markets (democracy), involve dialogues about values and consumer-driven information mechanisms whose proper functioning requires legal and judicial protection of liberty rights (e.g. freedom of contract, freedom of expression, freedom of information), property rights, liability rules, legal guarantees of non-discriminatory competition, individual access to courts, and protection of other human rights as incentives for welfare-increasing division of labour.³¹ In order to promote general consumer welfare rather than particular producer interests, market competition requires market access rights, legal obligations of market actors, governmental correction of “market failures” and collective supply of “public goods.”

29 This “fundamental principle” of human rights law is emphasized in the recent report for the UN Commission on Human Rights on *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, E/CN.4/2003/58 of 13 February 2003, para. 8.

30 See above note 16.

31 For a detailed explanation of why human rights, non-discriminatory markets and consumer-driven competition serve complementary functions, and on the differences between a “human rights approach” focusing on “basic needs” and a broader “constitutional approach” protecting equal constitutional rights beyond the basic needs of citizens, see Petersmann (above note 17).

V. The 1998 ILO Declaration on Fundamental Principles and Rights at Work: The Expanding Scope of an "Inalienable Core" of Basic Rights

Human rights are increasingly acknowledged today in national constitutions as well as in the law of world-wide organizations (like the UN, the FAO, WHO, UNESCO) and regional economic integration agreements (like the EC Treaty, the 2000 Cotonou Agreement, the 2001 Quebec Ministerial Declaration on a Free Trade Area of the Americas) as international *erga omnes* obligations of states and intergovernmental organizations. The 1996 WTO Declaration on core labour standards helped to reach consensus in the International Labour Organization (ILO) to adopt, on 18 June 1998, the Declaration on Fundamental Principles and Rights at Work which recognizes:

[t]hat all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.³²

The ILO Declaration and other modern human rights instruments³³ illustrate that—in addition to the longstanding prohibitions of e.g. genocide, slavery and apartheid—there is an increasing core of additional human rights which must be respected even “in time of public emergency”³⁴ and, since the end

32 ILO Declaration on *Fundamental Principles and Rights at Work*, ILO 1998, at 7.

33 E.g. the 1989 UN Convention on the Rights of the Child (ratified by more than 190 states) and the 1993 Vienna Declaration which recognizes, in para. 1, that “the universal nature of (human) rights and freedoms is beyond question.”

34 Cf. e.g. Article 4 of the ICCPR, Article 15 of the European Convention on Human Rights.

of the cold war, is evolving into international *ius cogens*.³⁵ The “inalienable core” of human rights (including basic constitutional rights) calls for interpreting national and international law as a functional unity for promoting and protecting human rights.

Human rights instruments recognize that human rights need to be mutually balanced and implemented by democratic legislation, which may legitimately vary from country to country. International courts have elaborated a number of legal “balancing principles” (like non-discrimination, necessity and proportionality of governmental limitations of freedom and other human rights) and emphasize the need to respect the “margin of appreciation” of parliamentary legislation implementing human rights.³⁶ As human rights also protect individual and democratic diversity, views on the interpretation of government obligations to respect, protect and fulfil human rights often differ among countries. In view of the limited mandate of international organizations, there are also very diverging views on whether, and to what extent, international organizations should not only *respect* human rights, but also *protect* and *fulfil* human rights.

VI. The Need for Harnessing the Complementary Functions of Human Rights and Market Competition: Lessons from the EU?

The recent “human rights assessments” of international economic law by the UNHCHR offer a promising start for mutually beneficial co-operation between human rights bodies and specialized economic organizations. The reports by the UNHCHR also reflect, however, “market biases” that call for a more thor-

35 For detailed references to state practice, see I. Seiderman, *Hierarchy in International Law*, 2001.

36 On the “margin of appreciation” doctrine in the case-law of the European Court of Human Rights, see e.g., H. C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 1996. On the similar “balancing principles” developed in WTO jurisprudence relating e.g. to GATT Article XX, see E.-U. Petersmann, “Human Rights and the Law of the WTO,” *Journal of World Trade* 37 (2003), 241-281.

ough examination of the “indivisibility” of civil, political, economic and social human rights and of their constitutive functions for consumer-driven and welfare-maximizing market competition. The High Commissioner seems to be aware of this need for better mutual understanding, as his reports “highlight the need not only to bring a human rights perspective to trade but also a trade perspective to human rights.”³⁷

The explicit recognition and legal protection of “indivisible” civil, political, economic, social and cultural human rights in European integration law—in contrast to their legally and institutionally separate regulation in the UN human rights conventions of 1966—illustrates the potential advantages of an integrated human rights approach to economic integration. The once revolutionary human rights proclamations of the 18th century—e.g. that “the aim of every political association is the preservation of the natural and imprescriptible rights of man” (Article II of the French Declaration of the Rights of Man and of the Citizen, 1789), and that the legitimacy of governments derives from protecting the human rights of their citizens (US Declaration of Independence, 1776)—are reflected in the EU Treaty requirements to respect human rights and democratic governance not only inside the EU (cf. Articles 6,7,49 EU Treaty), but also as objectives of the EU’s common foreign and security policy (Article 11 EU Treaty) and external development policy (Article 177 EC Treaty). The “market freedoms” (for free movements of goods, services, persons, capital and related payments), “fundamental rights” (e.g. to “equal pay for male and female workers for equal work”) and “EU citizen rights” protected by the EC Treaty and by the EC Court of Justice complement the explicit references in the EU Treaty to the European Convention on Human Rights (cf. Article 6). The EU Charter of Fundamental Rights of December 2000³⁸ proceeds from “the indivisible, universal values of human dignity, freedom, equality and solidarity” and protects specific liberty rights, equality rights and solidarity rights in economic

37 E/CN.4/Sub.2/2003/4 (above note 25), at para. 66.

38 The Charter is reproduced in *Official Journal of the EC*, C 364/1 of 18 December 2000.

and social areas no less than in civil and political fields. The market freedoms, fundamental rights, EU citizen rights and other human rights are all protected by the EC Court of Justice as constitutional rights with legal primacy in case of conflict with secondary EC legislation. Yet, even though the EC Court has long since recognized the common human rights guarantees of EC member states as general constitutional principles limiting the regulatory powers also of the EC,³⁹ there appears to be not a single judgement of the EC Court invalidating an EC measure on grounds of violation of human rights.

The regional integration law of the EU—even though it may be no model for world-wide organizations like the WTO—thus confirms the complementary functions of liberal trade law and human rights. The “basic rights approach” to market liberalization in Europe is, however, neither applied in North America (e.g. in the North American Free Trade Agreement) nor in the reports by the UNHCHR which view economic production, trade and economic rights as mere “instruments” for fulfilling non-economic “existential” human rights. This neglect of economic rights can be criticized as being not only inconsistent with the universally agreed “indivisibility” of human rights and with the empirical fact that most people spend most of their time on production and consumption of scarce (“economic”) goods and services, and consider e.g. their right to choose a profession as being of no less “existential importance” for their personal development in dignity than their political human rights. The higher ranking of civil and political over economic and social rights also involves a “double standard” which, if “human dignity” is defined in the Kantian sense of individual autonomy, should be left to each individual rather than be imposed top-down.⁴⁰

39 In *Internationale Handelsgesellschaft* (Case 11/70, ECR 1970, 1125,1134), the ECJ held that respect for human rights forms an integral part of the general principles of Community law: “the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community” (paras. 3-4).

40 Cf. E.-U. Petersmann, “Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously,” *European Journal of International Law*, 2002, 845-851.

Arguably, recognition of "market freedoms" as "fundamental rights" in EC law seems to better reflect the "indivisibility" and interdependence of personal self-development in economic and non-economic areas, without preventing government regulations balancing economic with non-economic rights and public interests. The protection of fundamental rights in EU law, and of economic liberty rights in the national constitutions of many countries (like Germany and Switzerland), further illustrates that human rights are not only a matter of disadvantaged groups and individuals, but serve broader constitutional functions for protecting all individuals from unnecessary governmental limitations of their equal basic rights. Given the economic interrelationships between consumption, production and trade, EC law also rightly protects freedom of production and freedom of trade no less than freedom of consumption and access to essential goods and services necessary for satisfying basic needs.

VII. Human Rights and the WTO: No Conflict in Principle?

The 1994 Agreement establishing the WTO promotes "human rights values" through the legal WTO guarantees of freedom, non-discrimination, rule of law and mutually beneficial division of labour across frontiers. Like the law of other international organizations, WTO law contributes to the progressive "constitutionalization" of modern international law e.g. by conferring a higher legal rank on the WTO Agreement over the multilateral trade agreements listed in its Annexes (cf. Article XVI:3 WTO Agreement); by promoting rule of law and submitting all WTO Members to compulsory international jurisdiction by WTO panels and the WTO Appellate Body, as well as to judicial review by domestic courts; and by reinforcing horizontal and vertical "checks and balances" among rule-making, executive and judicial powers at national and international levels. WTO rules serve "constitutional functions" for protecting freedom, non-discrimination, rule of law and peaceful settlement of disputes not only among states, but also in cosmopolitan trade relations

among citizens across frontiers and inside states.⁴¹ Hence, there are not only legal, but also economic and political reasons for construing WTO rules, human rights and domestic laws of WTO Members in a mutually consistent manner.

In the several hundred dispute settlement proceedings under GATT 1947 and the WTO, no conflict between GATT and WTO rules and human rights has so far been identified.⁴² Although the “primary law” of the WTO does not explicitly refer to human rights, there is so far no convincing evidence for systemic conflicts—at the international level of legal principles—for instance:

- Between the non-discrimination requirements of human rights (which may call for “positive discrimination”) and those of WTO law (which permits e.g. subsidies, tax benefits and other preferential treatment in favour of poor people, vulnerable minorities and suppliers of “essential services”);
- Between the human rights to liberty⁴³ and property⁴⁴ and the WTO guarantees of freedom of trade and protection of property rights (which permit e.g. compulsory licenses and other limitations in order to prevent “abuses” of intellectual property rights); also WTO market access commitments are subject to “general exceptions” (e.g. in GATT Article XX, GATS

41 Cf. e.g. E.-U. Petersmann, “The WTO Constitution and Human Rights,” *Journal of International Economic Law* 3 (2000), 19-25.

42 For a detailed analysis see, in addition to the above-mentioned reports by the UNHCHR, Petersmann (note 36 above) and G. Marceau, “WTO Dispute Settlement and Human Rights,” *European Journal of International Law* 13 (2002), 753-813.

43 Whereas human rights lawyers tend to treat the “right to liberty” (Article 3 UDHR) and “economic freedoms” (Article 6 ICESCR) as separate rights with separate functions, European constitutional law (e.g. in Germany, Switzerland, EC law) recognises economic liberties as possibly no less fundamental for individuals than other personal liberties.

44 The “right to own property” is protected in Article 17 of the UDHR and in regional human rights conventions (e.g. Protocol I to the ECHR), but omitted from UN human rights covenants except for the “author rights” mentioned in Article 15 ICESCR. Intellectual property rights are based on legislation and limited in time (cf. e.g. Article 33 of the TRIPS Agreement relating to 20 years of patent protection).

Article XIV) which appear flexible enough to do whatever is necessary for protecting and promoting human rights;⁴⁵

- Among the human rights guarantees of due process of law and access to justice and the corresponding procedural guarantees in WTO law; or
- Between the numerous “general exceptions” in WTO law and the human rights obligations of WTO Members.

Yet, this mutual consistency of WTO rules and universal human rights at the level of international law in no way precludes that—in domestic trade laws and trade policies—the human rights obligations of WTO member countries may not be adequately taken into account. Explicit recognition (e.g. in a WTO Ministerial Declaration) of the need to respect universally recognized human rights in the trade policy area could make it easier for WTO dispute settlement bodies to interpret WTO rules in conformity with universally recognized human rights. Whether universal human rights—such as the “right to development” which has been interpreted in many UN resolutions as requiring respect for universal human rights⁴⁶—may be relevant for the interpretation of WTO rules (such as the WTO objective of promoting “sustainable development”), may be settled more appropriately by the political WTO bodies than by WTO dispute settlement bodies which are likely to exercise judicial self-restraint by deciding only those legal issues that are indispensable for settling a trade dispute.

45 The UNHCHR report on the GATS (above note 24) refers to the “Cochabamba case” in Bolivia where:

[t]he city’s water system was liberalized to the subsidiary of a foreign service provider, leading to price increases of more than 35 per cent. This resulted in mass demonstrations and strike action that led the Government to reverse the decision to liberalize the sector and restore public ownership.

The report does not claim that the privatization was part of a WTO commitment (GATS does not mandate privatization of essential services), or that WTO law may not be flexible enough to protect essential services (cf. e.g. Articles X, XIV and XXI of GATS).

46 In UN practice, the “right to development” and the corresponding government obligations have been defined in terms of realization of all human rights (cf. UN General Assembly Declaration 41/128 of 4 December 1986 on the “Right to Development”).

VIII. The “Right to Democratic Governance” and the WTO

Human rights instruments have for a long time recognized that human rights need to be protected and mutually balanced through democratic legislation, and that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”

The will of the people shall be the basis of the authority of governments; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures” (Article 21 UDHR).

Most states claim today to respect this “human right to democratic governance.”⁴⁷ Yet, national parliaments and civil society groups often complain of the “democratic deficits” resulting from intergovernmental rule-making in distant international organizations, often without effective parliamentary participation and effective democratic control by public opinion and civil society (e.g. “inclusive” decision-making with participatory and / or consultative rights of non-governmental groups that may be affected by the decisions concerned). Such democratic concerns increase if intergovernmental negotiations (e.g. in the WTO) are strongly influenced by powerful interest groups (e.g. agricultural, textiles and steel lobbies), take place behind closed doors without adequate “deliberative democracy”, do not refer to human rights and general consumer welfare in the international negotiations and balancing processes, and this may lead to comprehensive “package deals” (like the 1994 WTO Agreement) that can hardly be reopened once the international negotiations have been closed.

Yet, the political distance between individual citizens, national parliamentarians and the WTO is not inevitable. The effective parliamentary oversight and control of US trade policies by the US Congress suggests that much of the alleged “democratic defi-

47 On the emerging “human right to democratic governance”, see e.g., T. M. Franck, “The Emerging Right to Democratic Governance,” 86 *American Journal of International Law (AJIL)*, 46-91 (1992); E. Stein, “International Integration and Democracy: No Love at First Sight,” 95 *AJIL*, 489-532 (2001).

cit" is due to inadequate parliamentary involvement in trade policy-making (notably in the EU). European integration illustrates that international law and international organizations can also enlarge citizen rights, limit abuses of trade policy powers, and facilitate parliamentary accountability of foreign policies beyond what is possible through merely national rules and institutions. In an increasing number of world-wide treaties (e.g. on prohibition of land mines, establishment of an International Criminal Court), non-governmental organizations and more democratic forms of consensus-building (e.g. on a new European Treaty constitution) have usefully complemented intergovernmental treaty-negotiations and parliamentary ratification.

If democracy is defined as self-government of the people, by the people and for the people, then the diverse forms of local democracy (e.g. in the Greek city republics in the 5th century BC), national democracy (e.g. in the US) and international democracy (e.g. in the EU) have at least three complementary elements in common:

A liberal element based on the instrumental function of democracy to promote the freedom, equal rights and basic needs of citizens.⁴⁸ This democratic function tends to be enlarged by WTO guarantees of freedom across frontiers and by non-discriminatory access to foreign markets enabling mutually beneficial trade exchanges, especially if international trade liberalization takes place in the context of "embedded liberalism" (J. Ruggie) promoting "social justice" through national institutions.

A majoritarian, representative element based on the need for majority decisions by local, national or transnational communities and their representative institutions for the collective supply of public goods that cannot be supplied through private markets (e.g. democratic legislation, accountability of the rulers). In contrast to the effective parliamentary control by the

48 On the important distinction between liberal and "illiberal" democracy, and on the need for restraining popular majority politics by equal basic rights and by other general constitutional constraints, see F. Zakaria, *The Future of Freedom. Illiberal Democracy at Home and Abroad*, 2003.

US Congress of trade policy-making, parliaments in most WTO Members (including the European Parliament) do not appear to effectively supervise and influence the trade policies of their governments. This “parliamentary deficit” in intergovernmental negotiations and rule-making needs to be reduced by more precise parliamentary negotiation mandates, parliamentary involvement in and surveillance of intergovernmental negotiations, and parliamentary scrutiny of international rules prior to the ratification of international agreements. There are also various means of promoting transnational democracy inside intergovernmental organizations, for example through consultative parliamentary bodies and participation or consultation of representative non-governmental organizations (as in the ILO and in the International Federation of Red Cross Societies).

The horizontal and vertical constitutional constraints on abuses of public and private power constitute a third *constitutional element* of the diverse forms of local, national and international democratic governance in order to hold the rulers accountable to citizens, parliaments and courts. WTO rules reinforce such constitutional restraints on discretionary trade policy powers and strengthen rule-oriented (rather than “power-oriented”) policies at home and abroad based on liberal democratic values. Empowering citizens to directly invoke and enforce (e.g. through domestic courts) precise international guarantees of freedom and non-discrimination offers a decentralized, democratic method of enlisting self-interested citizens as guardians of the rule of law.

IX. Policy Conclusions

The more than one hundred international treaties and universal UN resolutions on protection of human rights reflect the today universal recognition of an “inalienable core” of human rights as part of general international law and international treaty law. Even though the “primary” WTO law does not explicitly refer to human rights, and references to human rights in WTO decisions

and WTO reports remain very rare,⁴⁹ it follows from general international law and from Article 3 of the DSU that universally recognized human rights may be "relevant context" for legal and judicial interpretations of WTO rules.

Trade regulation (e.g. of agricultural subsidies, limitations on advertising and "freedom of commercial speech"), trade liberalization (e.g. of essential services, international movements of service providers) and domestic implementation of WTO rules can create competitive pressures and social adjustment problems which, without government protection of human rights and of basic human needs, may have adverse human rights implications (e.g. for small subsistence farmers, separation of foreign service providers from their family, access of poor or vulnerable people to food, medicines and essential services at affordable prices). The "input-legitimacy" of rule-making and adjudication in the WTO could be enhanced by an explicit recognition in a WTO Ministerial Declaration that all WTO Members are committed to respect for universal human rights within the limited confines of WTO law and policy. In view of the diversity of views on the interpretation and balancing of human rights, the WTO should remain an economic organization promoting a mutually welfare-increasing division of labour. Yet, the WTO should welcome the initiatives by UN human rights bodies to clarify the interrelationships between human rights and WTO law as well as the contribution of trade policy to fulfilment of human rights. International "human rights assessments" and the interpretation, progressive development and monitoring of human rights should not become the task of WTO bodies, but should be left to specialized human rights bodies and to national governments.

The WTO objectives of protecting freedom, non-discrimination and the rule of law in the world-wide division of labour, and to thereby increase economic welfare and mutually beneficial cooperation among citizens across frontiers, complement the hu-

⁴⁹ See e.g. the recent *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds* (WT/L/518) of 15 May 2003 which refers, in its Preamble, to "gross human rights violations" in "conflicts fuelled by the trade in conflict diamonds."

man rights objectives of promoting personal and democratic self-development through legal protection of equal basic rights and fulfilment of basic needs necessary for a life in dignity. There is so far no evidence of conflicts between WTO rules and universal human rights at the level of international principles. Initiatives by UN bodies to promote respect for human rights and labour standards in the domestic implementation of WTO rules and trade policies are likely to promote also the WTO objectives of e.g. “sustainable development,” “raising standards of living” and peaceful settlement of disputes.

Human rights protect individual and democratic diversity and require democratic implementing legislation, which may legitimately vary from country to country and change over time, as reflected in the Charter of Fundamental Rights of the EU of December 2000. In spite of the “General Comments” elaborated by UN human rights bodies, views on the interpretation of human rights, on their “indivisibility,” on their legal relevance for international organizations and on their judicial protection continue to differ widely among countries. The clarification of the legal relevance of human rights for international and national trade law and policy should therefore, primarily, be left to specialized human rights bodies and to democratic legislatures and domestic courts. WTO bodies should acknowledge and support the potential contribution of universal human rights to a mutually beneficial international trading system promoting not only economic welfare but also respect for human rights and “social justice.” Such a positive response to the human rights approach advocated by the UN could facilitate consensus on new WTO rules if they are seen to take into account also the social dimensions and adjustment problems of the world trading system and the need for respecting human rights in the Doha Development Round negotiations as well as in domestic implementation of WTO rules and trade policies.

How Can Parliamentary Participation in WTO Rule-Making Be Made more Effective?

The US Context

by

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I. Introduction

Demands for greater WTO accountability intensify as WTO rules broaden in scope and become more binding in effect. This essay addresses the issue of parliamentary oversight of WTO rule-making. The essay does not assess the role of organized “civil society” at the international level, which is addressed in papers following this one. Nonetheless, expanding the role of civil society oversight and parliamentary control of WTO rule-making at the international level can operate as institutional alternatives or complements, depending on one’s normative perspective.

This essay makes four primary points regarding the issue of parliamentary oversight of WTO rule-making. First, we need a conceptual framework to assess the tradeoffs between different mechanisms for ensuring oversight, including parliamentary oversight, of the WTO. No institutional mechanism is perfect. All proposed mechanisms should be assessed in terms of how well they permit parties to participate in decision-making that affects them in a relatively unbiased manner compared to other

realistic, non-idealized institutional alternatives. This analytical framework can be termed “comparative institutional analysis.”

Second, ensuring parliamentary oversight of WTO rule-making can be conceptualized at two-levels: the international level (at the WTO itself) and the national / WTO member level (or in the case of the EU, regional level). The approach of almost all US congressional representatives is to focus only on the national level. The European Commission’s trade commissioner, Pascal Lamy, in contrast, together with European parliamentarians, have called for inter-parliamentary meetings at the WTO / supra-national level. These two mechanisms—domestic and supranational—can complement each other, which is Mr Lamy’s view.

Third, parliamentarians’ views of alternative mechanisms for ensuring parliamentary control of the WTO tend to vary by jurisdiction. These views reflect power structures at the national, regional and international levels, as well as parliamentarians’ experiences with supranational governance institutions. The US Congress plays a relatively powerful role in US trade policy, and the United States plays a relatively powerful role in the WTO. Members of the US Congress are much less likely to consider inter-parliamentary meetings because such meetings could diminish their power, not enhance it. They prefer to harness the clout of the US government, over whose policies they have a significant say, to advance their constituents’ interests. In contrast, the European Commission needs only consult with the European Parliament concerning EU trade policy pursuant to an informal procedure. Although the European Parliament’s informal consultative role has increased over time, the EU treaties grant the Parliament no formal powers.¹ European parliamentarians thus could increase their relative prominence over trade policy through inter-parliamentary WTO meetings. In addition, European political representatives are more experienced with shared supranational governance institutions in light of the European Union’s own development. European political figures

1 See Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation*, Brookings Institution Press, 2003.

tend to propose expansion and adaptation of the EU model to address global governance challenges. US congressional representatives, in contrast, tend to be wary of having US “sovereignty” and US power constrained by the WTO or any other global governance regime.

Fourth, these proposals should be assessed in terms of how they address a central challenge facing current WTO decision-making—that of the difficulty of most developing countries to participate effectively in the WTO, whether in its political or judicial processes. Most developing countries are at a severe disadvantage on account of their relative lack of resources (both financial and human capital), their lower aggregate stakes in the trading system (even though they may have high relative stakes), and the increasingly complex and resource-demanding nature of the WTO system.² The creation of a WTO parliamentary body should be judged in terms of its impact on the participation of developing countries and their constituents relative to the institutional alternatives. That is: would a WTO parliamentary body further increase the costs of participation in WTO rule-making, favouring wealthy, well-organized and well-connected parties with higher absolute stakes (i.e. US and European multinational enterprises and issue-specific non-governmental organizations) over parties with lower absolute stakes (i.e. developing country constituents)? Or, would a WTO parliamentary body increase the relative understanding of the perspectives of developing countries and increase their impact in the shaping of WTO debates? These questions should be answered from a comparative institutional perspective. The impact of a WTO parliamentary body needs to be compared with the current alternative of only organized global “civil society” non-governmental representatives advocating on the international stage.³

2 See Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, ICTSD 2003.

3 See Gregory Shaffer, “The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters,” 25 *Harvard Environmental Law Review* 1 (2001).

II. Parliamentary Oversight of the WTO at the National / WTO Member Level: Overview of the US System

Traditionally, parliamentary oversight of the WTO lies at the national level. Under this approach, each WTO member arranges for parliamentary oversight in conformity with its own constitutional requirements. Almost all members of the US Congress and their staffs specialized on trade matters espouse this traditional view. This section provides an overview of how Congress exercises oversight of the WTO at the US domestic level.

Under the US constitution, Congress maintains authority over US trade policy.⁴ Congress delegates authority to the executive through Congressional legislation. Starting with the 1974 trade act, US administrations periodically have sought and obtained what is referred to as “fast-track,” and more recently “trade promotion,” power to engage in GATT, WTO and bilateral and regional trade negotiations. Congress sets the mandates. Sometimes the mandate permits the executive to sign binding agreements for tariff reductions without further congressional ratification, as occurred at the time of the first GATT tariff bindings. The Agreement Establishing the WTO, in contrast, as well as NAFTA and recent bilateral trade agreements, were subject to ratification by a majority vote of both houses of Congress under a special procedure. In August 2002, Congress granted the Bush administration trade promotion authority, subject to numerous conditions, including an expiration date of June 1, 2005, to be extended automatically until June 1, 2007 if neither congressional chamber adopts a resolution opposing extension.⁵

Each body of Congress, the Senate and House of Representatives, have special committees on trade, known as “watchdog committees.” They are the trade sub-committees of the Senate Finance Committee and of the House Ways and Means Com-

4 US Constitution, Art. I, sec 8.

5 See *Trade Act of 2002*, Public Law Number 107-210, par. 2103, 116 Statute 933 (August 6, 2002).

mittee. Members of each party are designated to these committees in proportion to the parties' representation in the House and the Senate. Since members of the Republican party currently hold a majority of the seats in the House and the Senate, a Republican currently chairs each of these committees. The Trade Act of 1974 provides that five members of the Senate Finance Committee and five members of the House Ways and Means Committee will be official "congressional advisers on trade policy and negotiations."⁶ In each case, "not more than three of [them can be] members of the same political party."

The Office of the United States Trade Representative (USTR), the administrative body responsible for representing the United States on WTO matters, is a creature of Congress. Congress created the Office of the USTR in 1962 (originally named the Office of the Special Representative for Trade Negotiations). Congress did so in order to shift power in executive branch deliberations from those agencies that focus on non-export goals (such as the Departments of State, Treasury and Defence) to those more likely to defend private commercial interests. The transfer of authority to the USTR permitted congressional committees to call USTR representatives before them and press them to take action on commercial matters or explain the reason for failing to do so. If unsatisfied with USTR policy, Congress retains the power to pass legislation forcing the USTR to act, to withhold or withdraw trade negotiating authority, to block ratification of signed agreements, to limit budgetary allocations, or to hold other legislation hostage.

Each of the congressional trade sub-committees are served by Republican and Democratic staffers. Many of these staffers formerly worked at the USTR or at other US trade agencies, such as the International Trade Commission. They specialize on trade matters and work closely with the senior Republican and Democratic committee members. They informally meet with USTR negotiators a couple of times each week on trade matters. When a negotiation reaches a crucial stage, they may meet daily

6 See *Trade Act of 1974*, Public Law 93-618, par. 161 (January 3, 1975).

or multiple times per day, including by teleconference call. In this way, staffers learn about textual developments in WTO negotiations. If anything controversial arises, they can immediately call the respective congressional representatives who, in turn, can contact USTR, hold a press conference, or otherwise attempt to exercise pressure. In addition, members of Congress can request research on trade matters from the bipartisan Congressional Research Service and the International Trade Commission, as well as Congress's General Accounting Office and the Congressional Budget Office. Through these reports, they can spotlight issues that are of particular concern to them and their constituents.

When Congress granted the Bush administration "trade promotion authority," it added a new institutional mechanism for overseeing trade policy—the Congressional Oversight Group (or COG).⁷ The COG consists of members of the Senate Finance Committee, the House Ways and Means Committee and the chairs and ranking members of other congressional committees of jurisdiction (those committees having jurisdiction over matters implicated by trade agreement negotiations). The COG is to receive "detailed briefings," access to negotiating documents, "the closest practicable co-ordination" with the USTR "at negotiating sites," and "consultation regarding ongoing compliance and enforcement of negotiated commitments."

Under guidelines drawn up with USTR, the designated congressional representatives are to receive a copy of any trade proposal before USTR tables it. Congress would like to receive these proposals at least two weeks in advance, although, at times, they receive the proposals only the night before the proposals are tabled. In the words of one Congressional staffer, this latter practice, although sometimes unavoidable in the heat of negotiations, can make "a joke" of the process, since Congressional representatives cannot provide meaningful input.⁸

7 See *Trade Act of 2002*, Public Law Number 107-210, par. 2107, 116 Statute 933 (August 6, 2002).

8 Interview with staffer on House Ways and Means Committee, May 28, 2003.

Members of Congress may attend WTO ministerial meetings as members of the US delegation. They largely self-appoint themselves in practice. Congressional representatives receive “detailed briefings” and copies of negotiating texts. The Democrat’s ranking member on the Senate trade sub-committee, Senator Max Baucus, has demanded that representatives of both parties of Congress be in the negotiating room at WTO negotiations as “observers.”⁹ He so far has lost that battle.

Members of Congress also have demanded more oversight of WTO dispute settlement panels. These demands increased following a series of US losses in challenges to US trade remedy laws. A growing number of Congressional representatives accuse WTO dispute settlement panels of “legislating.” Senator Baucus, formerly chair of the Senate Finance Committee, has labelled WTO tribunals “kangaroo courts,” lambasting them for having “attacked and weakened [...] our laws” by “exceeding their authority.”¹⁰ When Congress ratified the Agreement Establishing the WTO in 1994, the Senate Majority leader, Robert Dole, proposed the formation of a commission of US judges to assess whether WTO judicial decisions conform with WTO treaty obligations. Congress is considering new legislation to adopt a version of a “WTO Dispute Settlement Review Commission.”¹¹ The Commission would review, in particular, WTO panels’ adherence to prescribed standards of review.

USTR and congressional representatives jockey over the substance and timing of what USTR provides. Although Congressional representatives, especially when they are from the opposing party, maintain that they do not receive enough information from USTR, they nonetheless consistently retain pressure

9 See Statement of Senator Baucus to Congressional Oversight Group meeting, Sept. 19, 2002.

10 *Congressional Record*, S4308-26 (online ed., May 14, 2002). Senator Baucus also maintains that “WTO dispute settlement panels are legislating... They are making up rules that the United States never negotiated.” Speech on Senate floor, Sept. 26, 2002.

11 See *World Trade Organization Dispute Settlement Review Commission Act*, S. 676, 108th Cong., 1st Session (2003).

on the trade agency. With the assistance of its professional staff, the US Congress is able to oversee WTO developments to a much greater extent than the legislative bodies of probably all other WTO members.

III. Practice of Inter-Parliamentarian Meetings: Conflicting European Parliament and US Congressional Perspectives

Prior to the turmoil at the 1999 WTO ministerial meeting in Seattle, the WTO and GATT paid little attention to parliamentarians generally. Starting with the Seattle ministerial meeting, parliamentarians began to meet on WTO matters in inter-parliamentarian sessions, and the WTO Secretary General's office began to pay more attention to them. Members of the European Parliament presented a proposal at the Seattle ministerial meeting for "the establishment of a Parliamentary Assembly attached to WTO," which was unanimously adopted by those parliamentarians present.¹² However, most WTO member governments, as well as many parliamentarians, rejected the notion of a standing WTO Parliamentary Assembly. The focus then switched to the addition of an informal "interparliamentary dimension" to the WTO that potentially could evolve over time. An inter-parliamentarian meeting was held at the Doha ministerial meeting, and another will be held at the ministerial meeting in Cancun.

European parliamentarians were entrepreneurs in co-ordinating these inter-parliamentarian meetings. A number of the meetings were funded, in part, from the EU's budget, including to help cover the expenses of delegates from least developed countries. The European Parliament adopted resolutions in conjunction with the WTO ministerial meetings in Seattle, Doha and Cancun. Although its resolutions initially called for the establishment "of

¹² Erika Mann, *The Initiative for a Parliamentary Assembly within the WTO – Background and State of Play*, April 6, 2003.

a Standing Parliamentary Body of the WTO,”¹³ the European Parliament has become more flexible in its demands. A member of the European Parliament, Mr Carlos Westendorp y Cabeza, chairs the inter-parliamentarian post-Doha Steering Committee, which has been delegated the task of studying and co-ordinating the addition of a parliamentary dimension to the WTO.¹⁴ The European Parliament has institutionalized the selection of European parliamentarians to attend WTO ministerial meetings, determined in proportion to political representation within the European Parliament. Twenty members of the European Parliament attended the Doha ministerial meeting and twenty will attend the Cancun meeting. The EU’s trade commissioner, Pascal Lamy, has supported the European Parliament’s initiatives to add a parliamentary dimension.¹⁵ The European Commission has proposed to “hold, on a yearly basis and back to back with the annual open WTO meeting, a meeting of parliamentarians of WTO members.”¹⁶

The Inter-Parliamentary Union (IPU), the Geneva-based international organization founded in 1889 which traditionally has coordinated meetings of national parliamentarians, also has helped to promote the addition of a parliamentary dimension to the WTO.¹⁷ In June 2001, the IPU organized an inter-parliamentarian meeting in Geneva, with which the European Parliament was not formally associated. Then WTO Director-General Mike Moore spoke at the meeting, supporting the concept of inter-parliamentary meetings on international trade

13 See *European Parliament resolution on the communication from the Commission to the Council and the European Parliament on the EU approach to the WTO Millennium Round*, COM (1999) 331, Nov. 18, 1999, par. 74; and *European Parliament resolution on the Third Ministerial Conference of the World Trade Organization*, par. 4.

14 Steering Group, *Parliamentary Conference WTO*, July 3, 2002.

15 See Steve Charnovitz, “Trans-Parliamentary Associations in Global Functional Agencies,” *Transnational Associations 2/2002*, at 88-91.

16 Commission document cited in Erika Mann, *The Initiative for a Parliamentary Assembly within the WTO – Background and State of Play*, April 6, 2003.

17 See IPU web site, at <http://www.ipu.org/english/home.htm>.

matters. There initially was some rivalry between the IPU and the European Parliament, with the IPU calling for a less formalized parliamentary role. The European Parliament and IPU subsequently began to work together, co-organizing an inter-parliamentarian meeting at the WTO's fourth ministerial meeting at Doha in November 2001. There, participating parliamentarians again adopted a declaration calling for a closer association of parliaments with the WTO. They agreed to establish the Post-Doha Steering Committee to prepare future inter-parliamentary conferences on trade policy.

The European Parliament and IPU next organized a Parliamentary Conference on the WTO in February 2003 in Geneva, which over 500 parliamentarians from around seventy-five national parliaments attended. The participating parliamentarians issued another declaration, proclaiming that "the days when foreign policy, and more specifically trade policy were the exclusive domain of the executive are over."¹⁸ However, the declaration called for adding a "parliamentary dimension" to the WTO that will "evolve around regular parliamentary meetings held initially once a year and on the occasion of WTO Ministerial Meetings." The European Parliament and IPU have co-organized the holding of two inter-parliamentarian meetings scheduled for September 9 and 12, 2003 at the WTO ministerial meeting in Cancun. The first meeting will focus on the substance of the negotiations, and the second will focus on a parliamentary declaration and an assessment of the Cancun meeting.

The USTR and US Congress have been much less enthusiastic about adding a parliamentary dimension to the WTO than the European Parliament. Although the former Republican chair of the Senate Finance Committee, William Roth, was more active in inter-parliamentary affairs, helping to co-ordinate the inter-parliamentarian meeting at Seattle in November 1999,¹⁹ current

18 See Final Declaration, Parliamentary Conference on the WTO, Feb. 17-18, 2003.

19 See Steering Group, Parliamentary Conference WTO, Strasbourg, July 3, 2002.

congressional leadership appears disinterested. At Doha, only one Congressman and one Congressional staffer attended the ministerial meeting. No US congressional representative or staffer attended the steering meetings in Brussels in May 2002 or in Geneva in June 2003, even though a place on the Steering Committee is reserved for the United States.²⁰ Similarly, no US representative attended the inter-parliamentarian meeting in Geneva in February 2003, even though over 500 parliamentarians were present. Although around 40-50 US congressional representatives attended the WTO ministerial in Seattle, largely on account of its proximity, House members generally did not attend the inter-parliamentarian meeting.²¹ Similarly, although a number of Congressional representatives could attend part of the Cancun ministerial, they will not be thinking in terms of inter-parliamentary exchanges over the WTO. A Congressional staffer notes that the House is in session on September 9, 2003, the date of the first Cancun inter-parliamentarian meeting, so that possibly none from the House will attend it. Rather, US congressional representatives largely oversee and co-ordinate with USTR and meet with negotiators from other WTO members.²²

The US government and US Congress generally are not supportive of global inter-parliamentarian meetings. In particular, the US Congress looks adversely upon the Inter-Parliamentary Union. Although the United States was a founding member of the IPU, Senator Jessie Helms led the passage of legislation in October 1998 requiring the United States to withdraw from the IPU if the IPU did not accept certain US congressional demands.²³ Then Secretary of State Madeleine Albright notified the IPU of the United States' withdrawal from the IPU in September 2000,

20 Interview with member of the Steering Group, June 23, 2003.

21 Telephone interview with Congressional staffer, June 4, 2003.

22 Telephone interview with Congressional staffer, June 4, 2003.

23 See Pub. L. 105-277, Div. G, Title XXV, par. 2503(a), Oct. 21, 1998, 112 Stat. 2681-836.

although there is some question as to whether the United States has taken the proper steps procedurally.²⁴

Many congressional members feel antagonistic toward the IPU, in part, because many of the IPU's members are not democracies. A Libyan representative sits on the IPU Executive Committee, which, from a US perspective, undermines the IPU's inter-parliamentary claims. Similarly, the IPU meeting immediately preceding the one at Cancun will be held in Havana, Cuba on September 3, 2003. The mere idea that an inter-parliamentarian meeting could be held in Cuba deligitimizes the body in the eyes of the majority of the US Congress. As one Congressional staffer remarked in reference to the Havana meeting, "need one say more."²⁵ The staffer pointed out that "the IPU was not involved" when former Senator Roth played a supportive role at the inter-parliamentarian meeting at the WTO ministerial in Seattle. In contrast, the IPU maintains that its goal is to spur parliamentary involvement in international and domestic governance. For example, the only reason that the IPU meeting is being held in Havana is because a UN meeting on desertification and climate change is scheduled there.²⁶ However, many US congressional representatives also may associate the IPU with the United Nations (UN) and global governance endeavours generally, upon which they also look unfavourably, although the IPU is not a UN subsidiary.

Congress feels antagonism or disinterest not just to inter-parliamentarian meetings under the IPU. In 1995, the United States and EU created an inter-parliamentarian forum to address transatlantic issues, named the Transatlantic Legislators Dialogue. This legislators dialogue, however, has been unsuccessful, largely because of lack of US congressional interest.

24 Letter on file with author. According to the IPU, the letter needed to be addressed to it from the US Congress itself, since only parliaments are members of the IPU. Interview with IPU representative, Geneva, June 23, 2003.

25 Telephone interview with Congressional staffer, June 4, 2003.

26 The meeting is organized by the Secretariat of the Convention to Combat Desertification. See IPU website, *supra*.

When meetings are held in Brussels, allegedly no one from Congress attends. When meetings are held in Washington, representatives from the European Parliament are ignored and generally feel mistreated.²⁷ A trade specialist within the US government recalls “no serious [congressional] attempt to work with other parliamentarians” in “over twenty-five years of work.”²⁸

There remains one inter-parliamentarian grouping with which members of the US Congress have participated with somewhat greater enthusiasm—the NATO Parliamentary Assembly. This assembly meets about twice per year, in addition to staff level meetings.²⁹ Participating congressional representatives may have shown greater interest because the assembly’s representatives are limited to western democracies (i.e. NATO members) and the assembly played an important expressive role during the Cold War by incarnating the concept of a democratic west. In addition, the assembly has addressed security policy, and, since the fall of the Berlin Wall, the incorporation of Eastern Europe into the alliance, areas having relatively greater political prominence. Yet, US congressional representatives similarly showed greater support for the IPU during the Cold War years, when the US Congress typically sent the largest delegation to IPU meetings.³⁰ If NATO does not define a new role for itself in the post-Cold War world, congressional involvement in the NATO Parliamentary Assembly also could wane.

When I raised the issue of congressional oversight and democratic control of the WTO with the staff of Congress’s trade and foreign relations committees, as well as with the heads of staff of some congressional representatives, *no one expressed much interest in inter-parliamentarian meetings*. Such meetings were viewed as either purely symbolic or, even worse, legitimizing an

27 Telephone interview with EU Commission representative, May 28, 2003.

28 Telephone interview with US civil servant on trade matters, May 28, 2003.

29 Telephone interview, staffer for Senate Foreign Relations Committee, May 28, 2003.

30 Interview with IPU representative, Geneva, June 23, 2003.

illegitimate process. As one congressional staffer remarked, “if you try to systematize inter-parliamentary meetings, the danger is creating something that itself bears no legitimacy.”³¹ Under this view, legitimacy should take place “through national oversight,” whereas the establishment of an inter-parliamentary body actually would be “hurting legitimacy.”³² From this US perspective, the international level simply is “not ready” for this sort of development.

IV. Explaining Divergent US and EU Parliamentarian Views

The two primary explanations for the divergent approaches of US congressional representatives and European parliamentarians are their relative power over trade policy, on the one hand, and their experience with supranational governance mechanisms, on the other. US congressional representatives wield significant authority over trade policy and can advance their constituents’ interests best through working with the USTR in inter-governmental WTO negotiations. Congressional representatives generally see “nothing to be gained from participation” in inter-parliamentary meetings.³³ They are concerned that establishing such a forum could reduce US leverage in negotiations, providing an “opportunity for people who are losing in the big negotiation.”³⁴ They do not wish to create an opportunity for WTO members without power to have a new forum to advance their positions. If congressional representatives wish to obtain WTO rule changes, they work with the USTR, sometimes playing good cop-bad cop roles. Congressional representatives hold press conferences and attempt to exercise pressure on trade negotiators from other members about US demands and constraints. They see little to be gained by talking with other parliamentarians who have little to no power in determining the final negoti-

31 Telephone interview with US congressional staffer, May 27, 2003.

32 ID.

33 Telephone interview with US civil servant, May 28, 2003.

34 Telephone interview with Congressional staffer, June 4, 2003.

ated WTO texts. Rather, many US congressional representatives believe that their constituents' interests are best advanced when the USTR negotiates in a closed intergovernmental context.

The US Congress's position also is explained by the relative uniqueness of Congress's institutional position compared to that of other parliamentary bodies. When congressional representatives vote against the executive's proposed policy, even though the executive is from the same political party, they do not threaten to bring down the government on a "vote of confidence." Since the US executive and legislative branches are more likely to disagree on trade policy in the US political context, Congress's chief focus lies in overseeing and controlling the US executive branch, not in interacting with parliamentarians from other countries.

In contrast, European parliamentarians currently hold no formal power over EU trade policy. As European parliamentarian Erika Mann writes, "the European Parliament's participation in the area of commercial policy is essentially limited, while national legislatures' competencies have even been reduced in the course of the European integration."³⁵ European parliamentarians thus could increase their authority through participation in WTO inter-parliamentarian meetings. By adding a parliamentary dimension to the WTO, the European Parliament also could strengthen its bargaining position against EU member states over the need to enhance Parliament's role in the formation and ratification of EU trade policy.

Furthermore, European parliamentarians have experienced the meshing of national constitutional orders through the creation of supranational institutions. Their experience informs their views concerning the legitimacy of supranational institutions. As a member of the European Commission states, "because of the EU experience," European parliamentarians do not hold the "traditional view" that "legitimacy lies only at the national level." Rather, they hold a "dual view" that supranational

³⁵ Erika Mann, *The Initiative for a Parliamentary Assembly within the WTO – Background and State of Play*, April 6, 2003.

governance mechanisms also need to be developed that are not “state-based.”³⁶

Proponents of a WTO parliament or a Global Parliamentary Assembly often cite “the European Parliament [as] the laboratory of international democracy.”³⁷ EU officials often advance this EU model. As European Commission President Romano Prodi states, “Europe has a role to play in world ‘governance,’ a role based on replicating the European experience on a global scale.”³⁸ There remain obvious problems with applying the EU model to the WTO context. To mention one, the relevant analogue to WTO ministerial meetings in the EU context are EU intergovernmental conferences that negotiate changes to the underlying EU treaties. Yet, EU intergovernmental conferences, as reflected in their name, remain dominated by inter-state bargaining among European national governments. Nonetheless, the future prospects of a WTO inter-parliamentary body may result from the outcome of US-EU contention over their respective models for parliamentary oversight of the WTO and other international institutions.³⁹

V. Parliamentary Oversight and Developing Countries

Most developing countries initially resisted stronger involvement of parliaments in the WTO. A 2002 inter-parliamentarian Steering Committee, for example, acknowledged “massive resistance of developing countries” to the option of creating “a parliamen-

36 Telephone interview with member of the European Commission handling trade matters, May 28, 2003.

37 Quote from Lucio Levi, *World Federalist Movement, International Democracy, United Nations Reforms and the Role of Global Civil Society*, Port Alegre, World Social Forum, Feb. 4, 2002.

38 Quote in Robert Kagan, *Of Paradise and Power* (2003) (concerning divergent US and European views toward international law and institutions).

39 See e.g. Levi, *World Federalist Movement, International Democracy*, *supra* note 37. Levi explicitly stresses the need “to defeat the opposition of the United States” to “the plan for a world democratic order.” *Id.*, at 6.

tary assembly as part of the institutional framework of the WTO.⁴⁰ Developing country government concerns, of course, vary. Some countries fear that the addition of a parliamentary dimension would add to their burden, exacerbating the disadvantages that they already face in WTO negotiations on account of resource asymmetries. The addition of a parliamentary dimension, they fear, would favour large countries with larger delegations. Other developing countries fear that adding a parliamentary dimension shifts the focus toward the WTO's "external transparency," away from their chief concern over the WTO's "internal transparency" toward developing country members.⁴¹ Still other developing countries fear that their parliamentarians could undermine their negotiating positions, and they want to be sure that they can "control" the process.⁴² Some fear that parliamentarians could defend vested protectionist interests, and possibly undermine a mutually beneficial trade deal.

Nonetheless, developing country governments also recognize that they could gain from the addition of some form of inter-parliamentarian interface at the WTO level. Many parliamentarians from developing countries favour the holding of parliamentary sessions involving the WTO precisely because it is difficult for them otherwise to obtain information about WTO developments. They find themselves being asked to ratify WTO agreements about which they know little until the deal is done.⁴³ Developing country governments, on the other hand, may find that parliamentarian attendance at WTO ministerial meetings could help them explain the difficulty of WTO negotiations in national capitals. The holding of inter-parliamentary meetings

40 Steering Committee, Parliamentary Conference WTO, Strasbourg, July 3, 2002. Many developing country parliamentarians, however, may be quite interested in participating in WTO parliamentary meetings.

41 Interview with IPU representative, Geneva, June 23, 2003 (relating the statement of a developing county representative from northern Africa).

42 Interview with Asian developing country representative, June 24, 2003. China has an additional concern about Taipei's potential participation.

43 Interview with member of the WTO secretariat, Geneva, June 24, 2003 (relating concerns of African parliamentarians related to him).

on the WTO brings parliamentarians into closer contact with their national trade officials simply to prepare for these meetings. Parliamentarians come away from these preparatory sessions and the inter-parliamentary meetings much more informed about WTO negotiations and their context.

In addition, the potential benefits to developing countries of adding an inter-parliamentarian dimension are reflected in US congressional concerns about whether the process could advance the interests of the less powerful in the “main WTO negotiations.” For example, issues of primary concern to developing countries, such as “access to essential medicines” and “agricultural export subsidies,” are highlighted on the agenda for the Cancun inter-parliamentarian meeting. An inter-parliamentarian consultative assembly could help them advance their perspectives and agendas in global *fora*, including before the media, provided that they can send representatives to meaningfully participate.

VI. Competing Rationales for Adding a WTO Parliamentary Dimension or Relying on Parliamentary Oversight only at the National / Member Level

The primary criticisms of an inter-parliamentary WTO body are:

- (i) that it would provide a facade of legitimacy to an illegitimate process;
- (ii) that national parliaments, who remain the sole source of democratic legitimacy, should focus their attention on enhancing their oversight of national positions within their own constitutional orders; and
- (iii) that well-organized groups, such as western multinational corporations and single interest non-governmental groups, would be best-placed to lobby and advance their interests through an inter-parliamentarian body.

These views are reflected not only within the US Congress, but also by leading US political theorists. For example, Robert Dahl, the renowned US theorist on democracy, writes, “I see no reason to clothe international organizations in the mantle of democracy

simply in order to provide them with greater legitimacy."⁴⁴ Dahl suggests that "we treat [international organizations] as bureaucratic bargaining systems."⁴⁵ Similarly, Joseph Nye, Dean of the Kennedy School, writes, "For now, the key institution for global governance is going to remain the nation state," as "national governments [...] are the real source of democratic legitimacy."⁴⁶ As testified by mass demonstrations at EU summits over the past years, shifting primary rule-making power away from national legislative bodies to supranational institutions remains highly contested.

Not only the protestors, but also scholars are concerned about who participates in supranational *fora*. Not all affected "stakeholders" are equally positioned to participate in supranational legislative *fora*. For example, large businesses can be particularly effective lobbyists at the EU level since the forum is too distant for most constituents to follow policy debates and developments. Finally, some critics assert that an inter-parliamentarian body within the WTO would be a waste of resources in light of more urgent needs. The creation of a meaningful WTO inter-parliamentary dimension would not be cheap. Some policymakers question the utility of expending resources on such a body, which could merely serve as a "boondoggle" for a few elite representatives to travel to exotic places.⁴⁷

In contrast, the primary rationales for adding a parliamentary dimension to the WTO, at this stage, are:

- (i) to inform parliamentarians of WTO developments, thereby enhancing their ability to participate in the formation of national / WTO member positions in WTO negotiations;

44 Robert Dahl, "Can International Organizations Be Democratic? A Skeptic's View," in *Democracy's Edges*, eds. Ian Shapiro and Casiano Hacker-Cordon (1999), at 32.

45 *Id.*, at 33.

46 Joseph Nye, "Parliament of Dreams," *Worldlink* 15. 16 (March/April 2002).

47 Telephone interview with US congressional staffer, May 27, 2003.

- (ii) to foster deliberation among parliamentary representatives at the international level so that they better understand the perspectives of peoples from other jurisdictions and, in particular, the implications for other constituencies of WTO and national trade-related policies; and
- (iii) to monitor and provide support to the WTO as a multilateral forum for resolving cross-border trade disputes in a relatively neutral and peaceful manner.⁴⁸

Since WTO rules and procedures have significant implications for domestic regulatory policy, parliamentarians see an increasing need to oversee the WTO. Yet, many parliamentarians do not receive sufficient access to information on WTO developments. Adding an inter-parliamentarian dimension to the WTO could facilitate more informed parliamentary oversight of the WTO at the national level. As a Moroccan parliamentarian states, "A Parliamentary forum at the WTO level could make Parliamentarians from developing countries more aware [of WTO matters], improve their understanding of the WTO system and involve them more in formulating and steering trade policy."⁴⁹ A parliamentarian from Mauritius agrees, maintaining that "[t]he forum could stimulate parliamentary debate at the national level."⁵⁰

In addition, national political processes, by their nature, fail to account for the impact of national decisions on foreign constituents. Concomitantly, national political bodies cannot control for the impact of other jurisdictions' decisions on national constituents. One goal of establishing a WTO parliamentary dimension is to foster better understanding among parliamentarians of the perspectives of parties from other jurisdictions affected by national and international rule-making. Under this view, the crea-

48 The WTO's mission and impact, of course, are not limited to this aspect. As WTO trade rules have expanded in scope, and as their binding effect has increased, the organization has become more controversial.

49 Remarks of Mr Souhail, Summary Record of the Meeting of the Steering Committee, May 18-19, 2002, Brussels.

50 Remarks of Mr Gunness, Summary Record of the Meeting of the Steering Committee, May 18-19, 2002, Brussels.

tion of an inter-parliamentarian interface could have a socializing effect, as it has within Europe, so that parliamentarians take a wider view of the implications of policy beyond the national level. It is hoped that the process of deliberation can conduce policy-makers to modify their outlooks, often unconsciously.

Finally, an inter-parliamentarian body could monitor and support the WTO as a multilateral body needed to resolve cross-border economic disputes in a relatively neutral and peaceful manner. We could be entering a dangerous period of rising nationalist tensions stoked by global economic stagnation or recession. Through supporting a rules-based multilateral dispute settlement system, WTO members could help protect themselves from the threat of protectionist beggar-thy-neighbour policies that beset the world during the early 1930s. These policies not only exacerbated global economic decline, but also helped spur the rise of anti-democratic political movements. Some WTO institutional supporters wish to establish an inter-parliamentarian body in order to occupy a public space to offset calls among some "civil society" critics to disband the organization. Following the Seattle ministerial debacle, WTO Director-General Mike Moore declared that "elected representatives are the main expression of civil society."⁵¹ He stressed that "parliamentarians have a special responsibility to inform their constituents of the benefits a rules-based trading system can offer."⁵² Similarly, EU trade commissioner Pascal Lamy has argued that a parliamentary consultative assembly could "lead to stronger public support for the multilateral trading system."⁵³ Likewise, at a 2002 inter-parliamentarian steering committee meeting, an Indian

51 Steve Charnovitz, *supra* note 15. See also Mike Moore, *A World Without Walls: Freedom, Development, Free Trade and Global Governance*, 2003, 121, 235-237.

52 *Moore Calls for Closer Parliamentary Involvement in WTO Matters*, WTO Press Release, Feb. 21, 2000.

53 See Steve Charnovitz, *supra* note 15, citing a statement by EU trade commissioner, Pascal Lamy. Similarly, a member of the Commission confirms that debate at the international level "currently is dominated by NGOs, whereas parliamentarians are absent from the debate." Telephone interview, May 28, 2003.

parliamentarian remarked, “the principal task of Parliamentarians [is] to convince the public at large of the opportunities which the WTO rules also offer to developing countries for their economic development.”⁵⁴

VII. Mechanisms for Establishing a WTO Inter-Parliamentarian Dimension

Creating an inter-parliamentarian dimension to the WTO raises a series of practical issues. First, what should be the role of inter-parliamentary meetings? Most proponents now agree that an inter-parliamentarian body would act only in a consultative capacity, facilitating an exchange of information about WTO developments and views among parliamentarians. In this way, parliaments could be more informed about WTO matters when interacting with domestic trade officials, and would better understand the political context in which negotiations take place.

Second, would the parliamentary assembly be a standing body within the WTO institutional structure, or would *ad hoc* annual meetings be organized, including at WTO ministerial meetings? Most proponents agree that the latter option is more realistic at this stage. WTO members simply are not ready to modify the WTO’s institutional structure. However, inter-parliamentarian meetings could be institutionalized over time, if a parliamentary dimension were to evolve.

Third, how can new technologies be harnessed to facilitate inter-parliamentarian exchange between meetings? Entrepreneurs are developing an inter-parliamentarian Internet site that could serve as a virtual forum.⁵⁵ Similarly, under an initiative of former WTO Director-General Mike Moore, the WTO secretariat has prepared periodic electronic bulletins for parliamentarians concerning WTO developments, which Director-General Supachai

54 Remarks of Mr Swain, Summary Record of the Meeting of the Steering Committee, May 18-19, 2002, Brussels.

55 See e.g., The e-Parliament Initiative of Nick Dunlop and William Ury, at www.earthaction.org/e-parl/

Panitchpakdi has agreed to continue.⁵⁶ Parliamentarians could assign individuals from their national parliamentary staffs to attend to WTO-related matters and co-ordinate exchanges through the Internet. Parliamentarians thereby could work with each other to gather information and further agendas that they mutually support, while remaining locally based. However, since many parliaments lack professional staff, implementing this strategy faces significant challenges.

Fourth, in light of the proliferation of issues addressed within the WTO, how could inter-parliamentarian meetings play more than a symbolic role? In order for inter-parliamentarian meetings to focus on substance, parliamentarians could form sub-committees and working groups with issue-specific expertise, just as in national parliaments. Again, they could assign parliamentary staffers specialized in trade matters to work with these subsidiary bodies. These committees could prepare working documents and presentations to the plenary inter-parliamentary body. To give just a few examples, working groups could address such issues as the domestic regulatory implications of various GATS negotiations, the impact of agricultural and fishery subsidies, and mechanisms for implementing the Doha declaration on access to essential medicines.⁵⁷ These sub-committees could reflect the committee and working group structures within the WTO. National parliaments ultimately enact laws to implement WTO requirements. Those committees responsible for initiating such legislation could monitor the relevant negotiations up-front. Once again, however, implementing this strategy faces significant hurdles on account of national parliaments' constrained resources. Given developing country demands for enhancing the capacity of their own executive agencies to participate meaningfully in WTO negotiations, such resources might not be available, or even requested.

56 Interview with IPU representative, Geneva, June 23, 2003.

57 For example, according to an IPU press release, the Cancun parliamentary session is to focus on such areas "as agricultural export subsidies, intellectual property rights and access to essential pharmaceutical products, and trade in services." Document on file with author, provided by the WTO secretariat on June 24, 2003.

Fifth, how would the WTO secretariat interact with the parliamentarians? An inter-parliamentarian liaison office could be established within the WTO secretariat, possibly in the Director General's office or in the external relations division. Currently, the secretariat's external relations division is the primary interface, although the Director General's office was highly involved under Mike Moore. Members of the WTO secretariat who service existing WTO committees and working groups also could service a WTO inter-parliamentary body on matters falling within their jurisdiction, including through provision of documents to an inter-parliamentarian Internet site, co-ordinated through the WTO external relations division.

Creating a WTO parliamentary dimension would require many other decisions, including the funding of meetings; whether the IPU would operate as the co-ordinating entity or whether an independent network of legislators would be formed; how delegates would be selected (whether by national bodies, through self-selection subject to limits per WTO member, or otherwise); and how delegates would be apportioned among WTO members (whether taking account of population, participation in global trade or any other factor). As for the designation of parliamentarians, a system eventually could be institutionalized whereby parliamentarians would come from the trade committees of national / WTO member parliamentary bodies to whom they, in turn, would report.

VIII. Conclusion

The establishment of a parliamentary dimension within the WTO could promote greater parliamentary oversight at the national level. However, where legislative bodies, such as the US Congress, already wield significant authority over trade matters, including through the creation of negotiating mandates, guaranteed access to trade negotiators and negotiating texts, and ratification of trade agreements, they feel less need to participate in inter-parliamentarian meetings. Time and resources are limited. The more time that parliamentarians spend in inter-parliamentarian meetings, the less that they may participate

(indirectly through their own trade representatives) in the “main” negotiations. In contrast, parliamentarians that wield less authority over national trade policy, and have less access to WTO negotiating documents, benefit more from attending WTO inter-parliamentarian meetings. Inter-parliamentary meetings help them monitor not only WTO negotiations, but also their own government’s positions.

Nonetheless, many parliamentarians may become frustrated by the slow pace and the complexities of WTO agreements and negotiations. They may find that it simply is not worth the investment of time to understand and follow WTO developments when their involvement will bring few payoffs to their domestic constituencies. Parliamentarians are held accountable primarily through elections. They may find that their chances of reelection are better served if they attend to other issues. In contrast, non-governmental organizations (NGOs), especially single-issue ones, may have much greater incentives to remain engaged with particular WTO matters. As a consequence, there is a chance that NGO oversight and pressure on the WTO will continue, while most parliamentarians’ interest in WTO developments could wane.

A second rationale for holding inter-parliamentarian meetings is more controversial, in particular within the United States—that of fostering a global forum for cosmopolitics. Under this second rationale, parliamentarians should deliberate over the impact of WTO policies and national practices that affect each other’s constituents. In an idealized world, were such deliberation to take place in a relatively unbiased manner, and were it to have an impact on domestic and global policy-making, the world arguably would be more democratic and harmonious. However, in practice, such an inter-parliamentary body would be beset by severe institutional imperfections. Its precise role and structure, were it to exist, thus needs to be subjected to comparative institutional analysis—that is, an analysis that compares the *relative* costs and benefits of institutionalizing this participatory mechanism compared to other institutional alternatives. At this stage, it appears preferable to tread lightly, organize annual meetings where parliamentarians can learn about the WTO,

co-ordinate with their governmental representatives and interact with each other in an inchoate cosmopolitan process of parliamentary exchange.

**How Can Parliamentary Participation in WTO
Rule-Making and Democratic Control Be Made
more Effective in the WTO?**

A United States Congressional Perspective

Comments

by

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More effective democratic control of the World Trade Organization—both real and perceived—is desirable. However, this issue is not yet at the top of the list for most Members of Congress. If they worry about trade policy and democratic values, they are more likely to worry about the compromise of democratic values (or legislative authority) built into the US domestic process for considering trade bills: the no-amendment rules of the trade promotion authority (TPA; formerly, “fast track”) law.

Legitimacy for the WTO arguably depends upon its being grounded in democratic authority and upon its having sufficient transparency to be subject to effective accountability to democratically elected authority. Most Americans, including most Members of Congress, feel at best vaguely uneasy about those dimensions of the WTO.

Let me offer a few observations about the political and psycho-sociological environment that prevails as a typical Member of Congress deals with trade matters.

There is a kind of schizophrenia that infects the American political scene when trade issues come up. On the one hand, a Member may have a rational sense of agreement with the macro-economic arguments for trade; on the other, there is an emotional wariness borne of the much-reported micro-economic consequences for particular firms and employees in one's home district.

A Member most often *hears* about trade from angry constituents. The anger may be because of job or business losses, or it may be couched in terms of philosophical opposition: from the Left usually because of lack of transparency, and from the Right usually because of loss of national sovereignty.

The "transparency" argument is often a proxy for a generalized mistrust, for concern about democratic accountability, for protectionism, for basic fairness. The "sovereignty" argument is often a proxy for isolationist tendencies, for unilateralism, or for American exceptionalism. The Left and the Right can come together in a powerful way in opposition to the WTO regime, with fears about globalization and populist arguments about the increased power of multinational corporations.

That said, it is important to bear in mind that the average US Congressperson (at least those not on House Ways & Means Committee or Senate Finance Committee) is not especially concerned with trade issues except in an episodic way. The episodes occur when, as last year, there was a vote on TPA, or this year, as specific agreements are presented under TPA for an up-or-down vote. In those instances, the rhetoric can become hot and the vote very close (e.g., the TPA debate and vote).

In each instance, the Representative or Senator also receives a somewhat jarring reminder that, unlike most issues in the US constitutional system of divided legislative-executive power, there is no real opportunity for a legislator to practice the legislative craft on trade bills. It's simply a "yes" or "no" vote on a bill

that the executive has primarily shaped. (This entails a loss of *legislative* sovereignty, if you will.)

It often comes as a surprise to parliamentary colleagues from the rest of the democratic world to learn that many Members of Congress have mixed feelings about foreign travel. There are several reasons, including the fear that a political opponent in the next campaign will accuse you of taking “foreign junkets,” and the simple disinterest many Members have in going abroad. In any case, in assessing the way Congress approaches trade matters, it helps to understand this aspect of congressional behaviour and the general attitude it evinces about foreign policy—indeed viewed as “foreign” by the constituencies of many Members.

This is, of course, in sharp contrast to most of the rest of the world, for which there is not such a dividing line between domestic and foreign policy. That’s changed somewhat in the US, since 9/11, but not that much.

While, as Professor Shaffer suggests, most Members see their influence and leverage on the *domestic* aspects of trade policy as sufficient to fulfil their responsibilities, there is a small but growing number of Members, I believe, who take more than passing interest in WTO matters. (On this point, a systematic survey of Members about their views and attitudes would be useful.) These Members would probably see a WTO parliamentary entity of some sort as a healthy and appropriate way to address concerns regarding WTO legitimacy, transparency and accountability, though perhaps more troubling to those upset mainly about loss of US sovereignty to international organizations.

A new entity modelled to a degree on the CSCE Helsinki Commission, with observer and consultative status, would be a workable approach. Participation by Members of Congress in that Helsinki process has been pretty good. With the increased attention to globalization and concern about trade, and with some encouragement from congressional leadership, we could expect a decent level of US participation in such a WTO Consultative Assembly.

There is broad concern expressed about the fragility of the international trading system and its susceptibility to attack—from the demagogic or the misinformed or the protectionists. That fragility, it seems to me, is inversely related to the degree of public understanding of the system.

In a world that honours democratic values, the legitimacy of the WTO system must ultimately be grounded in public understanding and support. The question is whether a reasonably well-informed politician or citizen can with reasonable effort hope to understand this system sufficiently to give informed support.

The WTO regime is not one that can be sustained over the long haul by professional elites, no matter how decent and well-meaning. The public must believe that it has a stake in liberalized trade, must understand its positive qualities and its institutional limits, and must embrace or at least accept the idea that its enlightened self-interest is well-served over the *long term*.

In other words, for a democracy to buy a liberal trading system, its people need the political maturity to appreciate that the occasional short-term costs are outweighed by long-term gains, that the deferred gratification will exceed the immediate. This takes leadership from politicians and from civil society.

Any shoring-up of the fragility of the system depends on the ability of domestic politicians and civil institutions to explain what is going on to their constituents and their society and why it should be supported. (Think of a US Congressperson needing to explain a WTO resolution of a pending trade dispute at a town meeting in the middle of the country.) Thus, an increased role for national parliamentarians and Congresspersons and for national and international NGOs should have a direct bearing on the public's sense of the WTO system's legitimacy and trustworthiness.

The existing flexible and secretive structure may be efficient and practical for those on the inside, but it appears opaque and clubby to those on the outside. Yet, it is those on the outside who must eventually give, or withhold, their consent. So, it is in the enlightened self-interest of the WTO bureaucracy and pro-

fessionals to move to make their system more accessible to the people—as represented by national politicians and NGOs—on whose consent the system rests.

A “trust us” approach is unlikely to work for long. Given the high stakes and the consequences of fragility leading to fracture, WTO elites should adopt a preventative strategy of making their work and power as understandable and accountable to the publics of their member states as possible.

WTO personnel do not have primary responsibility for public education, but they do bear responsibility for shaping a system that can be comprehensible to the public. That responsibility extends to encouraging both national-level political leadership and NGOs to help in the process by establishing an institutional structure to facilitate and encourage their consultation and observation.

How Can Parliamentary Participation in WTO Rule-Making and Democratic Control Be Made more Effective in the WTO?

The European Context

by

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I. Why Are “Parliamentary Participation” and “Democratic Control” by National Parliaments and the European Parliament (EP) Necessary?

The concept of democratic governance which confers legitimacy is emerging as an *objective principle* under public international law. A *subjective fundamental right* for “democratic governance” has its source in the right of human dignity and is part of the common European constitutional traditions as expressed in Art. 6 and 7 of the Treaty on European Union (TEU) as well as in Art. 3 Additional Protocol of the European Convention on Human Rights (ECHR). The concept of democratic governance means that all acts of any public authority should be legitimized by a democratic process.¹

1 Americo Beviglia Zampetti, “Democratic Legitimacy in the World Trade Organization: The Justice Dimension,” *JWT* 37 (2003) 1, 105 (107); Thomas Franck, “The Emerging Right to Democratic Governance,” *AJIL* 86 (1992) 1, 46 *et seq.*; Meinhard Hilf, “New Economy – New Democracy? Zur demokratischen Legitimation der WTO,” in: Claus Dieter

National parliaments and the EP can be considered as the predominant sources of legitimacy, which is based on common national and European identity and solidarity. Thus Art. 6 (1) TEU states “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” Likewise Art. 6 (3) TEU adds that the Union shall respect the “national identity” of its Member States. And, finally, Art. 1 (3) TEU underlines that the relationship between the various EU Member States and their peoples has to be built on the principles of coherence and solidarity.

The WTO (and “globalization”) is seen as a danger for the democratic process within each Member’s constitutional systems. The same applies in the case of the EU, which has to share its sources of legitimacy with those of its Member States. In a sort of ill-conceived misconception the WTO is only seen as a “bureaucratic bargaining system” where there is no prospect for democratic legitimacy.²

The more the WTO is involved in the exercise of public authority by affecting regulations on the domestic level, the more that authority must be legitimized. This means that it needs a high degree of moral and normative justification for its political and social actions. Thus national regulations relating to the protection of health and environment or consumer welfare can come into conflict with the liberal import of goods and services from other WTO Members. A prime example are the European legislative acts on imports of hormone-treated beef or products containing genetically modified organisms (GMOs). Therefore the WTO and its respective agreements dealing with these conflicts

(contd.)

Classen (Hrsg.), *In einem vereinten Europa der Welt zu dienen...* Liber amicorum Thomas Oppermann, Berlin 2001, 427 (431); Meinhard Hilf, “Ein europäisches Grundrecht auf Demokratie?,” in Jochen A. Frowein et al. (Hrsg.), *Verhandeln für den Frieden – Negotiating for Peace*, Liber Amicorum Tono Eitel, Berlin 2003, 745 (747).

- 2 Robert A. Dahl, “Can International Organizations Be Democratic? A Skeptic’s View,” in Ian Shapiro and Casiano Hacker-Cordón (Eds.), *Democracy’s Edges*, Cambridge 1999, 19 (33, 34).

need a high degree of legitimization in order to be respected. The foundation of such legitimization lies in the *process of constitutionalization*.

A model for this process can be found in Art. 23 of the Basic Law (*Grundgesetz* = GG), the German Constitution. Art. 23 GG requires that in each case of a transfer of powers there has to be a guarantee that this transfer is based on a commitment to “democratic, rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution.” All these principles are inter-related. One should add the principles of external effectiveness and internal efficiency to the exercise of such powers.³ In sum, Art. 23 GG aims at stopping the tacit erosion of parliamentary influence in European and international relations.

Art. 23 GG should be applied in analogy to any transfer and exercise of powers as, e. g., in the case of the WTO.⁴ Paragraphs 2-7 of Art. 23 GG require—by way of compensation for the transfer of powers—the continuous involvement of the national parliament in the decision-making process of the German and European executive branch in European and international matters.⁵ Its aim is to add to the democratic legitimization of the decision-making process under the Common Commercial Policy of the EU and to preserve the residual powers of the sub-national entities such as the federal states (*Länder*) in the fields of, e.g., culture, health, education, and regional policy.

These procedures should be expanded to cover the WTO decision-making process in which the EU as well as its Member States are directly involved.

3 Beviglia Zampetti, *supra*, note 1, 105 (106).

4 Hilf, *supra*, note 1, 427 (432).

5 Art. 45 GG provides for a specific Standing Committee of the German Parliament – “Bundestag” (*Committee on the European Union*).

II. Is There a Democratic Deficit in the WTO System? What Are the Options for Participation and Control?

In the decision-making processes within the WTO system there are various stages at which national parliaments (or the European Parliament) may intervene and exercise their influence.

At a very basic level parliamentary participation might entail an active involvement in the internal national process of *preparation of negotiation positions* with respect to new agreements under the WTO or with respect to the continuing process of rule-making on a secondary level within the WTO institutions (such as the Ministerial Conference, the General Council or any other sub-institutions like committees and even working groups). However, in practice there seem to be only limited efforts on the side of the responsible executives to seek the support of national parliaments.

In addition, *democratic control* could refer likewise to a permanent control during negotiations as well as to an *ex-post-control* of final results. However, there are inherent difficulties to analyze and compromises to evaluate. The most prominent act of an *ex-post-control* is the parliamentary consent to the ratification of WTO agreements.

The “democratic deficit” stems from the elaboration of *GATT rules as from 1947* onwards. These rules were agreed mainly on a provisional basis and thus by-passing the need for formal parliamentary consent. Pre-existing acts of parliaments were “grandfathered” as being unaffected by any later-in-time GATT law.

Rule-making during the Uruguay-Round was primarily handled by trade diplomats acting on behalf of legitimated governments. National parliaments and the EP were to give their formal consent to the ratification, but had practically no influence on the decisions, which had already, been taken.⁶ The well-known exception is the US Congress.

6 See the various reports for different countries in John H. Jackson and Alan O. Sykes, *Implementing the Uruguay Round*, Oxford 1997.

During the Ministerial Conferences of Seattle and Doha an increasing number of members of parliaments were present in order to obtain first-hand information rather than becoming actively involved in the actual negotiations.

The respective parliaments nowadays tend to follow more closely the continuing activities of WTO Members in the “forum for negotiations” provided by Art. III:2 WTO. There, the built-in Agenda on issues like GATS and trade in agricultural products as well as the accession of new members, like China, are discussed. Furthermore, matters of interpretation of and amendments to the WTO agreements could be dealt with under Art. IX and X WTO. These procedures have not been used so far.

As to the *procedure on accession*, it is questionable whether the act of accession may be considered as a unilateral act under public international law, which does not require parliamentary consent. At least in a case like China, the accession should have taken the form of a multilateral treaty because of its far-reaching political and economic ramifications; it should have, therefore, needed the approval of WTO Members’ parliaments.⁷

Parliaments try to influence trade policy-making in many ways such as:

- by establishing a permanent dialogue with the respective executives (EC Commission / Member States’ executives) on all relevant WTO issues;
- by asking for *ad hoc* or regular reports such as on the follow-ups of given processes and negotiations;
- by participating in the process of giving instructions to negotiators;
- by addressing formal questions;

7 Meinhard Hilf and Götz J. Götsche, “Chinas Beitritt zur WTO,” *RIW* 2003, 161 *et seq.*

- by establishing special commissions of inquiry or *enquête-commissions*;⁸
- by voting on resolutions—often even referring to policies beyond their respective legislative powers.⁹

Some parliaments also nominate members to the official negotiating delegation of their country.

There seem to be no formal direct links between the permanent delegations of the EU or the EU Member States at the WTO and members of their respective parliaments. It seems that instructions are given only by the respective executives.

Secondary WTO law is scarce. Anyhow, the rule of *consensus* (Art. IX:1 WTO) favours the influence of national parliaments with regard to the respective executives. However, there seems to be little or no “input-legitimation” provided by such parliaments.

With respect to the Trade Policy Review Mechanism (TPRM, Art. III:4 WTO) parliaments do not seem to be involved in drafting the relevant country reports. The final reports are, however, communicated to the respective parliaments with—as far as can be seen—no further attention or follow-up.

With regard to the Dispute Settlement Procedure (Art. III: 3 WTO), national parliaments occasionally request their respective executives to open consultations under the DSU or to take

8 See e. g. Schlussbericht der Enquete-Kommission “Globalisierung der Weltwirtschaft – Herausforderungen und Antworten”, BT-Drs. 14/9200 vom 12. 06. 2002.

9 Thus, in the period of 2000 to 2003, the German Bundestag dealt with the Doha Agenda, the ongoing negotiations on GATS (water, education, culture including audio-visual activities a.o.), TRIPS, competition, environment, developing countries, social policies and agriculture. Further the Bundestag and the relevant committees were concerned with the cases handled under the Dispute Settlement Understanding (DSU) such as bananas, shipyards, GMO, US Foreign Sales Corporations (FSCs), hormones, asbestos, steel a.o.; see also below at 16.

specific positions during the ongoing procedure. However, the overall influence is practically insignificant:

- There seems to be no parliamentary influence during the formal consultations as well as in the selection of Panelists or Members of the Appellate Body;
- Arguably, parliaments rarely exert influence on their country's legal position before the dispute settlement institutions;
- Parliaments have not yet submitted *amicus* briefs;
- Parliaments occasionally deal with the follow-up or the implementation of DSB decisions (e.g. bananas, hormones);
- Neither national parliaments nor the EP have yet challenged the policy of not accepting the direct effect of DSB rulings or of WTO law in general.

As an overall assessment, it can be stated that national parliaments and the EP are still at a considerable distance from the decision-making process of the WTO.

III. How to Overcome the Lack of Participation and Control of National Parliaments and the EP?

Internal and external transparency are prerequisites for more efficient participation of national parliaments and the EP. The use of the Internet facilitates participation and control but hardly adds to an effective interaction of weighing and balancing within the WTO rule-making process.

A *WTO or world parliament* is illusionary: a *demos* necessitates at least a community which is able to express a common will and communicate on common values.¹⁰

A *WTO-Consultative Parliamentary Assembly* could be established. Each WTO member could delegate a reasonable number of up to e. g. four members of their respective parliament. Vari-

10 See the proposals made by Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, München 1999, S. 308 *et seq.*

ous groups represented in these parliaments could thus be present on an equal footing at the global level. In composing such an Assembly the share of world trade and / or the population should be taken into account. This consultative Assembly has been favoured, *inter alia*, by the European Parliament.¹¹

The *functions* of such an Assembly could be:

- to receive information;
- to demand and initiate specific actions;
- to address the WTO Secretariat or other WTO organs;
- to inform and to influence and by that to educate their respective national parliaments at home thus creating a better understanding and expertise in WTO matters;
- to help civil society to channel their influence to WTO institutions and finally;
- to build up a net for reciprocal information between various parliaments.

It is difficult to conceive how such an Assembly could directly enter into contact with the Ministerial Conference or the General Council. Arguably, an observer status could be an option.

Others prefer a consultative body like the *EC Economic and Social Committee*.¹² This body would be composed of specialists of various economic sectors. Members could either be delegated or even nominated by the respective organizations. Such an institution, however, would not be able to be called a *parliamentary*

11 Pascal Lamy, *What are the Options after Seattle?*, Speech to European Parliament, 25.01.2000, available at: [http://europa.eu.int/comm/commissioners/lamy/speeches_articles/spla09_en.htm] (last visited 08.09.2003); see also Peter Bender, "The European Parliament and the WTO: Positions and Initiatives," *European Foreign Affairs Review* 2002, 193 (206 *et seq.*); Markus Krajewski, "Democratic Legitimacy and Constitutional Perspectives of WTO Law," *JWT* 35 (2001) 1, 167 (184).

12 Thomas Oppermann, "'Demokratisierung' der WTO?", in Robert Briner *et al.* (eds.), *Law of international business and dispute settlement in the 21st century*, Liber amicorum Karl-Heinz Böckstiegel, Köln 2001, 579 (587 *et seq.*).

body. Experiences with such bodies in the EU as well as in some EU Member States are not very promising, at least in cases where they are merely subsidiary bodies along side the representative parliament.

In the EU, the EP could become involved in WTO matters in a more efficient way. The procedure of co-decision should be the general rule. All commercial treaties should require the consent of the EP. However, the constitutional treaty 2004 has not addressed this question of a more effective involvement of the European Parliament in a satisfactory manner. The EP was not given any new rights at the Nice summit, not even a formal right of consultation, although Article 133 (5) EC-Treaty in its current form provides that the EP be consulted with respect to the extension of paragraphs one to four concerning the negotiation and conclusion of agreements on trade in services and trade-related intellectual property rights. The Commission's proposal to apply the co-decision procedure of Article 251 EC to internal measures that implement the core elements of an international agreement in secondary Community law, has not been supported by any delegation. Thus, the status quo remains, that is, an informal information procedure.¹³

The influence of *civil society* expressed by some 20.000 NGOs and linked by the Internet has increased enormously. Some consider their political pressure to be lacking in legitimacy and de-stabilizing. With respect to WTO decision-making a number of specific requirements for NGOs could be established which have to be met before they can be admitted to the decision-making process.

13 Horst Günter Krenzler and Christian Pitschas "Progress or Stagnation?, The Common Commercial Policy After Nice," *European Foreign Affairs Review* 2001, 291 (312); Meinhard Hilf and Frank Schorkopf, "Das Europäische Parlament in den Außenbeziehungen der EU," *Europarecht* 1999, 185 (190 *et seq.*).

Summing up it seems that Parliaments are the best accountable representatives of civil society having the closest links to all citizens.¹⁴

IV. Outlook

In order to gain a higher degree of *democratic / social legitimacy* the WTO should strive to be present more often in public debate and the media. Thus current issues such as GMOs, services negotiations and others would be more reflected in the deliberations of national parliaments.

The WTO should show a sensitive political and judicial restraint with respect to democratically legitimated national regulations, which are and should be primarily responsible for weighing and balancing competing public interests.

There should be no admission of non-democratic states to the WTO. The EU-constitution-building debate within the Convention 2004 shows that international negotiations dealing with highly political issues can be made open to the public and can be organized with active involvement of the public.

As long as individuals *with their particular interests are not represented* within the WTO decision-making process one cannot foresee a greater output-oriented legitimacy. A Consultative Parliamentary Assembly of the WTO would be an adequate instrument to channel the interests and aspirations of individuals into the decision-making process of the WTO.

Under any circumstances, the ongoing tacit erosion of parliamentary influences should be stopped. A greater degree of democratic legitimization leads certainly to a better respect for the rule of law, can enhance solidarity and the protection of

14 See the corresponding statement of (former) Director General Mike Moore, WTO Press Release 169 (21.02.2002).

fundamental rights and finally may add to the effectiveness of world trade law.¹⁵

The WTO is acting in the limelight of world conflicts and economic interests. The process of its constitutionalization should go on.¹⁶ Enhanced parliamentary participation remains desirable even if it may not lead to a higher degree of free trade and co-operation.

15 See also Beviglia Zampetti, *supra*, note 1, 105 (120).

16 Meinhard Hilf, "Die Konstitutionalisierung der Welthandelsordnung – Struktur, Institutionen und Verfahren," in Michael Bothe (Hrsg.), *Entschädigung nach bewaffneten Konflikten / Die Konstitutionalisierung der Welthandelsordnung*, Berichte der Deutschen Gesellschaft für Völkerrecht, Bd. 40, Heidelberg 2003, 257 *et seq.*; Wolfgang Benedek, "Kompetenzen und Rechtsordnung der WTO," in Michael Bothe (Hrsg.), *Entschädigung nach bewaffneten Konflikten / Die Konstitutionalisierung der Welthandelsordnung*, Berichte der Deutschen Gesellschaft für Völkerrecht, Bd. 40, Heidelberg 2003, 283 *et seq.*

A Parliamentary Dimension to the WTO

More than just a Vision?!

by

Erika Mann

Member of the European Parliament

I. Introduction

Trade matters used to be highly technical matters, dealt with only by a few trade negotiators and experts. With the conclusion of the Uruguay-Round in Marrakech in 1994, a new era of international trade began. In contrast to GATT, the WTO's scope now covers more issues, extending far beyond the traditional domain of tariffs and trade in goods. Its rules reach deeply into domestic affairs affecting areas as diverse as intellectual property, services, telecommunications or government procurement. The WTO has an increasing impact on neighbouring policy areas such as health policy, environment, food safety and resource management. In addition decisions of the WTO judicial bodies now have a binding character. In short, the WTO has a direct impact on the lives of citizens and their societies. At the heart of globalisation, the WTO encroaches on some of the traditional prerogatives of legislators as the primary lawmakers in democracies.

The days when trade policy was the exclusive domain of the executive branch of government are over.¹ The boundaries between domestic and foreign policy increasingly blur. Political parties—no matter if left or right, opposition or in office—fear that their views are not sufficiently taken into account when their governments negotiate at the international level. The partly violent demonstrations at the Ministerial Conference in Seattle in December 1999 made very clear that trade unions and public interest groups—often promoting a single issue only—also try to influence the WTO's policies. The latest Ministerial Conference in Cancun in September 2003 has demonstrated that the interest civil societies in North and South take in issues such as trade and development, trade and environment, or trade and labour standards has not been some kind of ephemeral “en vogue” phenomenon.

This important shift in WTO competencies and societies' concerns about it should be acknowledged by formally adding a “parliamentary dimension to the WTO.” This does not prejudice the form, function and structure parliamentary involvement may take. Since Seattle, several parliamentary meetings on international trade policy have been organised, partly alongside WTO Ministerial Conferences albeit outside the institutional framework of the organisation. Now, the time has come to officially recognise and institutionalise the parliamentary dimension to the WTO in order to further enhance transparency and democratic legitimacy of WTO activities.

One may envisage different institutional designs on a continuum ranging from a permanent Parliamentary Assembly to occasional meetings of parliamentarians. Whatever outcome might finally emerge: the most important issue is to institutionalise the process.

1 Cf. para. 7, “Final Declaration of the Geneva Session of the Parliamentary Conference on the WTO,” adopted on 18 February 2003, in *Parliamentary Conference on the WTO 17-18 February 2003*, Inter-Parliamentary Union and European Parliament (ed.), Geneva, 19-20.

II. The Need for a Parliamentary Dimension to the WTO

Globalisation of politics may lead to a deficit of transparency, democracy and accountability if it is not compensated by substantive and procedural mechanisms of checks and balances similar to those that are usually applied to domestic policy-making. This is because the current process of globalisation shifts decision-making to the international level and thereby transfers power from legislators to the executive.

However, the traditional legalistic approach holds that international organisations are sufficiently authorised if national governments are scrutinised and overseen by their respective parliaments. Many decision-makers in governments still adhere to this thinking, thereby putting some real constraints on any more ambitious role parliamentarians could play at the international level.

Whatever side one takes, I would argue that parliamentarians must “go international”: to understand the global political process, legislators must have their own network of information sharing and be closely involved in the process. Government officials, enterprises and NGOs—they should all build up global networks, share information and gain some common understanding of the issues at stake. If trade specialists in national and regional parliaments do not keep pace, they will not obtain the first-hand information, insights and expertise which is necessary to influence their governments and to shape trade policy on the domestic level.

In democracies, parliaments are usually consulted before international negotiations are kicked-off, and they must ratify trade agreements once they have been signed. The US Congress even wields total control of trade policy, which would allow it to amend international agreements once they are before the Congress for approval. The Congress may, however, decide to transfer authority to the US Trade Representative under an act, which used to be called fast-track procedure and is now known as the Trade Promotion Authority.

At European level, the present situation is more complex. For certain trade agreements which have, for instance, budgetary

implications or set up new institutions (such as the WTO), the European Parliament has to give its assent.² If the conditions of Art. 300, para. 3 EC are not met, the European Parliament plays no formal role. However, the European Commissioner for Trade, Pascal Lamy, has made great efforts to build up informal channels of communication with the European Parliament, which have acquired quasi-formal character. If the relevant provisions contained in the draft Constitution for Europe are adopted, the role of the Parliament will be comparable to the one of the US Congress under fast-track procedure. When it comes into effect, the European Parliament will become a co-legislator as far as autonomous trade policy is concerned,³ and will have to approve all international trade agreements.⁴ Furthermore, it formally has to be informed about the state of play of negotiations on a regular basis, on an equal footing with the so-called Art. 133-Committee which is following trade policy on behalf of the Council of Ministers.⁵

A great benefit of legislators discussing trade issues internationally is the chance to gain knowledge about challenges other countries are facing, and to develop a shared understanding of issues of mutual interest. Scholars of international relations increasingly value the benefits of communication and arguing as opposed to a pure interest-based approach to negotiations.⁶ Looking beyond one's own constituency may thus be a first step to finding a mutually acceptable solution. While it is true that legislators are primarily accountable to their constituencies and will therefore represent their interests, political assessment may nevertheless change over time. A good example of this process is how the EP discussed the reform of European agricultural policy

2 Art. 300, para. 3 EC Treaty.

3 Art. III-217, para. 2 Draft EU Constitution as of 18.7.2003.

4 Art. III-227, para. 7 in conjunction with Art. III-217, para. 2, Draft EU Constitution as of 18.7.2003.

5 Art. III-217, para. 3 Draft EU Constitution as of 18.7.2003.

6 Thomas Risse, "Let's Argue!": Communicative Action in World Politics," *International Organization*, Vol. 54, No. 1, Winter 2000, pp. 1-39.

during the last few years. In my opinion, it is hard though to change domestic policies independently from general (global) trends. Politicians networking on trade are therefore more likely to contribute to policy change. Furthermore, the global picture is important to explain the need for change back home.

Interparliamentarian communication will also help to overcome the “clash of cultures” one could witness at the last Ministerial Conference and which contributed to its failure. In Cancùn, a very rationalistic approach of “give and take”-bargaining of Northern countries met a moral approach to trade negotiations promoted by developing countries, especially by the so-called “Group of 90” (African, ACP and least developed countries). No doubt, this clash was partly due to problems of communication and misperceptions between negotiators. Geopolitical considerations and ethical arguments were not sufficiently taken into account, especially by the EU and US. In contrast, the “Parliamentary Conference” managed to adopt by consensus, after a long and lively debate, a final declaration including political content on some of the most controversial issues such as agriculture (including cotton). The final statement which was agreed in Cancùn and which arguably strikes a fine balance between interest-based and moral-based arguments could help to foster common ground for a compromise acceptable to all negotiators in the future.

III. Flashback: What Has Been Done so Far?

The first formal meeting of parliamentarians dates back to the Ministerial Conference in Seattle in December 1999. U.S. Senator Bill Roth and Mr Carlos Westendorp Y Cabeza (who was then the head of the EP's Commission for Industry, External Trade, Research and Energy) led the efforts to organise a parliamentary meeting alongside the WTO Ministerial.

This initiative has been strongly supported by the European Parliament. In November 1999, it had adopted a resolution calling “on the Council and the Commission to examine the possibility of

setting up a WTO Parliamentary Assembly to achieve greater democratic accountability.”⁷ The proposal was then taken up and unanimously approved by the parliamentarians from WTO Member states present at the Seattle Ministerial, calling for the “establishment of a Standing Body of Parliamentarians whereby members of parliament can exchange views, be informed and monitor WTO negotiations and activities.”⁸

The year 2001 has seen a speeding up of parliamentary commitment towards trade issues. In April 2001, the European Parliament organised a seminar to discuss issues of internal and external transparency and democracy in the world trading system. A parliamentary meeting on International Trade was then organised by the Inter-Parliamentary Union (IPU) in June 2001, which brought together members of parliaments from over 70 countries. Two sessions of a working group have been held in Strasbourg and Geneva in September and October, respectively organised by the EP and the IPU. Both organisations also hosted a one-day parliamentary meeting in Doha, Qatar on 11 November, which was attended by over 100 MPs. The WTO Director-General, Mike Moore, addressed the meeting. The Final Resolution called for setting up a “parliamentary dimension to the WTO.”

After Doha, a formal Steering Committee between the European Parliament and the IPU was established. The Committee was composed of parliamentarians from 22 countries and representatives of four international organisations.⁹ The two seats re-

7 Cf. para. 74, *European Parliament resolution on the communication from the Commission to the Council and the European Parliament on the EU approach to the WTO Millennium Round* (COM(1999) 331 - C5-0155/1999 - 1999/2149(COS)), A5-0062/1999.

8 *Call for establishment of Standing Body of Parliamentarians Representing All Member Countries by the Parliamentarians attending the Third Ministerial Conference of the World Trade Organization*, Seattle, 2 December 1999.

9 Representatives came from the following countries and organisations: Belgium, Canada, China, Egypt, Finland, France, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Mauritius, Mexico, Morocco, Namibia, Netherlands, Niger, Nigeria, South Africa, Thailand, Uruguay, United States of America, Inter-Parliamentary Union, European Parlia-

served for the United States are still vacant. I do hope that colleagues from the US Congress will join the Steering Committee in the future.

The European Parliament created its own Steering Committee. Five members were chosen to manage the process on behalf of the Parliament. At this stage, the European Parliament and the IPU co-finance the meetings and publications to a certain degree.

After Doha, the Steering Committee met twice in 2002 to prepare the Parliamentary Conference in February 2003 in Geneva. The latter was attended by around 300 parliamentarians from 76 countries and by representatives of five multinational parliaments. It was decided to meet regularly and during Ministerial Conferences.

Alongside the fifth Ministerial Conference, a Parliamentary Conference was held in Cancun in September 2003, which was jointly organised by the EP and the IPU in co-operation with the Mexican Congress. For the first time, the final declaration included substantial statements on several key topics of the Doha negotiating round, including agriculture, TRIPs and access to medicines, as well as GATS negotiations. These topics had been prepared by rapporteurs, who presented their conclusions and also summed up the following debate.¹⁰ Just like in the actual WTO negotiations, the debate among the 350 parliamentarians present was very controversial. Due to the requirement to approve the final declaration by consensus, it proved to be difficult to find compromise language on some of these issues.

The final declaration was presented by myself since I had written the draft text in co-operation with members of the Mexican Congress, the IPU Secretariat, as well as one of the vice-presidents of the European Parliament.

(contd.) _____

ment, Parliamentary Assembly of the Council of Europe, World Trade Organization. See [<http://www.ipu.org/splz-e/trade03.htm#postdoha>].

10 The rapporteurs were Mr. Kharabela Swain, MP (India) on trade in agriculture, Mr. Jean Bizet, MP (France) on TRIPs and public health, and Mr. Kimmo Kiljunen, MP (Finland) on trade in services.

The European Parliament and the IPU are the main drivers of parliamentary involvement. Considering the different histories, functions, structures and decision-making procedures of the two organisations, it is more than understandable that the co-operation has not always been without difficulties. Political problems occasionally also arose from the lack of congruence between the respective memberships of the IPU and the WTO. Most prominently, Taiwan is a member of the WTO as a Separate Custom Territory without being a member of the IPU. Vice versa, Iran is a member of the IPU but not of the WTO. Some WTO members are even lacking a parliament or it is suspended.

I would suggest that as long as the parliamentary dimension to the WTO is not formally established, one should strive to achieve pragmatic solutions to the non-congruence problems.

IV. What Can Be Done to Improve Parliamentary Involvement in the WTO?

The “Parliamentary Conference” has repeatedly called on the respective governments to add the following paragraph to the respective final declaration of the Ministerial Conference: “Transparency of the WTO should be enhanced by associating parliaments more closely with the activities of the WTO.”¹¹

Two main schools of thought have emerged in the debate.¹² One approach is to establish, in the long term, an assembly called a “standing body of parliamentarians,” which would be formally

11 E.g. para. 13, Final Declaration of the Cancùn Session of the Parliamentary Conference on the WTO, adopted the 12 September 2003.

12 See Kobsak Chutikul, “Options for a parliamentary dimension of the WTO,” in *Parliamentary Conference on the WTO 17-18 February 2003*, Inter-Parliamentary Union and European Parliament (ed.), Geneva, 85 *et seq.*; See also Steve Charnovitz, “Trans-Parliamentary Associations in Global Functional Agencies,” *Transnational Associations*, 2/2002, p. 88-91; Pascal Lamy, *Global Policy without Democracy?*, Conference on the Participation and Interface of Parliamentarians and Civil Societies for Global Policy, Berlin, 26 November 2001; Gregory Shaffer, “How Can Parliamentary Participation in WTO Rule-Making Be Made more Effective? The US Context,” above, p. 57.

linked to the WTO. The second approach is to establish a network-like forum and to work with the WTO through existing structures such as the European Parliament and the IPU. This would avoid creating yet another inter-parliamentary structure needing substantial financial resources.

There are certainly many other possible scenarios. One certainly should look at options for parliamentary involvement with a sense of realism. I believe that at this stage, it is less important to know the exact and precise character of the parliamentary dimensions to the WTO. Institutions tend to evolve over time. There are many examples—the European Parliament is one of them—where parliamentary assemblies initially dubbed as just another “talk shop” have developed into important political players. The political priority at present should therefore be to establish an interparliamentary forum on a permanent basis which is as close as possible to the WTO.

One should keep in mind that a formal assembly linked to the WTO would require consent of all 146 WTO members, which is clearly lacking. For this reason, it appears that a consensus is now emerging to continue walking down the road that the process is already taking. The inter-parliamentary process for the WTO should evolve around regular meetings held initially once a year and on the occasion of WTO Ministerial Conferences. These meetings would be open to all parliamentarians involved in activities dealing with international trade. No formal membership in terms of countries or individual MPs are necessary. The task of inter-session political administration should be assured by a Steering Committee composed of parliamentary representatives according to a geographical caucus.

There are, however, some issues calling for clarification and improvement in the short run. As a priority, formal channels of communication and forms of co-operation with the WTO should be developed. Moreover, the function and modalities of the parliamentary meetings could be reviewed and specified, taking also into account the institutional evolution of the WTO.

To improve scrutiny over national trade policies, the Parliamentary Conference to the WTO could craft minimum standards for

the information and consultation of national parliaments in trade policy. A comparison of best practices should inform these recommendations. Another useful suggestion aiming at the same objective has been made at the Cancùn meeting. An “international trade day” could be held once a year in all national parliaments in order to increase awareness of trade issues. Sadly, this proposition was not accepted by the plenary at the Cancùn meeting.

V. Conclusion

The process of creating a transnational network of parliamentarians specialising in trade issues is well on its way. Of course, obstacles remain on the road and will have to be overcome. A fundamental legal problem is to clarify the question of how to maintain the principle of separation of powers between WTO members' executive and legislative branches. What actually happens if parliamentarians from a given country say exactly the opposite of what their government's position is? In countries where parliaments retain far-reaching competencies in the field of trade policy, this may leave government negotiators in an awkward situation. The United States is a case in point. With the extension of its competencies in the draft Constitution for Europe, the European Parliament may soon have the same problem.

The Doha-Round has suffered a severe shock in Cancùn. Efforts must now focus on getting the WTO process back on track. The process of parliamentary involvement appears to be easier to predict. A post-Cancùn Steering Committee has been nominated, which will meet in early 2004 in Geneva to prepare the next Conference scheduled to take place in Brussels in autumn 2004.

A Few Thoughts on Legitimacy, Democracy, and the WTO

by

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I am fortunate in having the benefit of a unique combination of experience. I am the only person who has had the privilege of serving as a trade negotiator in the Office of the United States Trade Representative, as a Member of the Congress of the United

* James Bacchus is the youngest Member, the longest serving Member, the only North American Member, and the only remaining original Member of the global tribunal, which hears final appeals in international trade disputes involving the 95 percent of world commerce conducted by the 146 countries and other customs territories that are Members of the WTO. Bacchus is a former Special Assistant to the United States Trade Representative in the Executive Office of the President. He is also a former member of the Congress of the United States, from Florida. He served two terms in the U.S. House of Representatives before choosing not to seek re-election in 1994. In 1995, he was appointed by the Members of the WTO to the Appellate Body. Bacchus received a Bachelor of Arts degree from Vanderbilt University, Magna Cum Laude and Phi Beta Kappa, with High Honors in History. He received a Master of Arts degree from Yale University, where he was a Woodrow Wilson Fellow in History. He was graduated with High Honors from the Florida State University College of Law, where he was Editor-in-Chief of the FSU Law Review. He was recently named to the law faculty as a professor of law at Vanderbilt University Law School. These are his personal views, and are not the views of his colleagues on the Appellate Body or the official views of the WTO.

States, and also as a Member of the Appellate Body of the World Trade Organization.

This unique combination of experience gives me the benefit also of a unique perspective. I have shared at different times in my life the different points of view of, first, those trying to conclude international trade agreements in the executive branches of states; then, later, those trying to affect international trade agreements in the legislative branches of states; and now, most recently, those trying to help uphold international trade agreements in the “quasi-judicial” branch of an international institution comprised of states. So I am able to see, uniquely, from the differing perspectives of them all.

What does this unique personal perspective tell me about the “legitimacy” of the WTO? What does it tell me about the “democratic governance” of the WTO? And what does all it tells me in answer to these questions reveal to me about how much the world understands the role of the WTO as an international institution?

Above all, the unique vantage point of my unique perspective shows me that there is too little understanding in the world of the essential “legitimacy” of the WTO, and of the extent of the “democratic governance” that already prevails in the WTO. It shows me that there is too little understanding in the world about what the WTO really is, and about how it really works. Regrettably, this is so even among many of those who are in important positions of responsibility in the world, and who thus might be expected not only to know better, but also to help encourage a better understanding in the world of the reality of the WTO.

There are many examples of this lack of understanding. Perhaps foremost among them is the mistaken, but widespread, notion that the WTO is some “illegitimate” global entity that is somehow separate and apart from the various individual “nation states” of the world, and that aspires in some vague way to an overarching global dominance. A corollary of this mistaken notion is the equally widespread view that the WTO can attain global “legitimacy” only by eliminating a perceived “democratic deficit.” From this basic misunderstanding about the basic nature of the WTO

have emerged many of the concerns about the WTO that have been heard from protesters, from pontificators, and even from quite a few legislators in the ongoing debate about the “globalization” of the world.

The truth is, the WTO is not some “illegitimate,” self-aggrandizing global suzerain that seeks in some sinister and mysterious fashion to impose its arbitrary will on the sovereign nations of the world. Far from it. The truth is not nearly so melodramatic. The truth is simply this. The WTO is only a label. The WTO is only the name that the vast majority of the sovereign nations of the world have chosen to use to describe their shared efforts to work together to lower barriers to world trade and to increase the flow of world trade. The WTO is nothing more nor less than—at last count—146 sovereign countries and other customs territories working together as something they themselves have chosen to call “*the WTO*.”

Yes, there is a place called “the WTO.” There is a world-wide headquarters for “the WTO” in a lakeside building in Geneva, Switzerland. There are several hundred people from all over the world who work there. About half are translators. About half of the rest are clerical workers. The remainder are lawyers or economists or international civil servants of some other technical sort who work for “the WTO.” I am one among them.

Altogether, the entire administrative endeavour of the WTO costs the 146 Members of the WTO a total of about \$80 million annually. Of this sum, about \$15 million is paid in annual dues by one WTO Member, the largest trading nation in the world, the United States of America. This amount reflects an annual calculation of the American share of overall world trade. This is a lot of money. But, in global terms, and in terms of the American federal budget, it is a pittance. In my own experience, I used to obtain, on a good day, more than \$15 million for a federal appropriation for a new road or a new bridge in my Congressional district in Florida when I was a Member of the Congress of the United States.

If numbers of personnel and amounts of financial resources are any measure, then the WTO is hardly the global juggernaut that

appears so ominously in the heated speeches of “anti-global” activists. The entire annual budget of the WTO is less than the annual travel budget of the International Monetary Fund, and it is considerably less than the annual budgets of a number of the well-funded global “non-governmental organizations” that sometimes seem so apprehensive of the WTO. Even so, apprehension remains in much of the world about the global role of the WTO, and about who and what those of us who work for the WTO are truly working for.

There is no need for such apprehension. The several hundred of us who work for “the WTO” do not work for ourselves, or for some expansive global entity that is accountable and answerable only to itself. In all we do every day, we work *exclusively* for the 146 Members of the WTO. We work *only* for what they work for. We do *only* what they *agree* we should do. We are simply the agents of their shared will as expressed by consensus in the “Member-driven” institution that is “the WTO.”

The source of the “legitimacy” of the WTO is the Members of the WTO. The “legitimacy” of the WTO is a “legitimacy” that derives from, and is inseparable from, the *individual legitimacy* of each of the individual “nation-states” that, together, comprise “the WTO.” Far from being an effort to subvert the sovereignty of individual states, the WTO is, rather, a mutual effort by individual states to assert and to sustain their sovereignty in an effective way in confronting the many challenges that face individual states in an increasingly “globalized” economy.

There is, therefore, “democratic governance” of the WTO to the extent that the individual states that comprise the WTO are democracies. And, the fact is, the vast majority of the Members of the WTO *are* democracies. They have representative governments that are chosen by their citizens in free and democratic elections. The delegates to the WTO who assemble in Geneva and elsewhere in the world to make decisions as “the WTO” have been appointed by the elected leaders of those governments in accordance with their own domestic traditions and their own democratic institutions.

I would be the last to contend that the “nation-states” of the world are as democratic as they should be. I know of no one involved with the WTO who would. But this should not obscure the fact that gains for democracy have been made throughout the world in recent years. Nor should it blind us to the reality that many of those recent gains for democracy are reflected in the membership of the WTO, even as they are reflected in the membership of the United Nations and other international institutions.

I, for one, would argue that, in part, the recent gains for democracy are a consequence of the recent gains from trade. And I, for one, would argue also that still more gains for democracy can be made if we make still more gains from trade. This is an important part of what must be understood more fully about the WTO.

Unquestionably, there is more that can and should be done to help ensure “democratic governance” of the WTO. Unquestionably, for example, there are additional gains for democracy that can be made in how the Members of the WTO deliberate on trade issues and in how they decide on trade agreements in their ongoing work *within the WTO*. There are numerous additional improvements that can and should be made in the ways the Members of the WTO work together toward building a worldwide consensus as “the WTO.” On this, the Members of the WTO agree. Indeed, the Members of the WTO are busy trying their best right now to make some of those needed improvements.

But, from my perspective, the most pressing issues of “democratic governance” relating to the WTO are not in the day-to-day work within the WTO. From my perspective, the “democratic deficit” relating to the WTO that demands the most attention is, instead, the shortfall from the fullest measure of representative democracy that persists within some of the individual states that comprise the WTO. To the extent that the individual states that are the Members of the WTO become more truly democratic, and to the extent that those individual states are more democratic in the making of their own domestic trade policies, the combined efforts of those individual states in their combined capacity as *the WTO* will be more truly democratic as well.

Despite all the misplaced apprehensions about the WTO, the reality is that the WTO is not in any way a threat to sovereign, individual democratic states. Quite the contrary. The WTO is a shared effort by sovereign states to assert their continued sovereignty. The very idea of individual states is premised on a world in which there can be *independence*. In contrast, our increasingly “globalized” economy is a consequence of a world in which there is, increasingly, *interdependence*. The WTO is a shared effort by the sovereign Members of the WTO to make continued political *independence* meaningful within the context of increased economic *interdependence*. The success of the WTO, thus far, is encouraging evidence of their shared success in doing so.

From my perspective, derived from my varied experience, the notion that there has been a marked decline in the significance of individual “nation-states” in the world has, like the rumoured death of Mark Twain, been greatly exaggerated. The noted American theorist of international political economy, Robert Gilpin, has made this same point, and has concluded that, “For better or worse, this is still a state-dominated world.”¹ The WTO is one example that supports this conclusion. In the face of “globalization,” the WTO is an international assertion by individual states that individual states remain the most significant “political actors” in the world. As I see it, the success of the WTO makes sovereign states stronger, not weaker. It proves that independence is still possible for sovereign states in an increasingly interdependent world.

If this is so, then how best can the continued significance of individual states be asserted in their combined efforts as “the WTO” in a way that is consistent with “democratic governance”? One obvious way is by doing more to ensure that the actions of Members of the WTO *as the WTO* reflect the democratic will of the world’s peoples as manifested not only in the *executive* branches, but also in the *legislative* branches, of the many democratic governments of WTO Members. And one important way

1 Robert Gilpin, *Global Political Economy: Understanding the International Economic Order*, Princeton and Oxford: Princeton University Press, 2001, 363.

of doing this is by involving more individual legislators within individual states in a more effective way in the making of the national trade policies that are ultimately transformed by international trade negotiations into international trade agreements.

How best can individual legislators within individual states, as the elected representatives of the citizens of those states, be given such a say? Here, I confess, the “American” in me shows through in my personal perspective. For it seems to me that the best way of assuring legislators around the world of more say in shaping the WTO-based world trading system is the way that has long been followed by the United States of America. The “American model” of ensuring that the legislative voice is heard and is reflected in the national executive expression of trade policy has long given American legislators a strong and effective voice in the making of America’s trade policy, and, in my view, is well worth emulating in other parts of the world.

The American model is a logical consequence of the Constitution of the United States of America. Under the United States Constitution, the executive branch of the United States government has certain treaty-making and other constitutional authority to conduct foreign policy.² Likewise, under the Constitution, the legislative branch of the United States government has constitutional authority “to regulate commerce with foreign nations.”³ These constitutional authorities overlap, and, over time, the executive and the legislative branches of the United States government have succeeded in working out ways to work together effectively in the shared exercise of their respective constitutional authorities.

These American ways of working together enable the Members of the Congress of the United States to have their necessary constitutional say in the making of international trade policy, and in the concluding of international trade agreements. They are consistent with American democratic traditions, and with the

2 Article II, Constitution of the United States of America.

3 Article I, Section 8, Constitution of the United States of America.

basic constitutional integrity of American institutions. They are also, for the most part, highly effective in asserting America's interests in international trade. Not least, they are effective in asserting those interests in a *democratic* way that helps ensure "democratic governance."

Specifically, there are a number of statutory and other mechanisms in the United States that make this possible on a continuing basis. The Office of the United States Trade Representative is one important example. By statute, the USTR answers to both the President and the Congress. The statutory delegation by the Congress of "trade promotion authority" to the President is another example. The ability of the President to negotiate international trade agreements is constrained by the extent of the authority the Congress delegates to the President to do so. The recent creation of the new "Congressional Oversight Group" by the Congress in the Trade Act of 2002 is the latest example.⁴ The new "Congressional Oversight Group" is the newest of many statutorily-mandated means of ensuring ongoing executive consultation with the legislative branch of the United States government on issues relating to international trade.

Admittedly, the American model of legislative involvement in the ongoing efforts of the executive branch to conclude specific trade agreements and to implement overall trade policy is precisely that—an "American" model. It is uniquely American. This model has emerged from the uniquely national circumstances of national institutions in the United States. Moreover, Americans are not alone in such democratic endeavours. Many other Members of the WTO have domestic practices that are equally democratic. Nevertheless, these American practices are, from my perspective, proven examples of effective ways for legislators to help ensure "democratic governance" in the making of national and, ultimately, international trade policymaking, and, as such, are worthy of consideration by other Members of the WTO when

4 Trade Act of 2002, Public Law Number 107-210, Section 2107, 116 Statutes 933 (August 6, 2002).

making their own sovereign choices about how best to govern their own democratic participation in the WTO.

Other suggestions have been made by others. Some of these suggestions may also be worthy of consideration. Should the elected national legislators of the Members of the WTO spend more time in Geneva and elsewhere learning about what the WTO really is, and about how it really works? Certainly. Should elected national legislators from different Members of the WTO get together more often to get better acquainted, and to talk about better ways their countries can work together as Members of the WTO? Of course. Should the Members of the WTO continue to try to enhance “democratic governance” and to ensure the effectiveness of “democratic governance” within the elected councils of the WTO? Surely they must.

However, to my mind, the principal focus of efforts to improve the “legitimacy” of the WTO-based trading system by increasing the “democracy” in international trade policymaking should *not* be on creating any new international mechanisms to supplement those means that already exist, and that are already in the process of being improved within the WTO. Rather, the principal focus of those efforts should be on ensuring more “democratic governance” of national trade policymaking through more effective domestic mechanisms of “democratic governance” within the national governments of the individual states that are the Members of the WTO.

Such efforts will vary with the varying uniqueness of national circumstances and national institutions. But common to them all, in my perspective, can be some of the basic aspects of the American model of ensuring national legislators a larger say in the making of trade policy at the *national* level. This larger say *nationally* can then be reflected *internationally* in the expression of national trade policies by national delegates of WTO Members in their international deliberations as the shared international enterprise known as “the WTO.”

WTO Cosmopolitics

by

Steve Charnovitz*

In early 2001, European Commissioner for Trade Pascal Lamy gave a noted lecture at the London School of Economics entitled, “Harnessing Globalisation: Do We Need Cosmopolitics?”¹ Lamy explained that better global governance requires a system which provides for inter-connections between governments, markets and civil society. He further suggested that non-governmental organizations (NGOs) and civil society can contribute to legitimization by fulfilling a demand for new social intermediaries, which is simply not provided elsewhere. Reflecting on the globalization debate, pre-September 11, Lamy opines that the term “governance” connotes too much control, and instead offers the term “cosmopolitics.” With reference to the short-term challenges for the World Trade Organization (WTO), he points to the idea of pulling on cosmopolitical constituencies for support.

Lamy’s lecture inspired new thinking about the role of cosmopolitics generally and in the WTO. In the article “WTO Cosmopolitics,” I sought to build on Lamy’s speech by tracing the

* The views expressed are those of the author only. Thanks to H. E. Ambassador Julio A. Lacarte for being the commentator on this paper, and to Merit Janow for helpful suggestions, which she provided before being appointed to the Appellate Body.

1 <http://www.lse.ac.uk/collections/globalDimensions/lectures/harnessingGlobalisationDoWeNeedCosmopolitics/transcript.htm>.

history of the cosmopolitan idea in international law, by identifying the eight ways in which cosmopolitics is manifested, and by advocating a thicker cosmopolitics in the WTO in order to make that body more effective in liberalizing trade.² What follows in this report are my own views, and should not be attributed to Commissioner Lamy.

I. Our Cosmopolitical WTO

If conventional politics is the idea that unitary states each speak with one voice, and that the only relevant players in the trading system are the voices of the 146 WTO Members, then surely conventional politics in that pure form no longer exists in the WTO. Today, more than ever before, the governmental delegates to the WTO are looking outward, to situate negotiations about trade within a world constitutive process. For example, in June 2003, the WTO Secretariat held a three-day public symposium to examine the challenges on the road to Cancun. At the symposium, WTO Director-General Supachai Panitchpakdi announced that he had set up an informal Business Advisory Body and an NGO Advisory Body.³

In 1969, Professor John Jackson could write that even though the General Agreement on Tariffs and Trade (GATT) has “an immense impact on the individual citizen, there is presently no *direct* relationship between GATT and such private persons.”⁴ The same point could have been made in 1979, and in 1989.

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- 2 Steve Charnovitz, “WTO Cosmopolitics,” *New York University Journal of International Law and Politics*, Vol. 34, 2002, at 299, available at: <http://www.nyu.edu/pubs/jilp/main/issues/34/h.html>. One way in which cosmopolitics is practiced is issue alliances among governments. See Ed Taylor, “Brazil, India, South Africa Join to Foster Trade, Possible WTO Bargaining Positions,” *BNA Daily Report for Executives*, 11 June 2003, at A-5.
 - 3 Daniel Pruzin, “WTO Chief Sets up Advisory Bodies with Business, NGOs to Boost Dialogue,” *BNA International Trade Reporter*, 19 June 2003, at 1044.
 - 4 John H. Jackson, *World Trade and the Law of GATT*, 1969, at 187.

But during the 1990s, the traditional insularity of the GATT / WTO ended. Cosmopolitics came to the WTO—most painfully at Seattle in 1999. Cosmopolitics came to the WTO because the public and NGOs began to see how emerging trade law affected numerous social, environmental, development, cultural, and ethical concerns. NGOs were not willing to leave these matters to trade technocrats, and were not willing to assume that the representatives of the Members could find the optimal solutions on their own.

The discussion here focuses on the WTO rather than its constituents. That is, to what extent does the WTO currently embrace cosmopolitics, and what more should be done? Let me briefly highlight some of the most important developments since 1995:

- Using its authority in Article V:1 of the Marrakesh Agreement, the WTO General Council has pursued and accepted co-operation with other intergovernmental organizations, such as the UN Food and Agriculture Organization (which has observer status).
- Using its authority in Article V:2 of the Marrakesh Agreement, the WTO has increased consultation and co-operation with NGOs. For example, the WTO Secretariat posts new NGO position papers periodically on the WTO website.⁵ In April 2001, the WTO joined the World Health Organization, the Norwegian Foreign Ministry, and Global Health Council (an NGO) to hold a workshop on affordable drugs.⁶ In September 2003, NGOs around the world will be getting accreditation to be observers at the forthcoming Ministerial Conference in Cancun.
- In 2001, WTO member governments agreed at Doha to express a commitment “to making the WTO’s operations more transparent, including through more effective and prompt dissemination of information, and to *improve dialogue with the public*” (para. 10) [emphasis added].

5 See http://www.wto.org/english/forums_e/ngo_e/pospap_e.htm.

6 See http://www.wto.org/english/tratop_e/trips_e/tn_hosbjor_e.htm.

- The WTO has achieved a great deal of transparency in its own operations, particularly through its website. For instance, many documents are downloadable on a timely basis, including now the *Trade Policy Reviews*. A current calendar of WTO meetings is provided. The value of this free public access is enormous. Just to give one example, anyone with internet access in any part of the planet can read and download freely the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) from the WTO website in at least three languages. We have gotten so used to such access that it may sound trivial. But I would invite the reader to go to the website of the International Civil Aviation Organization (ICAO) and try to download a copy of its founding Convention.
- The WTO Secretariat works hard at improving public understanding of the WTO and its processes. Everyone from the trade neophyte to the trade expert can learn a lot by spending 30 minutes periodically perusing the WTO website and looking at “WTO News,” “Trade Topics,” the “Community / Forums,” etc. The availability of such information not only better informs interested individuals, but also enhances the accountability of the WTO to governments and to the market. Recently, the new *Global Accountability Report* gave the WTO high marks for its website and overall accountability.⁷
- WTO Director-General Mike Moore established a public advisory committee, and recently Director-General Supachai Panitchpakdi has set up a private committee to prepare a report on the challenges and opportunities facing the WTO.⁸
- The WTO Appellate Body has ruled that panels and the Appellate Body may consider *amicus curiae* briefs.⁹ In that

7 <http://www.oneworldtrust.org/Ch99/htmlGAP/report/report.htm>.

8 WTO, “WTO Director-General Establishes a Consultative Board on the Future of the Multilateral Trading System,” WTO Presse/345, June 2003.

9 See Pierre-Marie Dupuy, “Sur les rapports entre sujets et ‘acteurs’ en droit international contemporain,” in L. C. Vohrah *et al.* (eds.), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, pp. 261, 274, 2003.

one respect, the WTO is ahead of most other international tribunals.

- In at least two instances, WTO dispute panels have sought information from the World Intellectual Property Organization which has responded.¹⁰

This report intentionally starts with the good news in the hope of orienting the conversation toward the future and making it pragmatic. Let us take as a baseline the current openness of the WTO, and the trends in other organizations, and ask whether greater transparency and non-governmental¹¹ participation would be good for the trading system. The emphasis here on transparency and the non-governmental role, as two important dimensions of cosmopolitics, reflects the Kantian tradition in international law.

II. Improving WTO Transparency

The WTO needs to do much more to improve transparency. Let me begin with transparency at the national level before discussing the WTO level.¹²

One of the least known and most positive features of WTO law are the rules requiring national governments to manifest transparency through procedures for notice and comment.¹³ In the years since the Uruguay Round, the value of such “good governance” provisions has become better understood as a driver of development and equity. Issues of transparency are again on the agenda in the Services negotiations of the Doha Round.

10 This occurred in United States – Omnibus Appropriations Act of 1998 and United States – Section 110(5) of the US Copyright Act.

11 Certainly, greater governmental participation would also be good for the WTO.

12 This paper does not discuss the vital issue of internal WTO transparency, that is, the transparency of WTO decisionmaking to the governmental members.

13 These provisions build on GATT Article X which requires publication of trade regulations.

The WTO could strengthen requirements on member governments to provide more information to the public and to the WTO. Let me give one example on a substantive topic of WTO law that loomed important in the past ten years—that is, Article XX of the GATT, which provides General Exceptions. In 1969, Professor Jackson made the interesting suggestion that governments be required to report all instances where regulations are utilized when those restrictions are consistent with GATT only by virtue of Article XX.¹⁴ Recognizing as we do today the delicacy of litigating the Article III and XX interface, we would probably not want to phrase the notification requirement in that exact way. Nevertheless, Professor Jackson was surely right in contending that more information about such measures would help governments bring more order to international trade.

Although the WTO imposes many rules for reporting and transparency by WTO Members, the WTO treaty does not reflexively impose similar requirements on the WTO itself. The WTO constitution does not posit openness and transparency as a fundamental value of trade law nor does it state that individuals have any *right* to information. The one semi-exception occurs in Annex 3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which states an obligation of a Member (upon request by another Member) to provide a non-confidential summary of its submission that could be disclosed to the public. So far, the experience under this rule has been disappointing. It has not led to significantly greater disclosure of submissions to panels.

Even without a constitutional commitment to transparency, the WTO can and should take legislative action to open up more to civic society. The two main reasons for doing so are that openness enhances legitimacy and that openness can help to build public support for the WTO's mission. Social and economic actors need information in real time about what the WTO is doing if these private actors are going to be able to influence governments.

14 Jackson, *supra*, note 4, at 744.

Here is one possible program to enhance openness:

- Rules are needed to strengthen protection for business confidential information.
- Other categories of WTO secrecy should be defined and instituted as needed.
- Otherwise, all other WTO documents should be publicly available. Recently, I read that the Chairman of the Special Session of the Dispute Settlement Body had prepared a Chairman's Text, denoted "JOB(03)91." That document is not available on the WTO website, however, and an email I sent to the WTO Enquiries Office asking for a copy went unanswered.¹⁵ A similar problem occurred at the Doha Ministerial Conference where none of the negotiating documents were made public until the negotiations had ended. The only logic to such a policy would be to keep the public from knowing what lawmaking is going on until it is too late to influence it.
- Written submissions to panels should be posted on the WTO website by the Secretariat.
- Observers should be permitted to watch proceedings of the WTO General Council and the Dispute Settlement Body.

The above current list does not include opening sessions of WTO panels to the public. The US government has made this proposal, but it has drawn little support from other governments. The proposal of the European Communities of March 2002 was a bit more cautious; it would allow the parties to decide whether certain parts of a panel or Appellate Body proceeding should be open to the public. Such a change would reverse the rule in DSU Appendix 3, which states that the panel shall meet in "closed session." The EC proposal would have been an interesting experiment. While on this subject, I should note that the US-Singapore Free Trade Agreement provides that unless the parties otherwise agree, a dispute panel will hold at least one public hearing (art. 20.4[4d]). (This is an example of the way in

¹⁵ Of course, the document was immediately available to subscribers of World Trade Online, to which I have access both at my law firm and at the law school where I teach.

which bilateral trade agreements can offer opportunities for policy experiments not possible in Geneva.)

III. Enhancing Participation in the WTO

As noted above, the Marrakesh Agreement provides for consultation and co-operation with NGOs. This provision mirrors a similar provision in the 1948 Charter of the International Trade Organization. The designers of the post-war trading system anticipated that there would be space for NGO participation, and yet that vision of a competition culture has not been fulfilled.

The advocates of NGO participation sometimes undermine their cause by claiming that NGOs can boost the representativeness of the WTO. Many of the WTO ambassadors have found that baffling because they do not see how the NGOs can improve on the official representatives of governments. Instead, the NGO community should not promise more than they can deliver. The value-added from NGOs is not really enhanced representation in Geneva.¹⁶ Rather, it is that NGOs can inject new energy, ideas, and values that may help to improve decision-making in the WTO. NGOs proposals can improve the market of ideas that undergirds the WTO. NGOs' also provide a mechanism for an individual to influence other governments beyond her own. Such transnational politics is especially important in the WTO given its consensus decision-making rule in which one foot-dragging government can impede the entire Organization.

Thus, in terms of the analytical framework employed for this Conference, the value of NGOs for the WTO is not so much that they may enhance the "input legitimacy" of the WTO, but instead that NGOs can enhance "output legitimacy" by leading to better, more effective intergovernmental decisions. By de-emphasising the issue of who NGO spokespersons represent, we can avoid

16 The WTO Secretariat has stated that "Citizens are expected to be represented at the WTO through their governments." WTO, *WTO Policy Issues for Parliamentarians*, May 2001, at 14, available at: https://secure.vtx.ch/shop/boutiques/wto_index_boutique.html.

the fruitless (yet currently popular¹⁷) efforts to vet NGOs so as to examine who their members are and where their funding comes from. International organizations should not care whether an NGO has 100 members or one million. Counting is for votes. Ideas are weighed not by how many people hold them, but rather by their scientific or philosophical merit.

Three participants in the international system are: (1) intergovernmental organizations, (2) parliamentarians, and (3) NGOs. All three should gain a greater participatory role in the WTO.

1. Intergovernmental Organizations

Functional international organizations make progress through specialization, but are vulnerable to tunnel vision. That's why it is important for international organizations to work closely with each other. The WTO is much better at this than was the GATT, but more co-operation would be beneficial.¹⁸

Let me give one example. In April 2003, the WTO Secretariat released a "Special Study" titled "Adjusting to Trade Liberalization."¹⁹ One chapter of the report was about how "Government can facilitate the adjustment process," and this chapter contains several pages of interesting information about social safety nets, labour markets, education and training, export promotion, etc. WTO attention to the difficult challenges of adjustment is certainly appropriate. Yet one wonders why the Secretariat sought to reinvent the wheel rather than work with the functional international organization with expertise in worker adjustment, the International Labour Organization (ILO)? Did the WTO Secretariat not know that the ILO has a comparative advantage on worker issues?

17 Recently, three new publications have been launched to report on NGOs. They are: *NGO Monitor*, *NGO Watch* and *NGO Watch Digest*.

18 See Gary P. Sampson, "Is There a Need for Restructuring the Collaboration among the WTO and UN Specialized Agencies so as to Harness their Complementarities?", below, p. 279.

19 WTO, *Adjusting to Trade Liberalization*, Special Study No. 7, 2003.

2. Parliamentarians

Elected parliamentarians are a growing and important part of cosmopolitics. This volume contains a separate paper on that.²⁰

3. NGOs

Greater NGO participation could help make the WTO more effective and would, at the very least, enhance the voices of developing countries at the WTO. A full implementation of Article V:2 would provide for accreditation of NGOs and for observer status in some of the WTO Committees, Bodies, and Councils. Many models exist for how this could be done in United Nations practices, and in the 80 years of experience of NGO participation in intergovernmental organizations in Geneva. One possibility is an Advisory Economic and Social Committee, as proposed in the International Law Association.²¹ Another possibility would be to convert the new advisory committees appointed by the Director-General into official advisory committees to the WTO.

My own preference is that international NGOs be mainstreamed into the WTO's functional committees and bodies. For example, development NGOs might be invited to observe the Committee on Trade and Development, food safety and agriculture NGOs might be invited to the Committee on Sanitary and Phytosanitary Measures, transparency and consumer NGOs might be invited to the Working Party on Domestic Regulation. For the first two-year cycle, the role of the NGO might be purely observational, but once governments gain more confidence, opportunities could be provided for NGOs to make presentations.

20 See Gregory Shaffer, "How Can Parliamentary Participation in WTO Rule-Making Be Made more Effective? The US Context", above, p. 57.

21 Ernst-Ulrich Petersmann, "Constitutionalism and WTO Law: From a State-Centered Approach Towards a Human Rights Approach in International Economic Law," in Daniel L. M. Kennedy and James D. Southwick (eds.), *The Political Economy of International Trade Law* 32, 62–63, 2002.

IV. Conclusion

This author wishes that he could be more optimistic that the WTO would act soon to improve external transparency and participation. Unfortunately, two barriers exist: One is the de facto consensus decision-making rule. The other is the fact that many WTO Member governments are not democratic, and therefore may not share the values of transparency and participation.

At the Conference in Florence in June 2003, one of the senior ambassadors present cautioned the participants to avoid “wishful thinking.” Injecting a dose of realism into a policy discussion is always a good idea, and led me to reflect on whether it is merely wishful thinking that NGOs participation will promote free trade and increase public support for the WTO. Perhaps it is.

Even so, such an effort seems worth trying because the advocates of free trade have the more intellectually honest case to make.

Two trends of the past few decades point to a need to refine our understanding of transgovernmental organizations. One is the ever-expanding need for international co-operation. The other is the deeper rooting of democratic expectations throughout the world. As a result, the challenge for all international organizations will be to better connect the decision-making of the organizations to the democratic processes in each country. In an era where cosmopolitics will be ascendant, the WTO cannot be aloof. It should continue down the path of expanding transparency and public participation.

Transparency, Public Debate and Participation by NGOS in the WTO: A WTO Perspective

by

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Diplomacy and international negotiations have traditionally thrived on discretion and secrecy; indeed, they could not exist if they were deprived of them. Habits become deeply ingrained for career diplomats, and successive generations of negotiators throughout the world became accustomed to carrying on their business far from prying eyes. Indeed, there was little demand outside of the governing sphere to know more of these activities, and public opinion as we know it today had little interest in becoming better acquainted with foreign affairs.

In historical terms, it was but yesterday that the proposal for open agreements openly arrived at, threatened to shake old and cherished practices to their foundations. All this has changed. Today, we all want to know all about these things, in greater detail the better.

Partly due to the conditions surrounding its establishment—a small membership with a substantial number of influential countries pursuing essentially parallel objectives, delegates who in the main knew each other intimately, and the fact that it was a trade agreement being provisionally applied with the ensuing uncertainty as to its permanence—GATT functioned for many

years sheltered from the public gaze. It was essentially run by trade mandarins who were experienced in diplomacy and economic relations. Ministerial meetings were few and far between. All in all, closeness was the rule.

For lengthy periods, minutes of meetings were undecipherable for the uninitiated, since they did not identify the speakers; and other times there were no adequate minutes, as for example as recently in the Uruguay Round. A good bit of dispute settlement today in the WTO would be simpler if only negotiators had set out clearly their intentions, in the black and white of agreed minutes, during the Round.

This is the negotiating culture inherited by the WTO, whose extent and importance today it would be both rash and difficult to under-estimate. Procedures and habits built up over more than half a century do not disappear overnight; and they tend to perpetuate themselves, specially when change often calls for approval by a consensus of the membership.

Let us endeavour to put the question of openness in the WTO, in a reasonable perspective. Recently, citizens of the world were able to follow on live television and radio, United Nations Security Council discussions and a number of national parliamentary debates, on the issue of Iraq. Here, the question was of war and peace, of life or death, of possible material destruction and social suffering. Nobody seems to have objected to the publicity surrounding differing and even confrontational governmental positions and policies. And rightly so.

Responsible people want to know, they need to know, what is happening in the world and how their governments are behaving. This is part—a big part—of the spread of democracy. As globalisation brings us closer together, so information on international relations increases in importance. Educational levels advance, access to information is made massively available, and larger and larger numbers of citizens feel they should participate in some way in events which, they increasingly realise, shape their lives.

This growing awareness is something new because of the widening scale in which it occurs. Needless to say, the extraordinary increase in the number and significance of NGOs is one way in which these demands for information are being met.

So, should the WTO—and other inter-governmental organisations—stick to existing practices, or should they respond to a seeming evolution in the way in which international relations are looked upon by people in general? The reply should be clearly affirmative, within the bounds set by practicalities and realism.

A great deal can be done along these lines in the WTO, without impinging on the unavoidable and necessarily confidential side of diplomacy. Reverting to my earlier example, does any one doubt that the public debates on Iraq were accompanied by intense, secret diplomatic contacts? If public discussion and private negotiations can take place simultaneously in the Security Council, they certainly can do so in the trade field.

Television and radio coverage of meetings when there is a demand for it, public access to meetings of WTO Councils, open hearings of panels and the Appellate Body, and a substantially enlarged availability of documentation, spring to mind. None of this would really run counter to the need for confidentiality in trade negotiations, since Members could at any time go into private session when they considered it advisable, or decide to restrict sensitive documents.

Going on to the role of NGOs, this has to be seen from at least three basic angles: each one of these organisations very often represents a particular interest which may be at odds with the position taken by other NGOs; there are a very large number of NGOs, to the point that the WTO expectation was that more than one thousand of them would seek registration at the Cancun Ministerial Conference; and I believe there is a widespread view among developing countries that since the most powerful and resource-rich NGOs are based in developed countries, anything that enhances their role in the WTO is likely to operate to their detriment.

NGOs are an important segment of civil society and should be able to contribute fresh ideas and innovative responses to trade issues. Indeed, governments routinely maintain close contacts with national NGOs and this is not seen as anything that should be objectionable. On the contrary, the lack of such inter-communication would seem out of place.

However, because of the factors mentioned earlier, there are practical and political obstacles that need to be surmounted properly if NGOs are to occupy a more significant place in WTO affairs. I do not think that ways suggested up to now fulfil completely the essential requirement of acceptability by the full membership.

One formula which has been proposed and which appeals to me, is an Advisory Economic and Social Committee which would have a suitable link to the WTO. I can visualize in broad perspective, some of the elements that could lead to a reasonable scheme which—while fully respecting governmental prerogatives—would allow civil society to contribute to the furtherance of world trade and to its links with other areas of endeavour which are of interest to the world community.

Clearly, such a scheme would keep discrepancies among NGOs far from the WTO: they would have to be worked out by the NGOs themselves and any suggestions or recommendations they made would come at the end, and as a result of, those internal discussions. NGOs would have to determine their own mechanism for taking account of each others' views; if over a thousand NGOs were to attend the Cancun Ministerial Conference, it is not adventurous to speculate that on a number of given WTO subjects as many as one or two hundred NGOs might wish to express their views. I do not see how this could be determined by the WTO membership, without embroiling the governments in lengthy and almost certainly futile discussions. This would have to be settled by the NGOs themselves.

Whatever proposals came out of any new NGO advisory body, would certainly have to be just that: proposals that Members would take up if and when they saw fit. At this stage in political thinking, it would be optimistic to hope for much more. Indeed,

this would already signify a significant change in GATT / WTO traditional procedures which governments may or may not wish to accept.

The WTO has been the subject of large and sometimes violent public demonstrations on the part of those who attribute to it some of the evils they see in the accelerating globalisation process underway. Witness the farmers in the Uruguay Round, and more recently the Seattle and Evian episodes. Very often the demonstrators respond to slogans which are based on distorted information. If they do not have access to reliable sources of information, they will believe the contents of these slogans. If they perceive the WTO as being shrouded in secrecy, they will inevitably distrust it.

As things stand today, whatever its merits may be, the image of the WTO tends to worsen in many sectors of society. Transparency will contribute heavily to rectifying this state of affairs.

If governments feel the WTO is working well, they should be desirous of proclaiming its success to public opinion. If the opposite is the case, then we should all know about it. This being so, transparency should be reinforced by closer involvement of parliamentarians who have a strong and particular approach to the welfare of their electorate. Their daily contact with public opinion and their constantly renewed contribution to national legislation make them ideal actors in these broad ranging issues. There is a considerable lack of knowledge of the WTO in many parliaments, and this works to the detriment of the Organisation.

It has been said that legitimate trade agreements should not be driven exclusively by export interests. Obviously, trade is and will remain the "raison d'être" of the WTO. That is what it is all about. However, the definition of what and whose export interests are being effectively served, lends itself to considerable debate and leads to taking into account other factors which have not been at the foreground of the GATT / WTO system.

Behind practically any WTO decision, lie economic and social interests. A simple example: when a customs tariff is modified, it is frequent that consumers gain or lose, producers in one

place gain and those somewhere else lose. Jobs are gained and jobs are put at jeopardy. These consumers and producers are people, individuals who strive to lead a good life and be useful members of their community. Very often, they are unaware of WTO decisions that make them prosper or fail, have a gainful occupation or join the ranks of the unemployed.

Behind the terminology of the Preamble to the WTO Agreement and the many provisions agreed during the Uruguay Round, there is a living reality that affects untold millions of people. This is a crucial facet of trade that is imperfectly conveyed and understood.

Increased world-wide public awareness of the full import of WTO decisions would almost certainly generate new pressures and demands on governments; this could very well complicate an already complex panorama for them, but it would certainly put the Organisation in closer touch with the real world.

PART TWO

**CHALLENGES TO THE ECONOMIC LEGITIMACY,
EFFICIENCY AND COMPETITION CULTURE
OF THE WTO SYSTEM**

**Come Together?
Producer Welfare, Consumer Welfare
and WTO Rules**

by

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I Some Brief Introductory Remarks

WTO rules concerned with trade liberalization (that is the GATT, the GATS and their Annexes) are based on the premise that trade liberalization has overall positive welfare implications for the liberalizing state. This much is commonplace in economics.

Trade liberalization in the WTO is a matter of degree and a subject of multilateral negotiations. It is not the case that WTO Members have unilaterally adopted equally open trade policies. What is horizontally (i.e., for all WTO Members) true is that their trade openness must, *in principle*, be non-discriminatory. What exactly non discriminatory access amounts to is very much a matter of discussion.¹

* As always, I am indebted for never ending discussions on the issue and very helpful comments on a previous draft to Henrik Horn. I would further like to thank Panagiotis Delimatsis, Patrick Messerlin, Tim Groser and Sebastian Herreros as well as participants at the EUI conference (27-28 June 2003) for many helpful comments.

1 See, for example, the analysis of positive case-law on this issue in Horn and Mavroidis (2003).

Non-discrimination however, does not prejudice the quality of regulatory intervention. That is, a WTO Member might be adopting a series of inefficient policies that will not sufficiently account of consumer welfare but, to the extent that it applies to them in a non-discriminatory manner will not be running the risk of seeing its choices successfully challenged before WTO adjudicating bodies. This is the direct outcome of the fact that both the GATT and the GATS are largely negative integration-type contracts where policies affecting trade are defined unilaterally and their international spill-overs have to simply obey the non-discrimination principle.²

The WTO contract contains safeguards:³ the GATT knows of four contingent protection instruments (antidumping, subsidies, safeguards, balance of payments) alongside the GATT waiver (which could be used in this way). The GATS on the other hand, contains no formal safeguards (although it was agreed that a Working Party discuss this issue), but is, in Hoekman's expression, full of in-built safeguards anyway.⁴

GATT contingent protection instruments allow for WTO Members the possibility to increase their multilaterally negotiated and agreed protection (either by raising their import duties or by restricting the volume of imports, or even through a combination of both options) whenever an event occurs that justifies recourse to such instruments: dumping might lead to antidumping duties, increased imports to safeguards etc. Recourse to contingent protection instruments is WTO-consistent when the event at hand is causing injury to the domestic producer and irrespective of beneficial spill-overs that the event at hand (say dumping) might have on consumer welfare.

2 True, some obligations move beyond a pure negative integration-type approach. With the exception of TRIPS however, most such obligations are of procedural as opposed to substantive nature.

3 I use the term in its generic sense here.

4 See Hoekman (1996).

The overall picture however that emerges could be described as follows:

- the GATT and the GATS share as their intellectual foundation the economic theory that trade liberalization has overall positive welfare implications for those opting for free trade;
- both the GATT and the GATS are essentially negative integration-type contracts. Hence, once the permissible level of protection has been negotiated, the quality of regulatory intervention affecting trade is not put into question by the relevant WTO rules if adherence to the non-discrimination principle is guaranteed (Section 2);
- the GATT allows its Members to increase their protection through use of the so-called contingent protection instruments. Recourse to such instruments is justified when, as a result of an exogenous action, the domestic industry has suffered injury. These instruments reflect an injury to competitors standard only (Section 3).⁵

In a nutshell the thesis of this paper is that the WTO contract, in its *static* expression, only tangentially requests from WTO Members to account for consumer welfare alongside producer welfare.⁶ The history of trade negotiations⁷ and the economic analysis of the function of interest groups⁸ provide ample evidence that this is the case. The WTO contract in its *dynamic* expression looks, in principle, a more promising avenue when it comes to taking into account consumer welfare: duties are being

5 In this paper, when discussing contingent protection instruments, I will refrain from discussing the balance of payments provisions in the GATT contract (Art. XII and Art. XVIII). These Articles know of very limited use nowadays and anyway espouse the injury to competitors standard. I will also not discuss TRIPs either. TRIPs might indirectly facilitate trade liberalization (and even this is debatable).

6 By this, I do not mean that binding concessions do not act beneficially on consumer welfare. Of course they do, since the counterfactual (volatility of customs protection) could prove disastrous in this respect. All I mean is that the WTO law does not prejudice the level of consolidation.

7 See Bagwell and Staiger (2002) pp. 43ff.

8 See the relevant chapters in Grossman and Helpman (2002).

continuously reduced as a result of negotiating rounds and contingent protection instruments are more and more put into question. The institutional implication has so far been an undeniable “tightening of the screws” in this respect.

II. Non-discrimination

A. The arduous task of defining non-discrimination

The non-discrimination principle in the WTO legal order has two legs: the most-favoured-nation (MFN)⁹ leg and the national treatment (NT) leg. The latter comes into play when the ticket to entry into a particular market has been paid.¹⁰ WTO rules make it clear that non-discrimination covers both trade (border) policies as well as all domestic policies affecting trade with the notable exceptions of subsidies and government procurement. This is definitely true for GATT. As far as GATS is concerned, the MFN¹¹ leg is a general obligation (that is, it binds WTO Members irrespective of their specific commitments) and exceptions to it are legal and political (Art. II GATS). The NT provision in GATS does not come into play absent specific commitments.

First observation, the non-discrimination principle in GATS is a watered down version of its GATT equivalent.

GATT case-law¹² has made it clear that for a violation of non-discrimination to occur, there is no need of trade effects. In its classic *Superfund* expression, a GATT panel stated that Art. III GATT is about competitive opportunities and protects legitimate expectations that post-payment of the ticket to entry into a par-

9 Whatever MFN means nowadays where more than 160 preferential schemes have been notified to the WTO.

10 Even when the ticket to entry bears no cost to exporters (no customs duties).

11 Much of the analysis here borrows from Horn and Mavroidis (2001).

12 If there was any doubt to this effect, the WTO Bananas jurisprudence made it clear that the interpretation of the substantive content of the non-discrimination obligation in the GATT is relevant for GATS-purposes as well.

ticular market, domestic laws will adopt an origin-neutral attitude vis-à-vis all products circulating in the market. This approach is valid for customs duties (Art. II GATT) and quantitative restrictions (Art. XI GATT) as well. We should note however, that the Art. XI GATT obligation is not subjected to a non-discrimination test, as things stand right now.

Second observation: the non-discrimination principle is about competitive opportunities and must be respected irrespective of the trade effects its violation might incur.

In its Bananas jurisprudence, the panel and the Appellate Body dealt, *inter alia*, with a clause in the EC schedule of concessions whereby some WTO Members were treated better than others. The Appellate Body confirmed the panel's interpretation that concessions have to be granted in a non discriminatory manner.

Third observation: WTO Members know ex ante (i.e., before negotiations start) that their eventual concessions will be applied in a non discriminatory manner, hence, there is no way around the non-discrimination principle during the negotiations.

So much is clear.¹³ But of course, so much is not enough. All observations mentioned *supra*, have to do with the function of the non-discrimination principle. None of them deals with its precise scope. For this latter exercise, we need to delve into concepts like “so as to afford protection” and “like products.”

And this is where our troubles begin. Let us kick off our discussion with one (to my mind, correct) observation by the Appellate Body: the term “like products” cannot have the same meaning

13 I am tempted to add for the sake of completeness, the WTO case-law on *Korea Beef*. There the Appellate Body interpreted the NT obligation in as yet novel manner: in its view, a change in the domestic regulation of Korea which results in a *reformatio in pejus* (worsening of competitive conditions) for imports is Art. III-inconsistent and that independently of whether such a *reformatio in pejus* results for domestic products as well. The reason why I decided to relegate this observation to a footnote has to do with my belief that on this occasion the Appellate Body mixed two distinct legal concepts, that of violation and that of non violation, and my wish that because of this legal error this reasoning will not be repeated in future case-law.

throughout the GATT, not even throughout one GATT Article. Horn and Mavroidis (2003) describe in the following terms their understanding of the status quo of the understanding by the Appellate Body (AB) of the terms appearing in Art. III.2 GATT:

(iii) The legal test for demonstrating conformity (or lack of it) of a domestic taxation scheme with Art. III.2 is also clear: when it comes to Art. III.2, first sentence, the satisfaction of the likeness and taxation in excess-criteria *ipso facto* amounts to a violation of Art. III.1 (two prong-test). Even a minute difference in taxes can satisfy the “in excess-” criterion. When it comes to Art. III.2, second sentence, the complainant must show, beyond a DCS relationship between two products and a tax differential, that the latter operates SATAP (three prong-test).¹⁴ In this case, sometimes a more than *de minimis* tax differential will suffice to satisfy the SATAP-criterion, and sometimes recourse will be made to other factors indicating the protective application of the measure at hand. The AB has provided an indicative list of such factors but has yet to explain which cases fall under the first and which under the second category;

(iv) Art. III.2 covers cases of both *de jure* and *de facto* discrimination;

(v) The AB has also made it clear that intent is immaterial when interpreting Art. III: in its view, Art. III addresses protective application of any given domestic legislation without addressing its underlying intent;

(vi) We further know that in order to establish whether two products are DCS, WTO adjudicating bodies must look at factors like cross-price elasticity, elasticity of substitution, end-uses, consumers' tastes and habits, and the products' properties and nature. The AB has not clarified the weight to be given to each of the mentioned elements, but it stated that cross-price elasticity is not the decisive criterion. The list of relevant criteria is not exhaustive; WTO adjudicating bodies might add other (as yet unidentified) factors to the list. The term “direct” in DCS refers to the degree of proximity between two products. The AB, however, does not specify what level of proximity is required for two products to be DCS. Thus, two products can be competitive but not directly competitive—i.e., they may not share a satis-

14 DCS refers to “directly competitive or substitutable” in the sense of the interpretative note to Art. III GATT. SATAP refers to “so as to avoid protection” in the sense of Art. III.1 of GATT.

factory degree of proximity. Potential competition is relevant to establish DCS-relationship especially in cases of “latent demand.” Evidence from other markets concerning the DCS-relationship between two products is welcome at least in cases where a potentially DCS product has not made its way in a particular market as a result of a regulatory intervention. The AB again does not offer any precise criteria as to the appropriateness of comparability between two markets. Since like products constitute a sub-set of DCS products, and since tariff classification may be relevant to establish likeness, it is also relevant to establish DCS;

(vii) To establish likeness, a complainant needs to show, besides what is needed to establish DCS-relationship, additional factors that might argue in favour of likeness. The only such factor mentioned in case law so far is tariff classification. However, the description in tariff classification must be quite comprehensive. General categories such as those often encountered in schedules of concessions of some developing countries will not be taken into account. Generally speaking, there is tendency in case law to construe like products in a narrow manner, in the mind of adjudicating bodies;

(viii) We are also clear as to the relationship between like and DCS products: all like products are, by definition, DCS products. Hence, the complainant who succeeds in showing that two products are like has, by definition, also shown that the two products are DCS;

(ix) Finally, an observation which does not stem directly from what has been discussed so far. It is by now settled case-law that a WTO Member whose practices are found to be in violation of Art. III can still justify these through recourse to Art. XX. Violation of Art. III does not *ipso facto* amount to violation of the GATT. Art. XX can “heal” the violation of Art. III and intent is relevant in the context of Art. XX. In other words, what the AB has done in the tax discrimination cases that it has treated so far is to provide a “dividing line” between Art. III and Art. XX: the applicability of Art. III is determined in the market place, whereas an evaluation under Art. XX may involve other considerations (the Japan panel report reflects similar thoughts, which were not overturned by the AB).

The inescapable conclusion is that we simply do not know what is the precise methodology for defining likeness in GATT law. Beyond the sometimes confusing AB case-law (likeness is not a matter of effects and not a matter of intent either), lies one

important observation that to some extent justifies the back and forth in the AB case-law: in the words of Horn and Mavroidis (2003) there is an inherent indeterminacy when it comes to defining the non protectionist counterfactual. Absent this definition—which is legally crucial, since the institutional promise of WTO Members as expressed in Art. III.1 is to avoid protectionist domestic legislation—, it is impossible to distinguish wheat from chaff.

The situation is probably more complex when it comes to discussing likeness in the context of Art. III.4 post-Asbestos. There, the Appellate Body seems to suggest that some product characteristics must be presumed to affect consumers' choices without however, evidence *in casu* of consumers' reactions to such characteristics. The test for likeness thus, is nominally still the marketplace but, for all practical purposes, it has been removed from the market.

I think it is not an exaggeration to state that we still lack a methodology that will help us define likeness with a satisfactory amount of foresight in future cases. Hence, what exactly non-discrimination means depends, in the Appellate Body's words, "on the tuning of the accordion." We know who will do it, we do not know how.¹⁵

At the end of the day, recourse to Art. XX GATT might give us a better idea as to the presence or absence of a protectionist motive (see *infra*, under II.B.).

The situation is even more problematic when it comes to defining "likeness" under Art. I GATT (MFN). Davey and Pauwelyn (2000) offer an exhaustive analysis of the concept as interpreted in GATT / WTO case-law. What stems from their analysis is that

15 In his wonderful collection of articles, Posner (1995) states that at the end of the day we will need a judge (probably borrowing from Avinash Dixit's affirmation that "all feasible contracts are incomplete" and adding his thought that judges are there to complete them). I can side with this approach. My comments here should be understood as a plea for methodology and not as a negation of the role of the judge.

so far, WTO adjudicating bodies did not have “hot potatoes” in their hands.

Art. 3.3 of the Harmonized System (HS) Convention reads:

Nothing in this Article shall prevent a Contracting Party from establishing, in its Customs tariff or statistical nomenclature, subdivisions classifying goods beyond the level of the Harmonized system, provided that any such subdivision is added and coded at a level beyond that of the six-digit numerical code set out in the Annex to this Convention.

Take the following example now. In the Doha-round, the United States insert at the eight-digit level the following two classifications:

- footballs produced with fair-labour standards 0%
- footballs produced with unfair-labour standards 30%

Is such a classification inconsistent with Art. II? It should be remembered that in Bananas, the Appellate Body outlawed origin-based distinctions. This is not the case here. Does the prior case-law help us in any way to pronounce in an unambiguous manner that such a classification is GATT-inconsistent or GATT-consistent? The short answer is no. Such a question has not been put to the test.

My conclusion stemming from the preceding analysis is that so far we probably know what non-discrimination aims to achieve but we are still in the dark as to the precise ambit of what has been time and again described as the “cornerstone” of the GATT edifice.

B. The new generation agreements

The situation is marginally better with respect to the new generation agreements (TBT and SPS). There, for a violation to be the case, a WTO panel needs to disregard not only the non-discrimination principle but also the necessity principle and, as

far as SPS is concerned, the requirement to base regulatory interventions on a scientific basis.¹⁶

One way to describe our discussion under II.A. could be the following: the judge will be called to discuss non-discrimination in an, for all practical purposes, asymmetry of information context: he / she will be called to establish whether a regulatory intervention is GATT-consistent months, years later after such an intervention took place and probably without the benefit of all the preparatory work leading to the intervention at hand.

Take the classic Art. III-XX GATT analysis as summarized under II.A.: intent is relevant when moving to Art. XX GATT and there, on occasions, the judge can benefit from proxies that help establish the authenticity of the intervention; this is the role, for example, of the “necessity” principle. The rationale for the principle is that, although social choices are unaffected by a negative integration-type contract (like the GATT), when expressing such choices (preferences), the regulating state should choose the least onerous to international trade means. Implicitly, whenever the necessity-principle is followed, we can deduce that the intervening state was authentic about the ends its intervention purportedly serves, since the side-effects of the intervention have been minimized.

Necessity serves thus as proxy to deduce intent.

The new generation agreements incorporate necessity in the original test for consistency of a regulatory intervention.¹⁷ Consequently, in case the necessity-requirement is respected, we have a better idea as to presence or absence of protectionist intent in a TBT / SPS case than we do in the context of an Art. III case.

16 Provided, of course that recourse to the precautionary principle has not taken place.

17 In practice, this is not a mundane observation: there are many reported cases where, for one reason or another, recourse to Art. XX GATT did not take place (see, for example the recent *Korea-Beef* and *Chile-Taxes on Alcoholic Beverages* cases).

The SPS beyond necessity also requests that SPS-covered interventions are, in principle, based on scientific evidence. It will be quite hard in practice to come up with examples where an SPS measure respects the necessity principle, is based on scientific evidence and still could have been motivated by protectionist intent. This “double check” arms pronouncements by WTO adjudicating bodies of WTO-consistency for such measures with a considerable amount of certainty.

It is reasonable hence to conclude that, because of the proxies inserted in the new generation WTO Agreements, we have a better idea as to the protectionist character of measures.

C. *Non-discrimination and consumer welfare*

However, even the new generation Agreements stop short of going beyond non-discrimination. Let me explain this sentence, because at first glance, it might seem as contradictory to what I have described above.

The thesis I want to defend here is that proxies such as necessity, or scientific evidence, help us better delineate the non-discrimination principle by reference to protectionist policies. The latter could be loosely defined as policies the prime objective of which is to subsidize (through regulatory means) the income of the domestic producer.¹⁸

A measure necessary to achieve an objective by definition imposes the least amount of hardship on imports. Hence, even if it does *de facto* burden imports it does not do so in a disproportionate manner. By the same token, a measure based on a scientific basis (provided that we can move to a better definition of “science” than that offered in the Appellate Body *Hormones* jurisprudence) has an acceptable rationale for its existence beyond simply subsidizing domestic interest groups.

Is this enough? No, clearly not. Hopefully future research will help us add to the present list of proxies or even allow us to

¹⁸ I still believe that as exposed in Horn and Mavroidis (2003), this is not a very satisfactory proposition. I use it *faute de mieux*.

establish in an asymmetry of information context. Be it as it may though, these concepts give us some ammunition to move away from the thesis that a measure was enacted with protectionism in mind.

However, having said that, we should keep in mind that under either the old or the new generation agreements, it is the means chosen to reveal a preference and not the ends (the preference itself) that can be put into question by the WTO judge.

This means that a WTO Member can be as inefficient as it wishes, as pro-domestic producer as it finds it warranted and still see its regulatory interventions immunized by WTO adjudicating bodies, provided that it respects the non-discrimination obligation. Some telling examples can serve as an illustration: a 1,000% sales tax applied to domestic and foreign cars alike does not violate Art. III GATT;¹⁹ a banning of all advertisement could hardly be found to be inconsistent with Art. III.4 GATT.²⁰

On the other hand, the negotiation of concessions, that is the degree of openness of an economy, is not a matter of concern for WTO law: it is purely a matter of concern of national governments. The WTO law will apply independently of the degree of openness of a national economy.

My conclusion is that non discriminatory market access of goods (and services) as interpreted so far by WTO adjudicating bodies has very little to do with consumer welfare concerns. This conclusion is the natural outcome of the predominant (i.e., with the exception of TRIPs) legal nature of the WTO contract: negative integration entails, among other things, that consumer prefer-

19 It could form the subject-matter of a non-violation complaint, provided however, that a number of conditions are met. See, on this issue, Bagwell *et al.* (2002).

20 As the Advocate General of the European Court of Justice acknowledged in *Leclerc - Siplec*, in a country where investment is not liberalized, such measures might have a discriminatory impact on foreign goods. Such case-law seems hardly reconcilable with WTO law. At any rate it is consumer welfare that will be affected by such measures since consumers will not be in a position to acquire information about other products.

ences might or might not be taken into account in the formulation of trade policy. At any rate, their inclusion is done for reasons exogenous to the WTO contract.

III. Contingent Protection Instruments

A. *Hard law for producer welfare: injury to competitors*

Turning now to contingent protection instruments, one observation seems warranted before we move to a discussion of the injury standard:

As Messerlin's comprehensive study (2001) shows, the trade impact of such measures, at least for some WTO players, is quite significant (in terms not only of increased protection but also of frequency of invocation of the instrument). A statement to the effect that the aggregate rate of duties for x products is less than 5% nowadays is meaningless. The careful analyst will try to reflect whatever other duties are legally added to the MFN rate in order to provide the actual picture of trade liberalization. Adding to the duties has an *a priori* detrimental welfare implication for consumers. As we will see *infra*, the rationale for this implication is subsidization of the income of the domestic producer.

Turning now to the legal requirements for a lawful imposition of an antidumping or countervailing (CVD) duty or a safeguard:

All three agreements request that in the presence of (i) dumping (subsidy / increased imports) which (ii) cause (iii) injury to the domestic industry producing the like product, a WTO Member can lawfully increase its protection. It goes without saying that increasing the protection *ipso facto* means that consumer welfare will be negatively influenced. That much is clear. However, as we know from antitrust analysis, sometimes measures against low prices are justified in economic theory (predation). The rationale for outlawing such policies is the embedded in many antitrust statutes / enforcement injury to competition standard (the fear that subsequently, because of high barriers to entry, the now cheap selling entity will be in a position to recoup its investment).

The injury in all three contingent protection instruments is the drastically different injury to competitors-standard. Art. 3.4 of the Antidumping Agreement (AD), Arts. 5 and 15 of the Subsidies Agreement (SCM), and Art. 4 of the Safeguards Agreement (SG) all share one common feature: action is lawful when the producer welfare has been (or threatens to be) negatively affected as a result of cheap prices, subsidies to foreign producers or increased imports.

Consumer welfare considerations are institutionally absent in the provisions of the aforesaid Agreements.

The natural conclusion is that lawful increased protection beyond the MFN rate is legal under WTO law when the producer welfare is affected. When it comes hence to contingent protection instruments, the WTO rules do not stand on the fence (as is the case with non-discrimination). They take an active pro-producer welfare stance.

B. Soft law for (against?) consumers interests

To complete the analysis, I should probably also refer to Arts. 6.12 AD, 12.10 SCM and 3.1 SG. These Articles request from WTO members opportunities to other interested parties (including consumers' organizations) to provide their views during the proceedings. The strongest language is that of Art. 3.1 SG²¹ but even that falls short of imposing WTO Members from controlling for consumer welfare implications as a matter of WTO law when imposing safeguards.

Some domestic statutes do provide for enhanced opportunities for consumers: the EC AD regulation requests that all AD duties imposed by the EC must be in the Community interest (which, must, at least a priori, include consumer welfare). The empirical analysis by Hoekman and Mavroidis (1996) demonstrates that, even in the presence of a legal requirement to this effect, this has hardly been the case.

21 A point that Aaditya Mattoo in his astute manner noticed first.

The inescapable conclusion is that activation of all safeguards to the WTO contract (the three instruments described above) are contingent, as a matter of WTO law, exclusively upon producer welfare considerations only.

IV. Conclusions

In this paper, I offered a diagnosis which can be summarized as follows: the foundation of WTO rules (the non-discrimination principle) does not take a stance on the issue of whether producer- or consumer-interests or a balancing of both should guide trade liberalization. The safeguards to the contract are there to ensure that producers' interests are not negatively affected because of an endogenously in every society defined threshold of acceptable trade liberalization. Because of the importance of the latter, it is fair to conclude that the WTO rules are producer-oriented.

Negotiating positions are designed at home. The degree of trade liberalization for the EC is first discussed in Brussels and the national capitals, for India in Delhi and so on and so forth. It is there where the game is played and not in Geneva. It is there where the change can happen.

European governments have not done a great job so far (because most likely as a continuous string of public choice theorists have explained, they have no incentive to do so) in making the European *demos* (or *demoi*) aware of the intellectual merits of trade liberalization. So should governments of other WTO Members do.

If at all, the WTO machinery can be used as the machinery to facilitate change of domestic policies ("use GATT as an excuse" as Hudec, in his inimitable way used to write). Not much can be achieved through dispute settlement activities. For a start through adjudication, one can only adjudicate what has been agreed at the table of negotiations (and this is precisely where change is needed). Moreover, adjudication suffers from its ad hoc character: outcomes have limited value for non-participants.

Hence, it is at the table of negotiations where things can change. In what has been described above, it is contingent protection

instruments that bind everyone. This is where change should occur (for example, by introducing one safeguard mechanism only coupled with a public interest clause and thus, abolishing the existing mechanism of *de facto* overlapping safeguards). Such a change could result in tangible benefits for consumer welfare.

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Non-discrimination, Welfare Balances and WTO Rules: An Historical Perspective

by

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Petros Mavroidis “twin” paper provides a very clear and detailed analysis of the current tensions between non-discrimination, the (producer and consumer) welfare balances, and WTO rules. This paper tries to understand why such tensions are still there, unabated and even perhaps deeper and stronger than ever—after half a century of refined economic analysis and of its improved operationability (that is, its capacity to be put in terms and forms fit for decision makers) and after half a century of a GATT trade regime so successful that new domains (agriculture, services, etc.) are now covered by its successor, the WTO.

In order to understand the sources and the evolution of these tensions between WTO rules and economic analysis, the paper adopts a historical approach which reveals the increasing understanding and operationability of the welfare economic analysis of trade policy on the one hand, and, on the other hand, the continued resistance of WTO rules to fully taking into account cost-benefit analysis based on welfare balances. Some lessons are then drawn—whether one could expect these tensions to decrease, and, if not, how to live with them.

The paper gives to WTO rules the widest possible definition (it covers both the so-called “static” and “dynamic” aspects in the

Mavroidis paper). Such rules thus cover all the provisions dealing with goods and services since the Uruguay Round—GATT, GATS, and their Codes or Agreements of Interpretation. They also cover all the decisions taken during the successive GATT and WTO Rounds, that is, decreases of tariff rates, reductions of non-tariff barriers, etc., and those taken under GATT provisions, such as antidumping, antisubsidy or safeguard measures.

I. The Shaping of the GATT (from the Late 1940s to the Late 1950s)

When looking at a system which has been in an almost permanent process of reshuffling and extension, it is important not to create historical nonsenses. The first thing to do when looking at the welfare balances in GATT 1947 is to carefully assess the state of welfare economic theory applied to trade policy (in what follows, trade policy is distinct from trade theory which examines the economic gains from freer trade) in the late 1940s, at the time of the signing of GATT.

A quick review of the few trade books prevalent in the 1950s and 1960s suggests that the notions of producer and consumer welfare in trade policy were generally dealt with quickly and not in a very operational way. If the key economic concepts were largely discovered by the late 1800s and formalized by the 1930s (Yntema 1932), their operational form, that is, their capacity to answer questions raised by decision makers in a straight forward and computable manner, was non-existent. The ranking of the instruments of protection in terms of welfare impact was also quite embryonic. Hence, the capacity of the existing economic analysis to generate sound GATT-WTO rules was *de facto* very limited.

In fact, the focus on trade matters in the late 1940s and early 1950s (that is, during the years where GATT was created and took shape) was not on the welfare balances. For instance, Meade's highly influential textbook (1955) devotes most of its chapter on "taxes (i.e. tariffs) and subsidies" to their impact on the public budget. Most of its developments related to welfare balances as conceived today were largely limited to the mere

evocation of changes in prices. That is not so surprising. The key elements of modern trade literature on producer and consumer welfare as we know them today have been mostly developed in papers written by Haberger, Johnson, Corden, and a handful of other authors during the late 1950s and early 1960s, before being cast in the form we are used to by authors writing in the late 1960s and early 1970s, such as Bhagwati, Kemp or Srinivasan.

This brief review of economic thought on trade policy issues is not so astonishing after all. International trade started to boom only during the late 1950s and early 1960s, after several decades of severe decline and stagnation. The nitty-gritty details of trade policy were thus unlikely to trigger deep interests from the economic profession. More generally, one should not forget that markets were suspicious of many “economists” of this period—planning was then a much more fashionable approach among policy-makers and the economists close to them.

In this context, it is not difficult to understand that the GATT drafters paid little attention to producer and consumer welfare. They were mostly sensitive to the mess of the existing bilateral and discriminatory trade policies—a mess which begun to emerge as early as in the 1880s, with the first “trade wars,” for instance between France and Italy, and which led to the highly protectionist policies of the 1920s and 1930s. For the trade negotiators of the 1950s, the most desirable objective was to introduce some kind of systemic “simplicity” in the spaghetti bowl inherited from the XIXth century by generating a level playing field between all foreign competitors—hence the focus on non-discrimination. As Tumlrir (1984) was the first to observe, the principle of non-discrimination was not strongly included in the complex web of trade agreements of the second half of the XIXth century. It was sneaked in through indirect means, often politically quite awkward (such as the Treaty of Frankfurt which ended the 1870 Franco-Prussian war) and as a result, it left wide open the door to bilateral, fast-spreading, trade wars.

Nowadays, the non-discrimination principle tends to be taken for granted. It should be stressed that it defines the level of competition between foreign competitors by drawing the line between “fake” liberalization (opening domestic markets to relatively inef-

ficient foreign producers, as often discriminatory liberalisation does) and “effective” liberalization (opening domestic markets to the most efficient foreign producers, as does non-discriminatory liberalisation). This division is important because fake liberalization can be a source of consumer welfare opportunity losses, in the form of transfers from domestic consumers to inefficient foreign producers.

It is important to note that the GATT text develops only one dimension of the non-discriminatory principle—the one referring to the source of imports for a given product (hereafter geographical non-discrimination). By allowing the possibility of different tariffs for different products, the GATT text ignores the other possible dimension of non-discrimination—between products. The only tariff structure which respects the two dimensions of non-discrimination is the so-called uniform tariff structure, be the tariff rate equal to zero (the free trade case) or to some positive number. The GATT regime had to wait until 1984 to witness the first clear example of the product dimension of non-discrimination, with the unilateral adoption by Chile of a uniform tariff schedule (at the very high rate of 35 percent, reduced the year after to 20 percent, and then followed by a series of mostly unilateral reductions, up to its current level of 6 percent).

Geographical non-discrimination raises a question for the many existing bilateral trade agreements (contrary to the usual understanding, regional trade agreements are very rare). So far, many of these trade agreements have had little content, and they are disappearing slowly under the dust on the shelves of the Trade Ministries of the signatories. The question is whether the new generation of bilateral trade agreements will be as mildly bothering for geographical non-discrimination as the old ones. The world trade regime is in a better situation to cope with infringements to the non-discrimination principle in the realm of goods, simply because the most-favoured-nation (MFN) tariffs on goods are lower than those in the late 1940s, so that trade preferences and their potential costs are likely to be smaller.¹

¹ The same observation cannot be made for services where today’s situation seems much closer to what existed in goods in the late 1940s.

The above review of the economic literature on trade policy suggests that the GATT 1947 text could hardly give some room to the welfare balances, since its basic notions and concerns were too far away from the main trends of a still undeveloped economic literature on trade policy.

Finally, it remains to underline that the welfare balances are *de facto* present in the GATT machinery, if not in the GATT text. As is well known, Rounds put in place trade negotiators who, because of the political situation in trade matters, behave essentially under the pressures of the domestic export lobbies which are convinced that access to foreign markets will provide them additional consumers, thanks to their comparative advantages over their foreign competitors. However, every time a trade negotiator speaks on behalf of its export lobbies, he / she is *ipso facto* advocating the interests of the foreign consumers (if the domestic exporting firms are correct when assessing their comparative advantages). In other words, each trade negotiator is improving the welfare of both domestic producers and foreign consumers (at a "cost" for foreign producers and possibly for domestic consumers, if the price of the exported good increases in the exporting country, compared to the pre-liberalization price because of the additional foreign demand). This improvement is most likely to be maximum if the Round covers the whole universe of goods and WTO members.

Much less often recognized is the sound approach of the GATT text in terms of the ranking of the instruments of protection to be used. GATT includes a classification of the instruments of protection which give countries a relatively clear view of what to do in trade in goods. Tariffs are preferred to other border barriers, such as quantitative restrictions, export taxes and subsidies, and tariff-rate quotas. Non-border instruments (production subsidies and consumption taxes) are seen as preferable. This classification is broadly consistent with the welfare balances that trade policy analysis associate with these trade instruments.

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However, preferential agreements in services are still very limited in numbers, scope and depth.

The still missing economic analysis of trade instruments could not be the main motive behind these sound GATT rules. Two other reasons have worked in the same direction: tariffs provide public revenues, and quotas provide rents, which can be used by the beneficiaries for capturing the government's trade policy. The first of these two argument (public finance) has probably been the dominant one.

In sum, the situation in the late 1940s and in the 1950s is quite ambiguous. On the one hand, sound competition came back through the non-discrimination principle—hence the unprecedented rapid growth of the Western economies supported and amplified by the series of GATT Rounds. On the other hand, the GATT-WTO rules show little knowledge about the emerging analysis of welfare balances—hence, leaving wide open a backdoor to protection as soon as liberalization may require severe adjustments.

II. The GATT Codes (from the Early 1960s to the Late 1980s)

In what follows, the generic term of “Codes” covers not only the texts which have been entitled as such (for instance, the Codes or Agreements of interpretation of the GATT Articles on Anti-dumping, Antisubsidy, and Safeguard) but also those which have introduced the Special and Differential Treatment (SDT) in the GATT text itself during its first twenty years of existence (GATT Article XVIII and the whole Part IV).

Have these Codes taken into consideration the trade policy theory, which has flourished during this period? At this time, the theory of trade policy has already “solidified” most of its operational capacities by providing simple (partial equilibrium) computational methods allowing for the estimation of producer and consumer surpluses (including by beginning to gather estimates of the various elasticities necessary to make such computations), by ranking the various instruments of protection in terms of welfare balances, and by developing the analysis of the optimal instruments to be used in case of specific distortions in an

economy—an analysis which strongly suggests that most distortions should be addressed by non-trade instruments.

The GATT Codes have not used this opportunity to take on board all these improvements. First, all the SDT-related texts fundamentally ignore consumer welfare and the fact that the net welfare gains from liberalization flow from a country's own liberalization—not from the liberalization of the country's trading partners. They tend to deny the freedom of choice to the domestic consumers of a country by expanding without limits the right of a government to make choices on the basis of undefined "development needs," meaning *de facto* what is good for the domestic producers and possibly the government. This wide divergence between the SDT premises and economic analysis explains the subsequent failure of this SDT approach.²

Second, as is abundantly pointed out by Mavroidis, the Codes for contingent protection did not reduce the initial bias in favour of domestic producers. In fact, the more time was passing, the more these Codes have shifted away from economically sound concepts. They drifted away from safeguard (which at least recognizes that domestic producers may be eligible for some breathing space, i.e., allows only transitory re-protection) to antidumping. In the 1970s and 1980s, antidumping (and anti-subsidy) have shown a sharply decreasing interest for adopting cost-benefit analyses based on welfare balances, with an increasingly deeper neglect of economically-sound definitions of their key legal notions (for instance, domestic industry, major proportion, like-product, injury, etc.). During the whole period, antidumping and antisubsidy national regulations have also shown an equally sharp decrease of references to consumers' interests and to competition combined with an increasing capture of concepts, as best illustrated by the "national interest" interpreted as an argument in favour of the survival of domestic producers (instead of its original intent of being the voice of the domestic consumers).

2 But one could think about an SDT approach more respectful of economic analysis because it is based on the product dimension of non-discrimination (Messerlin 2003).

How to explain such an increasing gap between key economic concepts and trade policy? The first answer may be narrow, but it has some weight. During this period, few people involved in the day-to-day trade policy (GATT negotiators, decision-makers in the capital cities, etc.) were trained as economists. The same observation could be made for the staff of the GATT Secretariat and of other international institutions. Moreover, one could argue that, had all these actors been economists, the result may not have been so different because the consensus among economists on trade policy issues was still building up. For instance, Hollis Chenery, Chief economist of the World Bank in the 1970s, stated that “industrialization consists primarily in the substitution of domestic production of manufactured goods for imports” (Krueger, 1998).

In fact, there is only one clear indication of the nascent but limited influence of economic thinking during these 20-25 years. The use of the cost-benefit analysis of welfare balances made its first clear apparition in the GATT context with the so-called Leutwiller Report (GATT 1985). But this Report was largely shaped by the very specific experience of the Australian Tariff Commission (itself relying on specific circumstances concerning trade economists in this country [McDougall and Snape 1970]).

The second answer to the increasing gap between GATT rules and the economic analysis is more profound—and also more debatable. It lies in the deep relations between economics and politics. Economic analysis insists on the fact that what counts for assessing trade policy decisions are the “dead-weight triangles,” that is, the net effect on the whole economy of a trade measure (be it of liberalization or of protection). Traditionally, the estimates of these dead-weight triangles are small, suggesting that liberalization policies improve national income by a small percentage. This “smallness” has generated scepticism about the importance of the economic analysis for taking trade policy decisions.

There were two reactions to this situation. First was that the dead-weight triangles associated with other policies for increasing national income were also small (indeed often significantly smaller). Second, the traditional trade analysis relies on the

assumption that transfers between producers, consumers and the government should be treated as domestic transfers, hence not counted when estimating the welfare effects on the “national” economy. This approach may have made sense in the 1960s, when it became the standard. But it tends to ignore many aspects, which have become increasingly important since the 1960s. For instance, the fact that not taking tariff revenues into account in the dead-weight triangles could be subjected to serious caveats. For instance, tariff revenues from low tariffs (again frequent in industrial countries nowadays) may be entirely spent by paying the customs officers needed for levying these tariffs. Another example is that it can be shown that a euro spent by the government has not necessarily the same “value” as a euro spent by the consumers themselves. Hence, in the case of highly taxed countries (as industrial countries nowadays) it may be the case that its value is smaller (the government has “too much” revenue, and wastes it compared to the potential use by the consumers). Looking at quota rents (instead of tariff revenues) and at producers’ surplus, a portion of them could leave the country if their beneficiaries have close links with foreign traders or producers. In all these cases, the traditional approach of the economic analysis underestimates the costs of protection.

III. The Post-Uruguay Round Period

The period from the late 1980s up to today has witnessed huge improvements in the operational capacity of economic analysis to estimate welfare changes triggered by trade measures for the various agents of the domestic economy. They have also seen notable improvements in the capacity of economic analysis to take into account certain aspects of imperfect competition in a theoretical and operational way. Moreover, this increasingly wide and operational economic analysis seems to have been accompanied by an increase of the economic skills of trade negotiators.³

3 Based on anecdotal observations (it would be interesting to have some systematic evidence on this point), the share of negotiators and decision-makers on trade issues with a substantial economic training seems to have increased. However, this observation may not be correct at the level of dispute settlements. If many lawyers have economic skills, they

However, once again, the WTO rules written down during these years do not reflect these substantive changes. In fact, the Uruguay Round may even show a worrisome evolution, compared to the previous ones. Whereas the successive GATT Rounds of the 1960s and 1970s have been able to deliver a healthy dose of competition through non-discriminatory liberalization, the Uruguay Round is characterized by modest results in this respect. Agriculture has been integrated in the legal framework, but it has not been liberalized. Progress has been limited in manufactures, if one excludes the scheduled (but still to come) dismantlement of MFA quotas by industrial countries and the unilateral (autonomous) liberalization of a substantial number of developing countries. Increases in market access in services have been almost nil.

Turning to the Uruguay texts themselves, it is interesting to focus on the most stable innovation of the Uruguay Round—GATS. References in the GATS text to the welfare balances are not notably different to those in GATT. This observation is not so surprising to the extent that what characterized the initial (in the late 1980s) situation in services is, once again, a highly discriminatory trade regime more than the level of protection *per se*. Prior to the Uruguay Round (and leaving aside the European Community), all the agreements on trade in services were bilateral agreements (including those between a WTO member and a sub-federal entity of another WTO member, such as the agreement between Britain and Pennsylvania in insurance services). In some instances, they were even the ultimate expression of the highest and most systematic discrimination at the world level (such as the Chicago Convention in air transport). In sum, the Uruguay Round negotiators in services faced the same situation of a highly discriminatory world as the founding fathers of GATT dealing with goods fifty years before.

However, there are two interesting differences between the GATS and GATT texts with respect to welfare balances. The first is to

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do not necessarily use them, all the more because economists have a tendency to fight each other with such an energy that it makes for nervous or dubious lawyers.

the advantage of GATS, as compared with GATT. GATS Article X text on the emergency safeguard measure (ESM) is an empty shell. It provides for a non-discriminatory ESM, but it has left for future discussion all the other possible provisions necessary for designing a fully-fledged ESM. Since 1995, WTO members have tried several times to define these appropriate provisions, without success so far. Industrial countries argue that such an ESM is not necessary, whereas a relatively large group of developing countries (mostly from those Asian and Latin American countries recently hit by financial crises) insist on such an ESM as necessary for facing the “unforeseen developments” which could be caused by further liberalization in services.

The still empty shell of GATS Article X can be seen as a recognition that the welfare balances in safeguard matters were not achieved in a satisfactory manner in GATT. However, there is a competing, less optimistic, interpretation. There are a large number of provisions in the existing WTO commitments conditioning market access to “economic need tests,” or to “proofs of public convenience,” etc. These tests or proofs (particularly numerous and obscure for provisions under mode 4) constitute a severe threat to the effectiveness of the existing commitments, and they are far away from any consideration of the appropriate balances between the various welfare aspects. In many respects, they constitute *ex ante* safeguards defined on a sectoral and country basis. Moreover, their existence raises the possibility of a trade-off between them and the creation of a fully-fledged EMS.

The second key difference between GATS and GATT is to the detriment of GATS, compared with GATT. The GATS text defines liberalization by the elimination of quotas—be it on the number of service suppliers allowed, on the value or quantity of services supplied, on the number of foreign persons employed, on the participation of foreign capital, or on the legal entities (GATS Article XVI). But, it shows no effort to envisage and promote the use of taxes as alternative trade instruments in services, be they on imports (mode 1), on entry, input, output or profit (mode 3) or on labour entry (mode 4). This renunciation of instruments facilitating a non-discriminatory approach in services represents a sharp difference from the GATT text. One could argue that such

a non-discrimination may be difficult in services, but making progress in this direction would nevertheless provide benefits.

The absence of interest of GATS in price-based instruments and the pervasive use of quantitative restraints in trade in services is likely to make progressive liberalization difficult to achieve in services. The protectionist power of a quota may remain almost intact until some threshold (hard to know in the real world) is reached, but it may vanish rapidly beyond the threshold. The focus on quantitative restraints may also favour the creation of huge and unsustainable (in the long run) differences among the protection rates granted to different services, as best illustrated by Korea where short term foreign borrowing (capital imports) was largely liberalized, while long-term borrowing was banned. Lastly, the absence of price-based instruments makes the introduction of acceptable safeguards more difficult (for instance, how is it possible to revoke granted licenses without risking a collapse of the whole system?).

Why then so little progress to include welfare balances in WTO rules in services? There are several answers. First is that the Uruguay negotiators believed that services were “different.” Indeed, they did so partly under the influence of many economists who have been unable to anticipate the consequence of technical progress on services, and its interactions with market liberalization (see, for instance, the huge literature of the late 1980s on the “non-tradability” of services).

Second, trade negotiators have little or no knowledge of the potential comparative advantages of their countries in services (contrary to what they believe for goods.) Even if imprecise or inaccurate (estimates are often too conservative, and certain sectors will boom unexpectedly post-liberalization), such knowledge is seen as a necessary guide for negotiators during trade talks when the time comes to define which foreign markets should be opened, and in exchange, which domestic markets could be opened or kept closed). The years devoted to the Uruguay Round negotiations have provided clear examples of wrong expectations in this respect. For instance, it was often said that industrialized countries had comparative advantages in services because services were seen as intensive users of capital and

skilled labour. Opinions have shifted rapidly and significantly on this matter, with emerging success stories, during the last decade, of developing countries in all kinds of services—from low-skilled (construction) to medium-skilled (maritime transport) to high-skilled services (from Indian software services to South African or Thai health services). By contrast, tourism (the service sector in which developing countries were the most confident of their comparative advantage, and the sector that makes up a large share of their total export revenues) has had surprisingly mixed success. Its reliance on key input services (airlines, travel agencies, etc.) based in the home countries of tourists (mostly industrialized countries) and on high-quality infrastructure services (from roads to security) in the destination countries (developing countries) makes tourism a sector where developing-country comparative advantages may indeed be very volatile. Such an unpredictable environment may have induced trade negotiators to loose faith in the usual analytical framework behind welfare balances.

Last but not least, services are more prone to differentiation than goods (the range of varieties for a broadly defined given service is likely to be much larger than the one for a given product). In such a context, welfare balances are more complex to examine because prices and quantities do not grasp the whole picture (there is a third component which influences each component of the welfare balances, that is, the number of available varieties of a given “product”). Operational models fully capturing the expected welfare changes caused by a variable number of varieties are not yet available.

IV. Concluding Remarks

This brief overview of the GATT and trade policy evolutions leads to two questions. First, should one expect WTO rules to better take into account welfare balances in the future? The answer is “yes” if the Doha Round and its successors do the basic job that any Round is supposed to do—improving market access (but the Uruguay Round has shown that such a goal can be missed).

However, the answer is probably “no” when the rest of the WTO rules are considered. Being based on a contract between sovereign states, it is hard to see how a well-defined procedure for assessing a policy and for judging its consequences (a cost-benefit analysis of the welfare balances) could be imposed on WTO members through the WTO framework. One could even argue that there should be no attempt to do so for two reasons (leaving aside all the legal and political difficulties). Were such a procedure to be imposed, it is likely that, even if sovereign states behave in good faith, they would put different weightings on the various components of the welfare balances. This situation may have already occurred in transatlantic competition cases, such as in the Boeing – MDD case (Evenett *et alii* 2000). Different weightings could lead to different outcomes in the various WTO members concerned, even if the analysis is based on the same initial welfare components and methodology. As a result, it is not even sure that the outcomes of such procedures would be very different from those prevailing in their absence.

The second reason is that WTO rules should not be seen as similar to laws voted by a Parliament and enforced on citizens. WTO members define rules that they apply to themselves. This situation induces them to look for strong terms for their partners, but loose terms for themselves, and it is hard to see how this game could end as long as the net gains or costs of WTO rules are not the same for every member. For instance, the fact that ten large economies (four developed and six developing) have initiated 90 percent of the stock of antidumping cases, but are the targets of 30 percent of this stock leaves little hope that the Uruguay Antidumping Agreement could be amended by the introduction of a cost-benefit analysis based on the “national interest.”

In sum, it is hard to see the benefits of introducing a strong competition culture *directly* in the WTO system (other than through improved market access). Indeed, it is easy to foresee the perverse effects of such a direct approach. As amply shown in the Mavroidis paper, the subtle definitions on which an economically sound use of the welfare balances approach is based require an intimate conviction of their usefulness by users.

Without such a conviction, welfare balances may be useless, even counterproductive. And if improving WTO texts are useful only for members already “convinced” by the usefulness of the welfare balances, what is the value of such “improvements”?

The second basic question is: what can then be done? There are two complementary options. First is to recognize that the fundamental layer for introducing the competition culture is every WTO Member, as indeed stressed by the Leutwiller Report thirty years ago. For instance, the fact that, within the last few months, the European Community has excluded services of “public interest” from both the full reach of domestic competition rules and the Doha negotiations is likely to be more than an unfortunate correlation.⁴

The second possible option is to recognize that, at the WTO level, the only available assets are market access and re-negotiations. They should be used more intensively, hence the two following suggestions. First, when negotiating in a Round on antidumping rules, small countries should make a coalition for increasing *de minimis* thresholds which are crude, but hard to manipulate, rules of thumb for assessing the real impact of their exports on the importing markets. Second, instead of refining endlessly the legal definitions of like-product, injury, etc., in antidumping procedures, it would be more efficient to draw the full consequences of the political necessity of certain trade actions. This approach would suggest favouring a progressive shift away from antidumping and antisubsidy (dumping and subsidies becoming simply an excuse for triggering protection) and towards safeguard, to subject such safeguard measures to the WTO basic discipline of re-negotiations—meaning that after “x” years of enforcing a safeguard, a country will abolish it, or, if it will decide to keep it, foreign countries will be entitled to compensations under the form of new liberalization from the country having imposed the safeguard (Messerlin 2000). Indeed, such rights could be

4 Despite the fact that some of them are already under world-wide competition, such as, University education (with vast movements of students, and more modest movements of professors) or some health services (with notable movements of doctors and patients).

automatically granted in cases where a safeguard is ruled as illegal in a dispute settlement case. This measure will allow management of the fact that unrestrained safeguards could be worse than antidumping actions (for instance, the EC steel safeguard alone is equivalent to more than 60 antidumping cases).

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**Is There a Need for Additional WTO
Competition Rules Promoting Non-discriminatory
Competition Laws and Competition Institutions
in WTO Members?**

by

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I. Introduction

When the WTO Working Group to study the Interrelation between Trade and Competition Policy was constituted in 1997 to fulfil the Singapore Declaration, initial discussions were shaped by two reference studies that were stimulated by the identification of “Globalization” in the early 1990s: the so-called Draft International Antitrust Code elaborated by a group of private scholars from the EU and the US¹ and the Report of the so-called Van Miert Expert group established by the EC then

1 H. Hauser and E. U. Petersmann (eds.), “International Competition Rules in the GATT / WTO System,” *Swiss Review of International Economic Relations*, 1994, p. 169-424 (see in particular p. 310-325). A further edition of the Draft International Antitrust Code which was presented at the OECD Committee on Competition Law and Policy was published by W. Fikentscher and U. Immenga (eds.), *Draft International Antitrust Code, 1995*. See also E. U. Petersmann, *The Need for Integrating Trade and Competition Rules in the WTO World Trade and Legal System*, Geneva, PSIO Occasional Papers, WTO Series No. 3, 1996, 43 p.

Commissioner in charge of Competition Policy Karel Van Miert.² The first study resulted a.o. in a detailed Code modelled after the experience of the most advanced economies, to be incorporated into WTO Law and to be administered by an “International Antitrust Authority” vested with, *inter alia*, a “right to ask for actions in individual antitrust cases or groups of cases to be initiated by a national antitrust authority” and:

[A] right to bring actions against national antitrust authorities in individual cases or groups of cases before national law courts, whenever a national antitrust authority refuses to take appropriate measures against individual restraints of competition (Article 19:2).

The second study drew on the experience gained by the EU Commission in its tackling of global anti-competitive behaviours in differentiated situations including international cartels (1989-1991 Wood pulp case), abuses of dominance on several major markets (1994 Microsoft), anti-competitive effects of vertical restraints (1994 Kodak-Fuji case) and global mega-mergers (1991 Aerospatiale – Alenia – De Havilland and 1995 Mc Donnell – Douglas cases). This study focused on “competition problems that transcend national boundaries: international cartels, export cartels, restrictive practices in fields which are international by nature (such as air and sea transport).” It identified problems arising chiefly on the part of American businesses but not exclusively (the 1991 prohibition of the Aerospatiale – Alenia Merger case concerned French, Italian and Canadian firms, and the 1994 Kodak – Fuji also involved a Japanese firm) and focused on diverging views about enforcing competition laws on both sides of the Atlantic (e.g. the unilateral extra-territorial enforcement of US Antitrust and Trade Laws vis-à-vis foreign anti-competitive practices leading to international conflicts of laws on jurisdictions, unilateral sanctions and counter-measures and enforcement problems such as information-gathering abroad and foreign “*blocking statutes*”). Even though the developing countries situation was touched by the second study, the developing countries were only considered as being subject to some types of

2 EC Commission, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, Brussels, Luxemburg, 1995.

anti-competitive practices (e.g. use of intellectual property rights for limiting domestic competition) and “extraterritorial application of other countries’ competition laws” (i.e. chiefly the laws of the US and of the EU).

However, it would be completely misleading, and unfair, to consider that global competition studies and multilateral projects emanated only from Europe. For instance, the ABA international antitrust proposal was one of the first and most prominent of these studies a decade ago. As early as 1991, a Special Committee on International Antitrust, chaired by Prof. Barry Hawk, of the Section of Antitrust Law of the American Bar Association issued a report in which, a.o., it recommended that “all countries should enter into an agreement to repeal their statutes granting immunity to export cartels at least to the extent that the statutes allow conduct in or into foreign markets that would be unlawful in their domestic markets”; that “a mechanism should be developed to resolve international disputes regarding conduct by export cartels that is alleged to have effects solely in foreign markets”; and that:

[A]lternative methods of resolving international conflicts over the behavior of export ventures include the formation of a multinational tribunal to make findings or to recommend resolutions to such disputes, or to establish a system of binding arbitration.³

Furthermore, Prof. Scherer made the insightful proposal, similar to the Munich Group’s recommendation, providing for a gradual, phased approach over approximately seven years to allow all signatory nations to comply with the full set of commitments. His book proposed to create an “International Competition Policy Office (ICPO)” that would be situated “within the ambit of the new World Trade Organization” and would “have both investigative and (in a second stage) enforcement responsibilities.” This ICPO would at first be an information-gathering agency, thereby following the model of the US Federal Trade Commission that

3 ABA, *Special Committee on International Antitrust*, Report, Chicago, 1991, p. 8-9.

was initially proposed by President Woodrow Wilson.⁴ This scheme would also follow the British model that was developed in the late 1940s and in the 1950s and which developed Competition authorities essentially vested with registration powers in their initial stages of functioning.⁵ Furthermore:

[O]ne year after a new international competition policy agreement has been ratified, all substantial single-nation export and import cartels and all cartels operating across national boundaries [should] be registered, and the mechanism of their operations [should] be documented, with the ICPO.⁶

Later, over a period of five to ten years, having gained in experience, the Scherer's proposed ICPO would become more like an action taking-body up to the point where:

[B]eginning seven years after its creation, the ICPO will receive complaints from the competition policy authorities of signatory nations concerning monopolistic practices that distort international trade but that are not expressly covered by the policies specified here. It will investigate those complaints and make recommendations for appropriate corrective action by the competition policy authorities of nations in which the alleged practices occur. If the ICPO finds that international trade has in fact been distorted and if the problem is not remedied through national action, individual nations will be authorized to take appropriately graduated countermeasures against the nation(s) or industries in which the distorting practices occur.⁷

In this proposal by Fred Scherer, the ICPO would also have had a major role with regard to mega-mergers that would have resulted in the concentration of 40% or more of the world trade under the control of a single enterprise or group of jointly acting enterprises. In that case, suggested Scherer:

4 F. M. Scherer, *Competition Policies for an Integrated World Economy*, Washington, Brookings, 1994, p. 92.

5 F. Souty, *La politique de la concurrence au Royaume-Uni*, Paris, PUF, 1996, 128 p.

6 Scherer, p. 92.

7 *Op. cit.*, p. 95.

[I]f the ICPO [determined] that competition in international trade [would be] likely to be jeopardized by such mergers to the detriment of consumers, it [would] recommend corrective measures to signatory nations, which [would] use their national laws and policies to remedy the problem.⁸

Because of the high-level political involvement of EU Commissioners, it was no surprise that, at the Singapore WTO Ministerial Conference in 1996, Vice-President of the EU Commission (and former Commissioner in charge of Competition) Sir Leon Brittan strongly supported the creation of a working group at the WTO, with full backing of then Competition Commissioner Van Miert. The EC also suggested an examination in the WTO of the following:

- a) the relationship between objectives, principles, concepts, scope and instruments of trade and competition policy and their relation to development and growth;
- b) analysis of existing instruments, standards and activities regarding trade and competition, including experience with their application;
- c) the interaction between trade and competition policy considering in particular (1) the impact of anti-competitive practices of enterprises and associations on international trade; (2) the influence of state monopolies, exclusive rights and regulatory policies on competition and international trade; (3) the relationship between trade-related aspects of intellectual property rights and competition policy; (4) the relationship between investment and competition policy; and (5) the impact of trade policy on competition.⁹

Debates at the WTO started focusing on issues that were chiefly related to *developed* countries that are already equipped with competition or antitrust institutions, as these concerns were reflected by legally non-binding multilateral guidelines. Over time, with progress made in symposia including civil society

8 *Op. cit.*, p. 94.

9 See Para. 20 of the WTO Singapore Ministerial Declaration adopted on December 13th, 1996.

(notably NGOs such as consumer's organizations)¹⁰ and all multilateral international organizations involved with Competition policy activities (the OECD, UNCTAD, the WTO and the World Bank), discussions focused more and more on issues related to developing countries, especially so after the Doha Ministerial Conference in November 2001.

During the period 1997-2003, the WTO Working Group on Trade and Competition Policy (WGTCP) identified all existing WTO provisions regarding private anti-competitive practices. Few of these WTO provisions on competition had led to WTO disputes. The WGTCP identified that International Hard Core Cartels (IHCC) affected both developed and developing countries in the same way. The debates in preparation of the WTO conference at Cancun showed the need for competition rules in the WTO to cope with issues of substance (i.e. anti-competitive behaviours) and to make the world trading system more efficient.

II. Existing WTO Provisions Regarding Private Anti-competitive Practices

This section briefly reviews the competition-related provisions in existing WTO Agreements, namely:

- *GATS, Art. VIII*: members are to ensure that state monopolies do not act in a manner inconsistent with their obligations / specific commitments;
- *TRIPS, Arts. 8 & 40*: authority to take measures against abuses of intellectual property rights such as anti-competitive licensing practices;
- *Basic Telecom Negotiations, Reference paper on regulatory principles*: commitments to adopt appropriate measures to prevent anti-competitive practices by major suppliers;

10 About five Symposia held in Geneva, 1997-2002, jointly organized by the Secretariats of the World Trade Organization, the United Nations Conference on Trade and Development, the Organization of Economic Cooperation and Development and the World Bank.

- *Agreement on Safeguards, Article 11.3*: Members are not to encourage / support the adoption of non-governmental measures equivalent to voluntary export restraints, orderly marketing arrangements or other governmental arrangements prohibited under Article 11;
- *Government Procurement Agreement*: It raises the level of burden on Members to strengthen the openness, transparency and predictability of procurement systems, thereby raising the risks of international collusion and cartelization: a recent and spectacular case has been made public by investigations conducted by the Financial Times which alleges that US Energy groups AES and Enron colluded to rig the auction for the largest electric distribution company in Latin America, thereby depriving the government of Brazil of several hundreds USD millions of benefits;¹¹
- *Consultation Arrangements under GATT and GATS*: Recognition that business practices that restrict competition in international trade may hamper the expansion of world trade and economic development.

So far, few of these WTO provisions on competition have led to cases or enforcement within the WTO dispute settlement system. One reason for this may be the absence of any specific competition institution in the WTO which specializes in competition related issues. Another major reason for this lack of enforcement is the dispersion of these provisions in several sets of documents which are not easily and frequently consulted by competition authorities in Member States nor by market operators (which remain unfamiliar with current WTO proceedings that only concern Member States of that organization and not corporations).

11 Demetri Sevastopoulo, "AES colluded with Enron to rig a bid for Latin American energy group," *Financial Times*, Wednesday, May 21, 2003, p. 1 and 20.

III. WGTCP Debates and Negative Consequences of Anti-competitive Practices for Developing Economies

The WGTCP has greatly contributed in identifying anti-competitive practices that affect trade. Two types of practices can be identified: First, practices that contribute to defeating trade liberalization, including import cartels, domestic abuses of a dominant position and monopolization, vertical restraints and some international cartels. Second, practices that more directly deprive nations of the benefit of trade, such as export cartels, anti-competitive transnational mergers and international cartels.

Contrary to frequently held misconceptions, transnational anti-competitive practices have important costs: they inflict serious harm on consumers (for instance in the graphite electrode case, the cartel members increased their prices by 60% resulting in overcharging of nearly USD 1 billion a year; in the lysine cartel, prices were doubled over several years).¹² As Anderson and Jenny put it:

[C]oncern over the impact of international cartels on trade and development receded somewhat in the 1970s and 1980s. However, in the 1990s evidence surfaced that they were far from being a problem only of the past and, indeed, that cartels were alive and flourishing in the 'globalizing' economic environment. Investigations conducted by the US Department of Justice, the European Commission, the Canadian Competition Bureau and other jurisdictions revealed the existence of major cartels.¹³

In the particular case of cartels, they can be very stable over time: the average duration of cartels for which there is publicly available information is 6 to 8 years but some cartels may last considerably longer (up to 40 years for the International Equipment cartel). And these cartels may affect a large and diversified number of industries (e.g. steel, plastic dinnerware, thermal fax

12 F. Jenny, *Competition Law and Policy: Global Governance Issues*, Globalization and Its Discontent Colloquium, New York University, March 4, 2003, New York.

13 R. Anderson and F. Jenny, *Competition Policy, Economic Development and the Multilateral Trading System*, Geneva, September 2002.

paper, heavy electrical equipment, construction materials and cement, glass, graphite electrode, vitamins, lysine, citric acid, etc.)

Besides identification of the harmful effects of anti-competitive practices on economic development, the WGTCP work has also shown that relatively few developing countries have effective and operational competition institutions, due to a lack of human and financial resources, which means that they are unable to fight against these anti-competitive practices. Indeed one of the major requests of participants from developing countries attending the WGTCP sessions is focused on assistance for institutional capacity building, with the major problem created by scarcity of skilled human resources in some least developed countries (thereby inducing a high turnover of the skilled work force within the civil service who tend to be drawn by better terms and conditions offered by private enterprises).

IV. International Hard Core Cartels Affecting both Developed and Developing Countries

It was Prof. Graham and Richardson who first identified the areas of anti-competitive practices where consensus was beginning to emerge because of existing world-wide convergence of enforcement and those areas where the economic analysis might lead to persisting disagreements.¹⁴

More recently, several studies sponsored by the World Bank, the OECD and UNCTAD have started to evaluate the actual prejudice to economic development and to international trade. In particular, with respect to developing countries, experiences have shown that international anti-competitive practices are often aimed at preventing the emergence of local industries in developing countries (i.e. use of dumping by heavy electrical equipment manufacturers and in the steel industry). They are most harmful in countries which do not have strong antitrust laws, now mainly developing countries, and they hurt developing

¹⁴ E. M. Graham and J. D. Richardson, *Global Competition Policy*, Washington, Inst. for International Economics, 1997, p. 591.

countries which are particularly dependent on imports for access to basic industrial products not produced locally or on exports (for their growth) and countries which have weak industrial structures. Some studies have shown the importance of cartels and the extent of the damage they have inflicted upon developing countries. For example, in 1997, developing countries imported USD 81 billion of goods from industries which had been affected by price fixing conspiracies during the 1990s. These imports represented 6.7% of total imports and 1.2% of the GDP of the developing countries.¹⁵ To put this statistic into proper perspective, international aid for development is about USD 50 billions per annum. Thus, at a minimum, the existence of anti-competitive international cartels implies transfers in the form of overcharge from developing countries to cartel members (often if not mostly firms from developed countries) which represent at least half of the value of the development aid given by governments of developed countries to developing countries.¹⁶

Lastly, a study from UNCTAD estimates the welfare impact of various hypothetical trade liberalization measures and states:

[A] world-wide reduction of 50% in all agriculture tariffs brings about an aggregate welfare gain of USD 21.5 billions. The largest absolute gains are captured by Japan, North America, the NICs, North Africa and the Middle East and Oceania. The estimates for the percentage gains for sub-Saharan Africa and Latin America are lower than in other studies conducted under similar assumptions. Since Africa and Latin America are among the major beneficiaries of preferential schemes, it seems likely that gains from liberalization for these countries in other studies could be overstated when full account is not taken of tariff preferences as has been done here.¹⁷

15 S. Evenett, M. C. Levenstein, V. Y. Suslow, "International Cartel Enforcement: Lessons from the 1990s," *World Economy*, 2001. This was a background paper prepared for the World Bank's *World Development Report 2001*.

16 F. Jenny, *op. cit.*

17 UNCTAD, *Back to Basics: Market Access Issues in the Doha Agenda*, Geneva, UN, 2003, Chapter V, "Estimated Gains from Multilateral Trade Liberalization."

A further analysis using the UNCTAD figures shows that the net welfare benefit for developing countries from such an agreement would be equal to USD 13.4 billions, out of the USD 21.5 billion in total. This USD 13.4 billions, which represents the theoretical gains to result from a drastic multilateral reduction in agricultural tariffs, is about half the minimum estimate of the direct benefit developing countries would obtain if a multilateral agreement on competition enabled the elimination of international cartels and therefore the supra-competitive margin developing countries have to pay to cartel members when they import goods (USD 20-25 billions according to World Bank sources).¹⁸

The definition of hard core cartels may be an issue. So far, only the OECD has attempted to define Hard Core cartels in a Recommendation to fight these cartels.¹⁹ Lastly, a study was prepared by the WTO Secretariat which attempts an inventory of the effects of "private international cartels" on developing economies and stresses the harm done to these countries:

[A]lthough estimates vary the price increases caused by international cartels are of the order of 20-40 percent. The price increases generate sizeable overcharges, especially given the large amount of imports by developing economies of cartelized products.²⁰

V. Need for WTO Competition Rules

Already in 2001, it was proposed by the EU at the WTO that:

[T]he potential development benefits of a WTO competition agreement would be a combination of three factors: a) a framework of rules which supports domestic competition institutions, b) flexibility and progressivity in commitments c) providing an

18 F. Jenny, *op. cit.*

19 OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, Paris, 1998.

20 S. Evenett, *Study on Issues Relating to a Possible Multilateral Framework on Competition Policy*, Geneva, WTO, 2003, (No. WT/WGTCP/W/228), p. 92.

effective response to developing countries co-operation needs, including capacity building.²¹

What are now the parameters of the discussion especially in view of the EU proposals?²²

First, the discussion at the WTO is neither about creating a supra-national antitrust agency, nor about the harmonization of national competition laws. There is agreement not to subject individual decisions of national competition authorities to the DSM, and there are no discussions in the WGTCF to change existing antidumping laws. Rather, the discussion focuses on how to address the issue of transnational cartels which defeat the purpose of trade liberalization and deprive trading nations of the benefits of trade liberalization as mentioned above. At present, the EU proposals are suggesting that every country should be covered by a competition law regime, that all national or regional competition or antitrust laws would include a provision prohibiting hard core cartels, and each country would remain free to include other provisions (e.g. on vertical restraints, abuses of dominance, merger control etc.). The national competition laws would have to meet the WTO standards of transparency, non-discrimination and procedural fairness.²³ Furthermore a mechanism of consultation and voluntary co-operation on transnational "hard core cartels" and a WTO Competition committee would be established to monitor the agreement and facilitate co-operation between countries, for example through peer reviews.²⁴ Finally, technical assistance would be offered to countries which do not have extensive experience nor resources in competition enforcement.

These elements suggest further reflections after Cancun particularly on the following issues: a definition of hard core cartels;

21 EU and its Member States Submission, 26 July 2001.

22 This section draws on a presentation made by F. Jenny at a WTO Post-Doha Regional Seminar at Nairobi in April 2003.

23 See EU and its member states submission at WGTCF No 1, May 2003.

24 See EU and its member states communication, No 2, May 2003.

the means for integrating or translating WTO core principles of non-discrimination, transparency, procedural fairness and due process into national or regional competition and antitrust laws; the ban on hard core cartels as so defined; international co-operation and special and differential treatment for less-developed countries; co-operation and consultation including peer reviews within the proposed Competition Committee; and the relationships to WTO dispute settlement procedures.

VI. Conclusion

The occurrence of such a significant number of global and regional private anti-competitive practices more than justifies competition rules in the WTO. However, the agenda in WTO discussions has so far narrowed to 5 areas, which can be summarized as follows:

1. A commitment to the adoption of national competition law and policy rules by all member states, or at least a commitment to respect some basic principles;
2. A general ban on hard core cartels (with an agreement among members states on an explicit definition of them that could be acceptable both to developed and developing countries);
3. The submission of competition law disciplines to WTO dispute settlement procedures;
4. The institution of a Competition Committee within the WTO to work on competition issues;
5. The adoption of Peer Reviews.

Some major competition issues—such as merger control—may have to remain outside the terms of the debates at the WTO because they have been pre-empted by the International Competition Network established among more than 50 competition authorities outside the WTO in 2001.

Investment and the Doha Development Agenda

by

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Abstract

In November 2001 Ministers of the WTO Member states tasked their negotiators to clarify investment issues with a view to considering modalities for negotiations at the Fifth WTO Ministerial in Cancun. This paper examines progress during the past two years in the Working Group on Trade and Investment. Its principal conclusion is that the current mandate was so broad that the outcome of slow progress towards a Multilateral Framework for Investments (MFI) was to be expected. This has resulted in a situation where further progress may only be determined in the context of negotiations, where true 'bottom line' positions would be exposed. Hence, the paper argues that any mandate emanating from Cancun should be more precise. It also argues that while discussions about the feasibility and architecture of an MFI continues, this should not retard current commitments and disciplines on investment related issues such as in the Agreement on Trade Related Investment Measures, Agreement on Subsidies and Countervail Measures and Mode 3 in the General Agreement on Trade in Services.

* The views in this paper are expressed in a personal capacity and should not in anyway be associated with the World Trade Organisation or its Member states.

I. Introduction

Although investment issues have been discussed and negotiated at the multilateral level for more than 50 years, they rose to prominence in the early 1980s with a limited mandated agenda on trade related investment measures during the Uruguay Round of negotiations. Progress on this limited mandate was slow. In contrast, the successful conclusion in 1994 of the North American Free Trade agreement, (NAFTA), which incorporated investment provisions and thus revitalised earlier ambitions to achieve a multilateral framework. Subsequently, the Organisation for Economic Co-operation and Development attempted to transform itself from a bureaucratic organisation into a negotiating body with the objective of successfully concluding a Multilateral Agreement on Investment. As is well known, that effort failed in 1998.¹ At the multilateral level, the First Ministerial of the newly created World Trade Organisation, held in 1996, initiated a Working Group on Trade and Investment.

Taken together these initiatives established the importance of foreign investment policy as an important component of the multilateral trading system. They also created new challenges for negotiators at the Fourth WTO Ministerial with respect to how this policy might be incorporated into WTO rules. The Ministers responded by establishing a mandate in what now is known as the “Doha Declaration” that, in effect, requires that key substantive decisions be made at the following (Fifth) Ministerial; (see Box 1).

Most recent discussion on investment issues in the WTO in fact has been at the very generic stage such that even the most basic question is not fully settled as to whether a formal negotiation will take place. Indeed, if investment issues are not adopted as part of the negotiating agenda at the Fifth WTO Ministerial to take place in September 2003 in Cancun, some WTO Members would take this as a victory. But, even if this were to happen, many investment policies that might have formed part of an overarching investment agreement will nonetheless be covered in

1 A detailed account is provided in Graham (2000).

a number of existing WTO agreements. Hence, the question that needs to be answered is, would additional investment rule-making as is proposed in the Doha mandate add new value beyond that which already exists? In particular, given the focus on economic development in poorer countries that is meant to be the focus of the new round, would a new agreement to create investment rules make a tangible and significant contribution to the development process, if such an agreement were eventually included in the WTO? Alternatively, could an equal contribution be achieved via the deepening of existing investment rules or negotiating new such rules within existing WTO agreements? The issue before WTO Members, therefore, is one of the extent to which investment issues in the WTO should be deepened and by what mode, as opposed to the binary question of whether or not the WTO will embark upon negotiation of an overarching investment agreement.

The approach taken in this paper to responding to these questions is to review the current investment related provisions in the WTO in the next section. The third section examines the mandate for investment issues given by Ministers in Doha while the fourth section is a review of the state of play of the various components of the current mandate. Most of it supports the transition of developing country governments towards a more open and receptive policy framework for FDI. It emphasises the assets possessed by multinational corporations and their ability to contribute to the economic growth and development of a host country.²

While the paper is policy oriented it is important to note the theoretical and empirical literature on the link between foreign direct investment and development. It highlights the fact that while there is very strong evidence supporting the case for investment liberalisation there are also possible negative effects from opening up to FDI.³ This is not surprising and in no way

2 These assets include additional capital, advanced technology, managerial expertise and linkages to international markets.

3 See, e.g., Moran (1998) and UNCTAD (1999).

should be discounted. Any economic policy will have both positive welfare effects, which require associated adjustment. Some of the specifics of this literature is discussed in Bora and Graham (2003) and will not be repeated in this paper.

II. Investment-Related Issues Bearing on Existing WTO Agreements⁴

As suggested earlier, critics of the investment agenda at the WTO tend to focus on the failure of the MAI, trying to use it as an example of why rule making on investment issues would not be in the best interests of countries, especially developing ones. However, this is to ignore the fact that many of the issues related to investment policy-making are already being covered within the multilateral rule making agenda.

One of the most contentious issues at stake, for example, is market access for foreign investors. This involves national and most favoured nation treatment for foreign investors, which were among the cornerstone principles of the MAI. The issue is taken up in some detail in the next section, since it is partly covered in two existing WTO agreements; the Agreement on Government Procurement (AGP) and the General Agreement on Trade in Services (GATS). The standard provided in these agreements, and indeed, other agreements such as Bilateral Investment Treaties and the North American Free Trade Agreement is national treatment for foreign investors. This means providing treatment to foreign investors which is no less favourable than that provided to domestic investors. A corresponding principle, is the most-favoured-nation principle, which prohibits discrimination between investors from different countries.

The AGP provides that there be no discrimination against foreign suppliers and, also no discrimination against locally established suppliers on the basis of their degree of foreign affiliation or

⁴ See WTO (1996) and Koulen (2001) for a more detailed discussion of the foreign investment related disciplines in the WTO.

ownership.⁵ The GATS treats foreign investment in the service sector as a mode of supply.⁶ This is done by defining the commercial presence of a foreign supply as:

[A]ny type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supply a service.⁷

Another mode of supply is through the presence of “natural persons.” Koulen (2001) argues that this is closely related to the commercial presence mode since it includes the temporary entry of business visitors and intra-company transfers of managerial and other key personnel.

One word of caution or clarification: while the GATS and the AGP have elements of market access for foreign investors, their architecture differs substantially from that proposed in the MAI or from Chapter 11 of NAFTA. One of the key differences, with respect to the GATS is that there is no general obligation. Members apply the standards of treatment through specific commitments. These commitments apply only to the listed sectors and the reservations and exceptions expressed by Members.

One final note with respect to market access is the role of the TRIPS agreement. While the agreement itself does not provide a standard of market access it does provide for a standard of intellectual property rights protection. One element of the determinants of FDI flows is the extent to which a firm specific asset can be protected from either expropriation or dissipation (Maskus, 2002). If intellectual property rights protection are of a sufficient standard it could induce FDI flows.

5 The agreement also has a provision against the use of offsets, which for the most part is parallel to the issue of performance requirements.

6 Investment aspects of GATS are dealt in some detail in Sauv e and Wilkie (2000).

7 Article XXVIII (d) of the GATS.

A second area where disciplines already exist is with respect to investment measures that can be linked to trade. In this respect there are measures, which, on the one hand, condition the behaviour of affiliates of foreign enterprises, and on the other, used to attract foreign investment.

With respect to this second area, coverage is at least potentially already established in the Agreement on Subsidies and Countervailing Measures (ASCM) for industrial products, the Agreement on Agriculture for agricultural products, and the GATS for services. The establishment of the first of these agreements, which provides remedies to challenge the use of subsidies, was a major achievement of the Tokyo Round of Multilateral Trade negotiations; the agreement was further modified during the Uruguay Round. However, whether this Agreement and the two others fully cover investment incentives is not very clear. The main reason why is that these agreements explicitly cover trade in goods and services and not foreign investment. Therefore, if there is a link, it must be through the relationship between investments and trade in goods and services.

The ASCM in particular raises ambiguities. The ASCM is a very broad agreement and contains a number of specific steps that are used to determine whether or not a measure comes under its jurisdiction. For example, a three-part definition is used to determine whether the measure is indeed a subsidy; what must be established is that a clear financial contribution has been provided by a government or public body within the territory of a Member that confers a benefit. A second condition is that the measure must then be specific to an enterprise, or group of enterprises.

Most measures that can be classified as investment incentives would indeed seem to fall within the jurisdiction of the ASCM on the basis of these criteria, or at least so with respect to industrial goods as covered by this Agreement. However, a number of additional factors must come into play before a subsidy is ruled as inconsistent with the ASCM and subject to discipline. To begin, it must be established whether the subsidy falls into a category of prohibited subsidies. This category includes specific trade-related subsidies; such as direct export subsidies and subsidies that are

contingent on exporting. The burden of proof rests with the complaining party. If this is established, the complaining member must show that it has suffered adverse effects. This means that either its domestic industry producing like industrial goods has suffered injury from imports sourced from the country offering the incentive, serious prejudice arising from export displacement in either the market of the country offering the incentive or a third market. Finally, account must be taken of nullification and impairment of benefits from improved market access that is undercut by subsidisation. Importantly, whether or not investment incentives can be shown to have these prejudicial effects has not been established in any case actually brought to the WTO where some sort of concrete precedent could be set.

The Agreement on Agriculture provides special provision for agricultural products. These provisions for the most part insulate subsidies to industries that produce agricultural products from the disciplines contained in the ASCM. However, after 1 January 2003 the ASCM agreement is meant to apply to subsidies for agricultural products.⁸ But, again, no cases have come up whereby investment incentives to foreign investment in agriculture have been challenged under ASCM.

Therefore, for those types of measures that might be classified as investment incentives, the WTO Agreements provide potentially broad although as yet untested disciplines. The policy question is whether specific application of these agreements should be allowed to be determined by future dispute cases or, alternatively, should negotiations now be conducted so as to clarify how these agreements should be interpreted with respect to investment incentives?

As already noted, selective government intervention meant to affect performance of foreign investment is already partially covered under the Agreement on Trade Related Investment Measures (TRIMS). Actually, the fact that this text is considered to be a full-blown WTO Agreement is something of a mystery. This is because the TRIMS agreement at present does little more than

8 Subject to the provisions of the agreement as set forth in Article 21.

clarify the application of GATT 94 articles III (4) on national treatment and XI (1) on quantitative restrictions.⁹ It does not even define a trade related investment measure. Instead the approach taken was to include an illustrative list of measures agreed to be inconsistent with the two key paragraphs of the GATT (III.4 and XI.1).¹⁰ This list covers measures that are mandatory or enforceable under domestic law and administrative rulings and measures for which compliance is necessary to obtain an advantage. The list includes local content schemes, foreign exchange and trade balancing, and export-restrictions. There is no text specifically addressing issues related to granting national treatment to investors.

The TRIMS agreement allowed any WTO Member access to an extended transition period for bringing policies that they might have into compliance with it, if and only if the relevant measures were notified within 90 days of the commencement of the Agreement. Twenty-six members, all developing countries but of widely varying economic characteristics, notified a variety of measures (Bora, 2002), most of which were local content schemes. The second most frequently notified measure was foreign exchange balancing. Subsequent to the expiry of the transition period, 11 Members applied and were granted extensions until 2004.

The basic issue regarding the TRIMS agreement is whether it should be extended beyond clarification of measures that might

9 The TRIMS Agreement is a rather modest attempt at disciplining policies that are targeted at foreign enterprises and which came about through conflicting positions on the extent to which investment issues should be covered by the WTO. Many developing countries resisted the extent to which market access for foreign firms would be covered, and as a result the negotiations focused on policies that applied to the operations of foreign firms. Even then, negotiations proved difficult, as there was no consensus as to whether or not a specific policy instrument was indeed trade distorting. Furthermore, some developing countries took the position that they should have access to policy instruments that could be used to offset any perceived negative effects associated with the operations of trans-national corporations.

10 There was nothing to suggest that the list was exhaustive of all the measures that could be considered to be inconsistent.

be inconsistent with GATT articles III and XI.¹¹ Indeed, during the Uruguay Round negotiation of the Agreement, a number of types of “performance requirements” placed on foreign investors by governments that might create trade distortions but were not necessarily inconsistent with the two GATT articles were identified (Graham and Krugman 1991) and proposed for inclusion in the Agreement. But, as a compromise among the negotiating parties, all of these were removed from the Agreement more or less at the last moment. (Hence, the answer to the “mystery” noted above: had it not been for this last-minute compromise, the TRIMS agreement might have indeed evolved into a full-blown agreement and not a “clarification” of existing GATT obligations.)

In addition to market access for investors and potential disciplines on incentives and performance requirements there are also provisions in the Agreement on Trade Related Intellectual Property that have the potential to protect an investor’s assets (Maskus, 2002). Some developing countries have argued that these provisions are “overreaching” and in fact impede development. Whether or not these claims have merit is hotly disputed. However, at the present time, it does not appear that any existing provisions of the TRIPS Agreement will be subject to renegotiation during the Doha Round.

III. Is There Any Value Added by Including a New Investment Agreement in the Doha Development Agenda?

The investment-related paragraphs of the Doha Ministerial mandate (see Box 1) recognise the case for a multilateral framework to secure transparent, stable, and predictable conditions for long-term, cross-border investment, particularly foreign

11 An interesting aspect of the Panel decision on India is that it found the measures to be inconsistent with III:4 and XI:1 and chose not address the claims under the TRIMS agreement. While it is tempting to interpret this as an irrelevancy of the TRIMS agreement the decision was based on judicial economy, as opposed to a judicial interpretation of hierarchy of agreements. See WT/DS146/R, 21 December 2001.

Box 1

Investment work program in the Doha mandate

20. Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

21. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral co-operation for their development policies and objectives, and human and institutional development. To this end, we shall work in co-operation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

direct investment (FDI) that contributes to the expansion of trade. The identified issues concern both the liberalisation of foreign investment and its operation once established in foreign markets. It recognises the points made in the previous section that foreign investment in general, and FDI in particular, is seen as a way of transferring needed capital as well as other assets, such as technology, managerial skills, and improved access to export markets to host countries.

Nevertheless, potential drawbacks of foreign investment should also be noted. Of particular concern is the impact of short-term and volatile capital flows on the macro-economic and balance-of-payments stability of host countries. Other concerns include the impact of foreign investment on domestic investors, competition in host-country markets, domestic savings and consumption patterns, and the ownership of productive and financial assets. The Doha Ministerial mandate thus places particular emphasis that any multilateral framework must reflect the special development, trade and financial needs of developing and least-developed countries, and on allowing Members to undertake obligations and commitments commensurate with their individual needs and circumstances. This includes that any prospective investment framework in the WTO must preserve the right of Members to govern and regulate in the public interest. It is emphasised also that creating a more open and stable climate for foreign investment is itself an important development objective. Not only do developing countries have an interest in encouraging inward investment and the benefits that accrue from it; these countries also have a growing interest in creating a more secure international framework for outward investment, as they increasingly became exporters of FDI and home countries to transnational corporations.

The negotiators thus provided a mandate that could best be described as pragmatic. The pragmatism arises from the recognition that existing WTO rules already partly cover the four substantive key issues. For example, market access via FDI in the context of services (but, importantly, not industrial goods) is covered under commercial presence under the GATS. Disciplines on government subsidies towards investment as they relate to

merchandise trade are not identified in the Doha Declaration because, as noted in the previous section, they potentially are covered under the ASCM and the TRIMS. Agreement These agreements might not be as fully developed as they could or even should be, but negotiations to enlarge or clarify their coverage could be argued better to fall under negotiations specific to these Agreements, not to a new agreement. (On this, however, see our concluding remarks.)

Even so, the Ministers of the WTO Member states did agree to include the relevant paragraphs in the Declaration. Given the lack of consensus on the intrinsic value of investment-related rules, a plausible question is in fact why Ministers agreed to the mandate at all. Four reasons can be put forth:

A. Coherence argument

Coherence in the WTO context usually means the aligning of the policies and practices of WTO with those of the World Bank and the IMF. However in this context, we mean coherence between trade and investment policy. The intellectual history of FDI started with a supposition that trade and foreign direct investment are substitutes. In this context, FDI was seen mostly a means to overcome tariff barriers. Over time, however, this dichotomy has blurred substantially. Both evidence and theory provide valid reasons for trade and FDI to be complements (Markusen 2002; Graham and Wada 2000). This blurring is amplified by the fragmentation of production, which causes intermediate products to be cross-hauled among various subsidiaries of transnational corporations. A good example that trade and investment indeed are complementary is the identification of *investment* restrictions as non-tariff *trade* barriers (NTTBs) by the private sector. A recent survey found that investment measures are one of the most frequently cited NTTBs by the private sector (OECD, 2002). Hence, the reduction of tariffs over the past 50 years has, in some sense, increased the need to address foreign investment barriers as one type of trade barrier at the multilateral level.

B. *Single undertaking*

The Uruguay Round Agreements expanded the scope and mandate of the WTO in an unprecedented fashion. In addition to extending the rules based discipline to agriculture, textiles, and clothing, new agreements covering intellectual property, trade in services and contingency measures were concluded. That these agreements all became part of a single undertaking happened because, given the diversity of trading interests of the WTO Membership, some of the underlying issues are relatively more important to certain Members than others, and interests of the membership are not symmetric. Thus, concessions could be granted by one Member in exchange for concessions by other Members, enabling progress on a range of issues where such progress might not have been possible had each issue been separately negotiated. Much the same can be said for investment. Progress on investment might in fact result from progress on other issues. For example, one of the more accepted political realities of the Doha Round of negotiations is the pressure on the European Union to reform its agricultural policy. This could be done unilaterally by the EU, of course. However, this is unlikely in today's mercantilist world, and thus there is a political need for the EU to receive a "concession" in return, even if it is most likely the EU itself that would receive the most benefit from reform of its agricultural policy. Such a "concession" might come in the form of movement on the investment front; the EU has been the leading advocate of expansion of WTO rules to cover investment. In the words of Hoekman and Saggi (2002), progress on investment in the WTO could be part of a "grand bargain."

C. *Changing business environment*

An important element of international trade policy is that it should be relevant to the private sector. As such, it must be noted that international business today is conducted quite differently than it was as recently as 15 years ago. In particular, falling barriers to the international trade in goods and services, combined with rapidly changing technology, have caused significant changes in the organisational structure of businesses. Lower tariff and transport costs, plus improvements in information technology, have made it increasingly easier to locate

different stages of production in different countries, to take advantage of special characteristics of each country. As this happens, intra-firm international trade in “intermediate goods” (e.g., components, subassemblies, and semi-finished goods) rises. In order to take advantage of these opportunities there is clearly a need for a firm to make investments in many countries. The nature of these investments goes beyond the traditional view that FDI is simply “greenfield” type investments of 100 percent ownership. In many cases, the investments are joint ventures or licensing and contracting relationships. An increasing need thus arises that the rules on international trade take into account the various forms in which international investment takes place.

D. The complicated architecture of plurilateral rules

While investment rule-making at the multilateral level has proceeded slowly, this does not mean it has not proceeded at all. Many countries have been quite active in this area over the past 15 years. The initiatives range from the comprehensive and controversial Chapter 11 of the North American Free Trade Agreement to the many bilateral investment treaties (BITs) currently in force. These instruments differ greatly in terms of their coverage and level of discipline.

This increase in activity raises the issue of consistency and discrimination. BITs are not necessarily the same between countries and investment provisions in regional trade agreements (RTAs) such as NAFTA chapter 11 vary considerably. Moreover, differences among various instruments can lead to inefficiencies and distortions. As a result, the proliferation of such agreements raises the issue of whether or not a multilateral approach would be superior for reasons of efficiency to a network of BITs and investment agreements within RTAs. A single multilateral instrument would also arguably create a more equitable environment for investment than would a patchwork of inconsistent agreements.

IV. State of Play in Investment Negotiations¹²

Paragraph 22 of the Doha Ministerial Declaration (see Box 1 above) mandated the Working Group on the Relationship Between Trade and Investment to focus on *clarifying* the following issues: scope and definition; transparency; non-discrimination modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions exceptions and balance-of-payments; consultations and the settlement of disputes between members. In addition, the Working Group also was instructed to continue work on the relationship with other WTO agreements and International Investment Agreements and on the issue of FDI and the transfer of technology.

Each of the seven issues identified in paragraph 22 are now considered in turn.

A. Scope and definition

There are two main approaches to defining investment—an intrinsically narrow approach, such as an enterprise-based or transaction-based definition, on the one hand, and a broad, asset-based approach, with different options for including or excluding various categories of investment. The United States for the most part has championed the broader approach. A number of developing countries, on the other hand, propose a narrower approach, e.g., that any coverage of a future WTO agreement be limited to foreign direct investment (but see subsection on balance of payments below).

In addition to the difficulty of defining investment, there is the added difficulty of defining what exactly is an “investor” for purposes of implementing an investment agreement. This is an important issue because implicitly any agreement involves rights and obligations of investors, as opposed to governments. For example, if a future agreement were to guarantee national treatment to investors and / or their investments, it would be of

12 Much of this section is based on the discussions of the Working Group on Trade and Investment in 2002. See the *Annual Report* of that Group for further details, WT/WGTI/6.

paramount importance to define precisely what entities qualified for this treatment.

B. Transparency

In describing the objectives of a multilateral investment framework, Ministers at Doha began with the concept of securing a “transparent” framework for foreign investment. The discussion in the working group did not focus on the benefits of transparency, but rather on the nature and depth of transparency provisions and on the scope of their application in a possible WTO agreement on investment.

Some possible transparency obligations discussed in the working group are:

- Publication and notification requirements;
- Enquiry points;
- Prior notification and comment;
- Administrative and judicial procedures;
- Investor and home-country obligations.

At this point in time, the positions of individual WTO members on what transparency-related obligations should be contained in any future investment agreement are not fully clear.

C. Development provisions

The main areas where developing countries are seeking flexibility in any WTO agreement on investment are in regulating the entry of foreign investment (through general screening, selective restrictions, and conditions on entry) and in using policies to enhance the contribution that foreign investment can make to their economic and social development needs and objectives (through performance requirements, investment incentives and preferences for domestic investors). Not surprisingly, a consensus on exactly what approach is best from a development perspective does not exist. Rather, views range from it being desirable that there be widespread scope for government intervention or, alternatively, that there be strong obligations on governments not to

use such intervention on a selective basis. Various broad options have been identified during the period after the Doha Ministerial during discussions in the working group. These are:

- (i) that the development objectives of an agreement on investment be included in the preamble of the agreement;
- (ii) that the scope of an agreement be clearly delineated—e.g., that it be made explicit whether the agreement applied to FDI only or to all forms of investment, and whether it covered the pre- as well as the post-establishment phase of investment;
- (iii) that the agreement should allow at least some exemptions from obligations;
- (iv) that Member countries be allowed some flexibility in undertaking specific commitments;
- (v) that any agreement allow longer transition periods for implementation for poor countries than for richer countries; and
- (vi) that some means should be provided for technical assistance and capacity building for poorer countries.

Furthermore, it should be recognised that the seven issues listed for “clarification” in paragraph 22 did not exhaust the scope for development provisions; rather, one could expect further discussion to reveal whether certain items should be excluded from the list, and whether new items should be added.

D. Non-discrimination

The principle of non-discrimination is at the core of most international commercial treaties, although its application is typically subject to carefully defined conditions. These conditions might allow governments to give preferential treatment to domestic products, producers and investors, or to certain of their commercial partners but not to others, or to pursue domestic policy objectives that could not be realized without practising some degree of discriminatory treatment. The scope for the application of non-discrimination can also be limited by the definition of

“investment” in an agreement—i.e., by the range of assets to which non-discriminatory standards are applied.

An important distinction can be drawn between the application of non-discrimination—and national treatment in particular—at the pre-establishment and post-establishment phases of investment. Similarly, MFN and national treatment also differ. An argument can also equally be applied to the application of the national treatment standards. National treatment, like MFN treatment, could also be extended to all stages of investment—its entry, its operation after establishment, and its liquidation. In doing so, however it will be important to take into account the need (or at least preference) on the part of some developing countries to have some flexibility to discriminate between domestic and foreign investors.

In the context of the discussion of non-discriminatory standards at both the pre- and post-establishment phase, it is important to note, once again, that scope of application depends crucially on the definition of the term “investment,” as well as on the exceptions allowed and the specific commitments made under the agreement’s provisions by individual Members.

E. Modalities for pre-establishment commitments based on a GATS-type positive list approach

The GATS approach to scheduling market-access commitments has been suggested in paragraph 22 as a model of development-friendly multilateral rules. Discipline is achieved through the binding of policy, but at a pace that is consistent with the needs of each Member. At the same time, there are also valid criticisms about the degree of the liberalisation that could be realised through such an approach. Bindings have policy value in the sense that they are credible commitments of policy, but under the GATS approach, different countries can put forth significantly different bindings. Moreover, it has been argued that, under the GATS approach, the degree of effective liberalisation has been limited to the *status quo*; countries have been to date

unwilling to bind themselves to any commitment that does not already exist under current law and policy.¹³

F. Exceptions and balance-of-payments safeguards

Another element for consideration is ways in which general, security, and regional integration exceptions as well as balance-of-payments safeguards might be incorporated in a prospective WTO investment agreement. An issue of great importance to some developing countries is balance-of-payments safeguards, since it touches directly on concerns about short-term capital flows and exposure to financial volatility. Indeed, such concerns are at the heart of why these countries seek that any such agreement be limited to cover foreign direct investment only. However, it is also noted that foreign direct investors do engage in short term financial transactions, and thus it is argued that even an investment agreement that is limited to foreign direct investment must contain some balance-of-payments safeguard, perhaps one similar to that already contained in the GATT (which in turn is meant to be consistent with IMF rules regarding balance of payments).

G. Consultation and the settlement of disputes between members

Although there are different models for settling investment related disputes (e.g., NAFTA chapter 11, which allows for private parties in some circumstances to initiate dispute settlement procedures under so-called investor-to-state provisions), judging from reports of the Working Group, that there is a widely shared view that the existing WTO dispute settlement mechanism should apply to any future investment agreement—just as it applied to all other WTO agreements. Moreover, there seems to

13 Indeed, a frequently heard complaint about GATS is that national commitments under GATS often are less than the *de facto status quo*. In other words, the extent of *de facto* liberalization actually exceeds that achieved *de jure* under GATS. Defenders of the GATS approach counter that, while this latter might be true, GATS is an unfinished work that will, with time, achieve a net liberalization. Whether this proves true, of course, only time will tell.

be a widely shared view that the WTO would *not* include investor-to-state dispute settlement procedures such as are found in the NAFTA. Even so, there is no doubt that the application of the existing WTO dispute settlement system to investment obligations and disciplines would raise a number of issues that would require further examination and clarification such as: the scope for non-violation actions; extending cross-retaliation and cross-compensation to the investment area; the interaction of investment rules with other substantive rules in existing WTO agreements; and the relationship with other dispute settlement systems in existing international investment agreements.

V. Conclusions

Much of the concern about a possible framework agreement in the WTO for FDI is the possibility that it may shift the balance of rights and obligations of foreign-controlled firms operating in a national jurisdiction. Some such concern is warranted and we would not quarrel with that, although elimination from consideration at WTO of NAFTA-like investor to state dispute settlement procedures takes some of the edge off of this concern. The focus of this paper, however, is on the issue of whether or not good investment policy requires a multilateral system of binding and enforceable rights and obligations. The paper takes as a starting point the ongoing debate on the link between foreign direct investment and the development, noting in particular that FDI can make significant contributions to development but, at the same time, is not strictly necessary for development to occur.

In our view, the ground has now been prepared sufficiently to move the agenda on investment forward. Each of the proposed issues has been covered and there has yet to be a claim that technical assistance delivery has not been fulfilled. The difficulty at this stage is whether or not the differences among WTO Members that have emerged can be resolved outside a negotiation forum. For the most part, discussions on investment within the WTO so far have avoided any use of the term "negotiation." But, even to the casual observer, the nature of the national position papers and the report of the Working Group on Trade and

Investment suggest that the Members have not been merely engaging in discussions aimed at achieving some sort of intellectual clarity but rather, they have been *de facto* preparing for an upcoming negotiation.

In this respect two matters can be identified that bear on whether a constructive negotiation is now likely to ensue. First, there does exist a group of Members who remain steadfastly opposed to investment issues in the WTO under any circumstances. Exactly which Members are in this camp is, however, not wholly clear, as many countries have maintained a stance of deliberate ambiguity on this issue. The “anti-MFI” camp might be limited to India and certain of the ASEAN countries. But it could include a majority of developing countries. Since the exact numbers are not known the probability that the “Indian position” (i.e., do nothing on the investment front) is likely to carry the day remains uncertain.

The second matter compounds the first: There is genuine concern on the part of a number of developing countries that, even if they were in the end to support investment negotiations, they do not have the power or capacity to negotiate an agreement that is in their interests. Thus, these countries might be classed as ones that believe that although an agreement that indeed is in their interests is feasible, nonetheless the actual outcome of a negotiation could very well be an agreement that is antithetical to their interests.

The existence of these two groups of developing nations must be taken into account when viewing the broader context of the negotiations. How these groups “play their cards” in Cancun will bear greatly on the nature and extent of any negotiation on investment. The most divisive but key issue in the upcoming round of negotiations, for example, is not investment, but agriculture. *Demandeurs* for agricultural reform could very well be willing to use investment negotiations as a “bargaining chip” to affect the outcome in agriculture, regardless of whether or not they fundamentally support inclusion of an investment agreement in the negotiations. Thus, developing countries in the second of the two groups, and perhaps even in the first, might be quite willing for extensive negotiations on investment to proceed,

if this would induce the EU to reduce its resistance to reform of its agricultural policy. Investment could prove to be a bargaining chip with respect to other issues as well, e.g., access to essential medicines. In the end, whether there is to be negotiated an investment agreement in the WTO might thus itself be a matter to be negotiated.

We conclude by noting that if negotiations to conclude an investment agreement do proceed in the WTO, there is a major issue lurking that must be resolved that we have already hinted at. This is whether the new agreement would supplant existing rules bearing on investment in the WTO. For example, provisions pertaining to market access (national treatment, most favoured nation) for foreign investors in the services sectors are already part of the GATS, as already noted. Would parallel provisions in a new investment agreement supersede these? Some parties have already suggested that the answer should be “no” and thus that a new investment agreement might cover only goods and not services, much as the present GATT covers trade in the former while GATS covers trade in the latter. However, some private parties have objected to this, noting in particular that many foreign-invested operations in practice deal in both goods and services and thus that it would be undesirable to have two agreements in effect that could be inconsistent with one another. It also has been pointed out that the reason why GATS covers investment in services is because, when the GATS was first negotiated, there really was no prospect for WTO rules on investment; because trade and services and investment in services are highly intertwined, the GATS negotiators realized that the new services agreement would have to cover at least some investment-related issues. In this context, the GATS agreement could be seen as provisional with respect to investment coverage, i.e., filling a lacuna that then existed. Once the lacuna is removed, arguably, the need for investment-related provisions in the GATS would expire, and the new agreement could thus be written to supersede GATS. Similar statements could be made about other investment-related issues, e.g., the unresolved issues in the ASCM could be resolved by explicit provisions pertaining to investment incentives in an agreement on investment. Likewise, the existing ATRIMS, which we have already argued is really less

than a full-blown agreement, could be incorporated into an agreement on investment.

On the issues of the previous paragraph, however, we don't pretend to have the final word. Rather, we simply note that these issues of consistency and possible overlapping coverage between an agreement on investment, if one is negotiated, and existing provisions of existing WTO agreements pertaining to investment, must be dealt with.

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Are the Competition Rules in the WTO Agreement on Trade-Related Intellectual Property Rights Adequate?

by

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I. Competition Rules in the TRIPS Agreement

A. *Brief historical background*

Article 46 of the 1948 Havana Charter for the International Trade Organization (ITO) contained an undertaking by Members to prevent restraints on competition (and to cooperate with the Organization in preventing such restraints), and permitted a Member to bring a complaint to the Organization on the basis that another Member was failing to deal with a competition-related situation. Included within the specific kinds of practices which the Organization's dispute settlement procedure would have addressed was commercial conduct:

3(e) preventing by agreement the development or application of technology or invention whether patented or unpatented;

(f) extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subjects of such grants.¹

¹ Havana Charter for an International Trade Organization, United States Conference on Trade and Employment, held at Havana, Cuba, Nov. 21,

The ITO would have had the authority to “request each Member concerned to take every possible remedial action, and [...] recommend to the Members concerned remedial measures to be carried out in accordance with their respective laws and procedures.”² The Organization would have prepared, distributed to Members and made public a report on its decisions, and the remedial actions taken by Members.³

From the late 1960s through the early 1980s there was considerable attention to the relationship between IPRs, transfer of technology and competition in the context of debate on a New International Economic Order. In 1980, the UN General Assembly adopted as a resolution “The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices” which includes rules relating to abusive practices in the field of IPRs.⁴

The negotiating history of the TRIPS Agreement reflects concerns expressed by developing countries with the potential market restricting / anti-competitive effects of IPRs.⁵ Proposals to incorporate provisions addressing the potential anti-competitive effects of IPRs originated with the developing countries. For example, draft Article 43, para. 2B (developing) of the Brussels Ministerial (December 1990) Text included more specific references to anti-competitive practices and remedies than were ultimately incorporated in Article 40.2, TRIPS Agreement.

(contd.)

1947 to Mar. 24, 1948, Final Act and Related Documents (March 1948), at Chapter V, Restrictive Business Practices, art. 46. See Frederick M. Abbott, “Public Policy and Global Technological Integration: An Introduction,” in *Public Policy and Global Technological Integration* 3 (F. M. Abbott and D. Gerber eds. 1997) (Kluwer).

2 Id., arts. 8 & 48(7).

3 Id., art. 48(9) &(10).

4 See, e.g., Section D4, Reprinted in 19 Int'l Leg. Mat. 813 (1980).

5 See, e.g., Communication from India of 10 July 1989 MTN.GNG./NG11/W/37 sub. 2 and VI.

Article 43

1. PARTIES agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

2B. PARTIES may specify in their national legislation licensing practices or conditions that may be deemed to constitute an abuse of intellectual property rights or to have an adverse effect on competition in the relevant market, and may adopt appropriate measures to prevent or control such practices and conditions, including non-voluntary licensing in accordance with the provisions of Article 34 and the annulment of the contract or of those clauses of the contract deemed contrary to the laws and regulations governing competition and / or transfer of technology. The following practices and conditions may be subject to such measures where they are deemed to be abusive or anti-competitive:

- (i) grantback provisions;
- (ii) challenges to validity;
- (iii) exclusive dealing;
- (iv) restrictions on research;
- (v) restrictions on use of personnel;
- (vi) price fixing;
- (vii) restrictions on adaptations;
- (viii) exclusive sales or representation agreements;
- (ix) tying arrangements;
- (x) export restrictions;
- (xi) patent pooling or cross-licensing agreements and other arrangements;
- (xii) restrictions on publicity;
- (xiii) payments and other obligations after expiration of industrial property rights;
- (xiv) restrictions after expiration of an arrangement.⁶

6 Draft *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, MTN.TNC/W/35/Rev. 1, 3 Dec. 1990 (Brussels Ministerial Text). The TRIPS Negotiation Group Chairman noted in his comments: "Further basic issues needing to be resolved are [...] the content of the provisions on the Control of Abusive or Anti-Competitive Practices in Contractual Licences (Section 8 of Part II)."

The Brussels Ministerial Text of Article 8.2 differed from the final TRIPS Agreement text, using a “do not derogate from the obligations” formula instead of the final “consistent with the provisions of” formula as the control mechanism.⁷

B. TRIPS provisions

There are three provisions of the TRIPS Agreement expressly addressing competition. The first, Article 8.2, acknowledges the right of Members to act against abuse of IPRs, provided such action is consistent with the provisions of the Agreement.

Article 8, Principles

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

The second, Article 40, is a more detailed provision that, by its title and terms, is addressed to anti-competitive licensing practices or conditions.

SECTION 8

CONTROL OF ANTI-COMPETITIVE PRACTICES IN CONTRACTUAL LICENCES

Article 40

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

7 The Brussels Ministerial Text provided:

Article 8: Principles

2. Appropriate measures, provided that they do not derogate from the obligations arising under this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Id.

2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.⁸

Article 31(k), TRIPS Agreement, acknowledges that compulsory licensing is a remedy available to correct abuse of patents,⁹ providing:

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative

8 Article 40, TRIPS Agreement, continues:

3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by the other Member under the same conditions as those foreseen in paragraph 3.

9 Article 31(l), TRIPS Agreement, addresses the problem of dependent patents whose exploitation might otherwise be blocked. This is also a competition-related provision.

process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

Article 31(k) is the only part of the TRIPS compulsory licensing rules that incorporates a waiver of the condition that compulsory licenses must be issued “predominantly” for the supply of the domestic market.¹⁰

At an indirect level, Article 6, TRIPS Agreement, as confirmed by the Doha Declaration on the TRIPS Agreement and Public Health, authorizes each WTO Member to adopt its own policies and rules on the subject of exhaustion of rights.

Article 6
Exhaustion

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

Doha Declaration

5(d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.¹¹

10 Of course, compulsory licensing is not the only remedy available for anticompetitive abuse of IPRs, which may include, *inter alia*, injunction and fines. This paper was presented prior to adoption on August 30, 2003, of the Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, which provides for a waiver of the Article 31 (f) condition.

11 WTO Ministerial Conference, *Declaration on the TRIPS Agreement and Public Health*, adopted 14 November 2001, Fourth Session, Doha, WT/MIN(01)/DEC/2 (20 Nov. 2001).

The exhaustion principle is fundamentally directed at maintaining competitive markets in trade.¹²

The general recognition of flexibility in implementing methods in Article 1.1, TRIPS Agreement, will apply in the competition context.

The first paragraph of the preamble to the agreement notes that IPRs should not themselves act to distort trade:

Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

Part III, TRIPS Agreement, on enforcement of IPRs is of course generally applicable to enforcement in the competition context as well requiring, for example, due process of law.

C. Interpretation

The TRIPS Agreement provides WTO Members with substantial discretion in the development and application of competition law to arrangements and conduct in the field of IPRs. The text of Article 8.2 requires that competition measures be “consistent” with the TRIPS Agreement, and this suggests that competition law should not be used as a disguised mechanism for undermining the basic rights accorded under it. Measures may be taken to prevent abuse of IPRs, or resort to practices that “unreasonably” restrain trade or that “adversely affect” the “international transfer of technology.” The question whether a particular practice “unreasonably” restrains trade involves a classical balancing test taking into account the effects of conduct on consumers or industrial policy interests, and has been applied with significantly different results not only in different legal systems, but in the same legal systems over time. From the standpoint of competition rules customarily applied to IPRs-

12 See e.g., Frederick M. Abbott, “First Report (Final) to the Committee on International Trade Law of the International Law Association on the Subject of Parallel Importation,” 1 *J. Int’l Econ. L.* 607 (1998).

related practices in developed and developing Members, it is doubtful that such application in good faith will be limited by the text of Article 8.2.

Article 40.2 expressly envisions that Members may “specify” in their legislation licensing practices that “may in particular cases constitute an abuse” of IPRs. This language encompasses the adoption of *per se* rules in respect to certain types of licensing practices, such as applied by the EC in its technology transfer regulation.¹³ The “in particular cases” language, which is acknowledged to represent less than ideal drafting, is intended to require that Members define such practices on the basis of their competitive merits, rather than in an overly abstract manner (and not to prevent the adoption of *per se* rules).¹⁴

While there might be ways to improve the drafting of Articles 8.2 or 40 so as to improve clarity, as a practical matter these provisions do not appear to substantially impinge upon Member discretion in the formulation and application of competition rules to IPRs, and it is doubtful that a new set of negotiations is needed to establish the presence of discretion from a legal standpoint. Moreover, the Doha Declaration on the TRIPS Agreement and Public Health, paragraph 5, has confirmed the flexibility inherent in parallel trade and compulsory licensing rules.

The TRIPS Agreement does not limit the remedial measures that may be imposed by competition authorities and courts. For example, it does not preclude the award of treble damages that may be imposed as a remedy in US antitrust proceedings. Remedies may include injunction, damages, fines and, as noted above, compulsory licensing.¹⁵

13 See discussion of EC technology transfer regulation, *infra*, notes 19-24.

14 See “Part 3: Intellectual Property Rights and Competition,” in UNCTAD-ICTSD TRIPS Resource Book: *An Authoritative and Practical Guide to the TRIPS Agreement*, at: <http://www.iprsonline.org> (2003).

15 There are certain conditions placed on compulsory licensing as antitrust remedy, but the main effect is to allow reduction of remuneration based on the remedial nature of the license.

The presence of discretion from a legal standpoint does not assure that developing Members will not come under pressure from developed Members should they choose to exercise it. Developed Members with some regularity assert political and economic pressure on developing Members not to act in ways permitted under WTO agreements.

It may not be the most productive use of this brief paper and the attention of this distinguished audience to focus on narrow interpretative issues that are likely to influence Members only at the margins.¹⁶ The real question and centerpiece for this discussion is: what would or might be gained from changing the present rules?

II. Prospective New Competition Rules for TRIPS

A. A trade and competition agreement

There is a general question whether a multilateral or plurilateral trade and competition agreement should be agreed upon at the WTO. While such evaluations are to a certain extent subjective, there appears to remain a fairly wide level of divergence regarding what Members think might or ought to be done regarding such an agreement. Developing Members are worried that national treatment rules will be used to force changes to national industrial policy, including preferences to small and medium enterprises (SMEs). Members are unable to agree on what constitutes a “hard core cartel” (having moved from focusing on the “hard export cartel”), and whether such cartels could be justified in some circumstances based on economic efficiency. From the developed country side, there appears to be agreement that developing Members should adopt and implement competition laws (where they have not already done so), that measures should be transparent, and that national treatment rules should apply. While there seems to be agreement that restrictive business practices in the developed Members act to the detriment of de-

16 A detailed analysis of the “control” language of the competition provisions can be found at Part 3 of the UNCTAD-ICTSD TRIPS Resource Book, *supra*, note 14.

veloping Members, there is little in the way of explanation why those practices are presently tolerated in developed Members and why it should be necessary to adopt a multilateral agreement to address this problem. The antitrust laws of the United States, for example, expressly exempt US-based anti-competitive conduct that affects only foreign markets, tolerating and encouraging the very conduct about which concern is expressed.¹⁷

However, the purpose of this paper is not to consider the prospective contents, or advantages and disadvantages, of a multilateral agreement on trade and competition, but whether changes to the competition rules in the TRIPS Agreement are necessary or desirable.

B. The locus of change

A threshold question is whether any changes to TRIPS-related competition rules would be made in the text of the TRIPS Agreement, or would instead be embodied in a separate trade

17 The Sherman Act provides, for example:

15 USCS § 6a (2003)

§ 6a. Conduct involving trade or commerce with foreign nations.

This Act [15 USCS §§ 1 *et seq.*, commonly “the Sherman Anti-Trust Act”] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless:

(1) such conduct has a direct, substantial, and reasonably foreseeable effect:

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of this Act [15 USCS §§ 1 *et seq.*], other than this section.

If this Act [15 USCS §§ 1 *et seq.*] applies to such conduct only because of the operation of paragraph (1)(B), then this Act [15 USCS §§ 1 *et seq.*] shall apply to such conduct only for injury to export business in the United States.

and competition agreement. There is nothing in the WTO agreements to preclude competition rules with effect on TRIPS being set out in a separate agreement and cross-referenced. As a practical matter, absent an express exclusion, it is inevitable that competition rules set out in a trade and competition agreement would affect TRIPS since IPRs regulation is traditionally within the general scope of competition law. For example, while the US Department of Justice and Federal Trade Commission have issued antitrust guidelines for the licensing of intellectual property,¹⁸ these guidelines are based on interpretation of Sherman and Clayton Act rules and jurisprudence, and not on a body of rules specific to IPRs. Similarly, while the EC has issued fairly extensive guidance on the licensing of technology, this guidance is framed as an application of Articles 81 and 82, EC Treaty, and not on a separate body of IPRs-specific competition law.¹⁹

Changes directly to TRIPS Agreement rules pre-suppose a reopening of the agreement, and whether that is desirable will depend on the perspective of the participating Members. Generally speaking, the imbalance of bargaining power at the WTO has made developing Members wary of reopening TRIPS. Reopening might be used by the US-EC-Japan-Swiss group to lobby for increased levels of protection, which are likely to further exacerbate the imbalanced static wealth transfer effects already in place.

At the WTO, parties bargain in their own interests, with Members typically representing their producers. For this reason, it is perhaps most useful to look first at prospective changes to TRIPS

18 US Dept. of Justice / Fed. Tr. Comm., *Antitrust Guidelines for the Licensing of Intellectual Property* (1995), available at: <http://www.usdoj.gov/atr/public/guidelines/ipguide.htm>.

19 "Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements," *Official Journal* No. L 031, 09/02/1996 P. 0002-0013 (reference to unadjusted EC Treaty numbering). On April 7, 2004, the European Commission announced the adoption of a new block exemption on technology transfer agreements under Article 81 (3) of the EC Treaty.

competition rules across a matrix of potential interests, with discussion of global public welfare effects reserved until later on.

C. North – North

As noted above, Articles 6, 8.2 and 40 of the TRIPS Agreement leave Members with substantial discretion as to whether and how to apply competition rules to IPRs-based restraints of trade and abuse of dominant position. The United States and EC over time have taken substantially different approaches in this area, and changes in their approach have reflected revised views on appropriate industrial policy. It seems doubtful that competition authorities in either the US or EC would be anxious to formally harmonize or approximate rules in the IPRs field since this would involve a reduction of discretion. It is, in fact, difficult to see why, from the perspective of the US or EC, approximation or harmonization—that is, “freezing the industrial policy pendulum”—would be desirable.

In the 1960s and 1970s, US competition law authorities and courts were concerned that IPRs had a direct correlation with market power and potential abuse, and antitrust analysis began with a presumption that IPRs conferred market power. By the mid-1980s, and as reflected in the 1995 Licensing Guidelines, this perception shifted, and IPRs are presently treated as any other form of property (whether real, personal or intangible), without the market power presumption. With few exceptions—price fixing, horizontal market segmentation and output restraints (which also apply in goods markets)—technology acquisition and licensing agreements are evaluated under a rule of reason approach.²⁰ The rule of reason approach extends, for example, to exclusive grantback provisions. For the past two years the Federal Trade Commission has been studying the effects of IPRs on innovation markets in the United States, with

20 The DOJ / FTC Licensing Guidelines separately consider IPRs as they affect goods markets, technology markets and innovation markets. The technology market refers to licensing and acquisition of existing technologies, while the innovation market essentially refers to the market in future R & D.

evident concern that overprotection of IPRs may present risks to future innovation. This may signal the beginning of a shift towards another view of IPRs and market power, though conclusions are not yet reached.

The EC has taken a more direct approach to the regulation of technology markets, prescribing a detailed set of rules. These exempt from competition law scrutiny a range of licensing practices, impose certain *per se* prohibitions, and leave other areas for which parties must notify and effectively seek clearance from the Commission.²¹ The Commission reserves the power to intervene even in regard to approved practices in cases involving dominant position.²² A practice allowed under a US rule of reason analysis may be prohibited as *per se* anti-competitive by EC regulation. An example is the exclusive grantback provision.²³

With respect to licensing, both the US and EC use percentage of market formulas for establishing presumptions of market concentration in respect to technology and innovation.²⁴ The formulas are different, though this does not necessarily imply that competition authorities in the two Members would reach different results in a given a case.

The potential advantage of stronger North-North-oriented TRIPS and competition rules might be to force some industrialized countries to apply competition rules more vigorously (that is, e. g., to redress type of enforcement failures alleged in *Japan – Film and Photographic Paper*).²⁵ Yet even if more aggressive enforcement policies in some industrialized Members would be desirable, producer interests in the US and EC are

21 See Regulation on technology transfer, *supra*, note 19, at, e. g., arts. 1-4.

22 See, *Id.*, art. 7.

23 The exclusive grantback license is subject to a *per se* prohibition in EC competition law. *Id.*, Article 3 does not permit a measure whereby “(6) the licensee is obliged to assign in whole or in part to the licensor rights to improvements to or new applications of the licensed technology.”

24 *Id.*, arts. 5-7, DOJ / FTC.

25 *Japan - Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel, WT/DS44/R, 31 Mar. 1998.

unlikely to support the negotiation of strong enforcement obligations that may be used for the basis of investigations into their own activities.

In 1998, I commented on the prospects for a WTO trade and competition agreement in respect, *inter alia*, to the then-pending controversy between the US and EC involving the Boeing – McDonnell Douglas merger.²⁶ I asked, rhetorically, whether and what issue involved in that controversy would a WTO trade and competition agreement propose to “cure”? I would ask today whether there is any defect in the TRIPS Agreement competition rules from a North-North perspective that we might propose to “cure” in multilateral negotiations? From a pragmatic standpoint, it is difficult to see what that might be.²⁷

D. North – South

Developed Members consistently evidence two principal objectives in WTO negotiations with developing Members. The first is to enhance their access to developing Member markets. The second is to prevent developing Members from exercising discretion in a way which would be considered unfavourable to the developed Members.

Although the practice appears presently out of favour,²⁸ some developing Members have sought to impose on the importation of goods or the undertaking of direct investment conditions requiring transfer of technology, typically in the form of patent and know-how licensing to a local enterprise.²⁹ This is not a restric-

26 Frederick M. Abbott, *The Prospects for World Competition Law: An American Perspective*, address to the German-American Lawyers Association Cologne, Germany November 9, 1998 (unpublished, in author's files).

27 This observation is made in light of the substantial ongoing cooperation between US and EC competition authorities under bilateral agreement.

28 This is not based on an empirical study, but rather on the author's general perception that the volume of complaints about such practices has subsided.

29 “Civil offsets” or “offsets” appear to remain a standard feature in military equipment procurement agreements but, as above, this is an impres-

tive licensing practice as such, nor does it involve use of IPRs for anti-competitive purposes. To the extent such practices are regarded as discriminatory, they are for the most part to be dealt with under the GATT.³⁰ Some of these conditions have been addressed in the Agreement on Government Procurement.³¹ It is difficult to place this subject matter within the scope of the TRIPS Agreement.

From a market access standpoint, developing Member enterprises do not seem likely for the near to medium term to be using IPRs licensing agreements—such as pooling arrangements or R & D joint ventures—as a means to restrict access of foreign goods or services to local markets. There would not appear to be a pressing need to develop additional rules to address potential future activities of this nature.

Government preferences in the grant of research funding might be considered an anti-competitive practice in the IPRs field. This is an issue that might be addressed by developing Members in relation to developed Members. It is doubtful there is significant concern in developed Members with respect to such grants in developing Members.

Developed Members might be concerned with potential “overaggressive” pursuit of competition-based claims in the field of patents, and developed Members might seek to limit the potential exercise of discretion. So far, the principal limitation in the TRIPS Agreement is that competition measures be consistent with it. This is a “soft” limitation. It would conceptually be pos-

(contd.) _____

sionistic observation. Offsets in military procurement are by no means confined to developed-developing country arrangements, appearing to be a standard feature of developed-developed country procurement arrangements.

- 30 This set of issues is addressed in detail in Frederick M. Abbott, *Reflection Paper on China in the World Trading System: Defining the Principles of Engagement*, in *China in the World Trading System* 1, 13-18 (F. M. Abbott, ed. 1998) (Kluwer).
- 31 These concerns have been raised, for example, in respect to purchases of civil aircraft, and were addressed at one stage under the Agreement on Trade in Civil Aircraft. Id.

sible for developed countries to seek negotiation of a list of prohibited or presumptively prohibited anti-competitive restraints that would act as the outer limit of discretion for competition authorities in developing Members. Such an exercise seems unlikely to succeed in light of the need to achieve consensus on a list of practices.

Developing Members might seek to impose conditions on technology licenses in favour of local enterprise; for example, requirements that the licensee be trained in the use of the technology and be permitted to use it in competition with the licensor during or after the license term. Although ongoing demands from developing Members for improved technology transfer might appear to favour such conditions, this does not mean that developed Members may not view TRIPS and competition negotiations as an opportunity to limit such practices. Again, however, there is little prospect for consensus agreement on such limitations.

To be clear, this report is not recommending that developed WTO Members pursue any of the foregoing negotiating objectives, but rather is suggesting the types of outcomes that such Members might pursue in TRIPS and competition negotiations.

E. South – North

Developing countries presently have substantial discretion in the formulation and application of TRIPS and competition rules within their own territories. In many respects this may be the ideal position for them, and may argue against attempting to negotiate any new TRIPS and competition rules.

It is an important feature of US antitrust law that conduct which only affects external markets is not subject to scrutiny. In the general context of a multilateral competition agreement, it would be highly desirable from the standpoint of developing Members to obtain agreement that this sort of legislation is prohibited. That is, it is not permitted to discriminate against foreign markets in the application of competition rules. This general principle could well be transposed more specifically to the TRIPS and competition arena. That is, for example, licensing

practices that are not tolerated in the home market will not be tolerated in a foreign market, and the enterprise subject of the complaint will face penalties in the home market for engaging in prohibited conduct overseas.³²

As an illustration, the US Federal Trade Commission recently completed an in-depth study of so-called “Orange Book” practices by certain pharmaceutical enterprises.³³ This study found that patents had been grossly abused at the Food and Drug Administration to prevent the entry of generic drugs onto the US market. A principal violator company has been the subject of consent injunction and has paid substantial fines.³⁴ The US market is subject to relatively close monitoring by competition authorities and public interest groups. Yet potential competitive abuse of patents in foreign markets is not within the scope of US antitrust law (absent a direct and substantial impact on the US market, including on US exporters), and equivalent capacities for monitoring and enforcement would be the exception in developing Members. Thus, if US law prohibited equivalent anti-competitive acts in foreign markets this might yield significant benefits to developing Members.³⁵

32 This may raise difficult issues in the application of competition law. A *rule of reason* analysis will include such matters as a determination of the relevant market and the conditions of competition in that market. The fact that an analysis would be difficult does not mean it should be avoided. *Per se* rules might assist when applied to conduct abroad.

33 US Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (2002). <http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf>

34 See “States and FTC Settle with Bristol-Myers Squibb in Buspar Monopolization Suit,” 28 *Antitrust Multistate Review*, No. 2, p. 3, National Association of Attorneys General Antitrust Report, Feb. 2003 (Lexis-Nexis).

35 As of April 2004 there is a decision by the US Supreme Court pending regarding whether a plaintiff may bring suit in the United States for antitrust injuries occurring in a foreign market if the predicate of a direct and substantial effect in the US market is satisfied, even if that predicate is not satisfied as to the particular plaintiff (*Hoffmann-La Roche v. Empagran*, 124 S. Ct. 966, cert. Granted).

Article 40.3 of the TRIPS Agreement provides for consultations and furnishing of non-confidential information, and for furnishing other information subject to the national law of the requested Member.³⁶ It is difficult to know the extent to which the national law of a Member will permit (or not) the mandatory furnishing of business information to the authorities (or private complainants) in another Member. Developing Members pursuing competition cases may have great difficulty obtaining critical information from private enterprises in developed Members, and a stronger form of co-operation agreement relating to such information might usefully be negotiated. However, it must be recognized that such information rules would run in both directions, and developing Members would also need to consider the extent to which they would be willing to furnish information in equivalent settings.³⁷

The TRIPS Agreement contains a limited set of illustrative anti-competitive licensing practices: “for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing” (Article 40.2). Because developing Members come under pressure from developed Members when they seek to act against the latter’s perceived interests, there is an argument to be made for expanding the list of practices that may be considered anti-competitive. This could provide assurance to developing Members that actions taken against such conditions could not be successfully challenged before the Appellate Body. However, there are two arguments against pursuing

36 Article 40.3, TRIPS Agreement:

[...] The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall co-operate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

37 An argument might be made in terms of special and differential treatment in the field of evidence sharing. An argument might be made in favor of lower capacity for local investigation in developing Members.

expansion of the list. First, the negotiations might well result in reducing the flexibility presently enjoyed by developing Members. Second, if a developing Member is going to be threatened or intimidated by a developed Member for using flexibility existing in the TRIPS Agreement, adding text that is more supportive may not remedy the problem. The problem is rooted in an imbalance in political and economic power, not in the language of the TRIPS Agreement.

The US Patent Act establishes preferences that patents resulting from federally-funded research be licensed to parties that will produce in the United States.³⁸ This is arguably a legislative restriction on patent licensing that discriminates against foreign enterprises. A developing Member objective in TRIPS and competition negotiations might be to subject such licensing practices to further scrutiny.

Developing Members differ widely in their capacity to address competition issues. Some have relatively well developed legal and prosecutorial infrastructure. In others, such infrastructure is very weak. Perhaps the most important aspect of any competition agreement at the WTO would be a hard commitment on financial contribution from the developed Members to training of competition law authorities and the furnishing of suitable investigatory facilities. Since the TRIPS Agreement has an essentially satisfactory set of competition rules at present, there is no need to change the TRIPS rules in order to establish training and infrastructure programs. A critical aspect is to assure that training and infrastructure support be provided by persons whose interests are on the side of developing Members.

38 Section 204 of the US Patent Act, e.g., provides, *inter alia*:

No small business firm or non-profit organization which receives title to any subject invention [i.e., based on federally funded research] and no assignee of any such small business firm or non-profit organization shall grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States.

It is important to recall that some developing Members have in the past attempted to rebalance the international distribution of technological capacity through legislative means, in particular through rules governing technology licensing.³⁹ That experience should be studied carefully—in particular regarding the effects of a political / economic power imbalance on legislative solutions—as a prelude to considering additional rules in this area.

F. South – South

Might developing countries in the TRIPS and competition context benefit from additional rules in relations among themselves? Competitive markets restraints in the field of TRIPS might as readily affect developing Members as among themselves as they do in relations with developed Members, except that developing Members are at present largely importers of technology protected by IPRs.

The starting point is existing discretion to develop and apply rules, and this may be the optimal situation.

Developing Members might gain from strengthened rules on furnishing of evidence, just as in South-North relations, bearing in mind again that this would be a two-way street.

Training of personnel and improvements in infrastructure may be just as useful in South-South relations as in South-North relations.

G. Global public welfare

It is reasonable to ask what might be the optimal TRIPS and competition result leaving aside the perspective of Member self-interest, and viewing the subject from the perspective of global public welfare. In this approach, TRIPS competition rules would seek to assure that producers did not obtain IPRs monopoly rents in excess of their economic contribution to social welfare,

³⁹ Recalling, in particular, Decisions 84 and 85 of the Andean Commission (1974).

and WTO Members would co-operate in implementing this objective. Consumer protection and human rights interests (e.g., right to health) would play a role in implementation of competition rules at least equivalent to that of industrial policy interests. The grant and enforcement of patents in developed Members would not presuppose the grant and enforcement of patents in developing Members because of the different situations in the respective WTO Members. In developing Members, competition on the basis of marginal costs would be the objective in socially sensitive sectors of the economy.

Accomplishment of global public welfare maximizing objectives might require elaboration of a set of prohibited anti-competitive practices addressed to conduct occurring in any territory. Such a set of rules might take into account the differential capacities of enterprises based in countries at different levels of development. There might be created a multinational investigatory and enforcement body with power to compel production of evidence, to refer cases to a neutral tribunal, and to impose remedies.

Leaving aside concerns that might legitimately be raised regarding the implications of such multilateral rules and enforcement mechanisms from the standpoint of state sovereignty and individual rights, there is little reason to believe that the international community is prepared to embark on a law-making venture of such scope. In relation to the TRIPS Agreement and prospective changes to competition rules it is more practical to focus attention on whether incremental modifications are necessary or desirable.

III. Conclusion

The present situation under the TRIPS Agreement provides WTO Members with substantial discretion in the development and application of competition rules. A survey of potential interests from the perspective of differing circumstances does not suggest compelling grounds for change. However, as a “down-payment” by developed Members in the Doha Development Agenda, they might agree to reform their competition laws such that exemptions are not provided for conduct undertaken abroad. If devel-

oped Members are serious about the pursuit of market liberalization, they should accept that it is entirely inconsistent with that objective to tolerate and encourage their enterprises to adopt restrictive business practices in foreign markets.

PART THREE

**INSTITUTIONAL CAPACITY OF THE WTO
TO IMPLEMENT THE DOHA
DEVELOPMENT ROUND AGREEMENTS**

Improving the Capacity of WTO Institutions to Fulfil Their Mandate

by

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I. Reforming WTO Decision Making¹

The December 1996 Singapore Ministerial Declaration was based on a draft prepared in Geneva containing agreed text on all but certain sensitive issues. In Singapore, an “inner circle” composed of ministers from 34 of the WTO’s then 128 members took responsibility for arriving at agreed text on the remaining issues. At the late evening session devoted to getting a consensus on the draft declaration, most of the other 90 or so WTO members with delegations in Singapore took the floor in turn, each making virtually identical interventions consisting of three points: first they thanked the 34 members of the inner circle for their hard work; second, that although they had some reserva-

1 This first part of our brief paper was prepared by Richard Blackhurst. It is based almost entirely on, and draws heavily from, the author’s paper “Reforming WTO Decision Making: Lessons from Singapore and Seattle,” in *The World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century*, edited by Klaus Gunter Deutsch and Bernhard Speyer, (Routledge, London), 2001.

tions on certain points, they could join the consensus in favour of the draft declaration; and third, that the way in which the draft declaration had been prepared was undemocratic, unfair and disgraceful, that they were no longer willing to accept decision-making processes that always presented them with *faits accomplis*, and that they attached the highest priority to fundamentally revising the way important decisions are arrived at in the WTO.

Three years later, almost to the day, the venue shifted to Seattle. WTO ministers arrived with no agreed text for a Ministerial Declaration launching a new round of multilateral negotiations. Near the end of the conference, the usual way of arriving at decisions—as exemplified by the 34-member inner circle at Singapore—broke down completely. This time comments by countries excluded from the “green room” meetings—the name frequently given to inner circle meetings—found their way into the popular press.² It was abundantly clear from those comments not only that there had been no improvements in this area of WTO decision making since Singapore, but that the situation had become notably worse.

Apparently this *ad hoc* and informal approach to decision making worked better in Doha. It is difficult, however, to avoid the conclusion that this outcome can be traced to a combination of the particular personalities and personal relationships involved, plus a dose of luck. None of the growing, very fundamental weaknesses of the green room process identified below have been dealt with.

1. *Two points to keep in mind*

First, the processes by which WTO members discuss, debate and negotiate issues is distinct from the organization’s reliance on consensus to *adopt* decisions (the members have made it very clear they plan to keep the emphasis on consensus decision making). Any organization with a large membership, and in

2 See Blackhurst, “Reforming WTO Decision Making: Lessons from Singapore and Seattle” for fifteen quotations from the international press covering the period 5 December through 29 March 2000.

which all groups, committees and councils are open to all its members, is going to have a problem functioning, regardless of whether it takes decisions by consensus or by simple majority. *It is that particular problem—the debate and negotiation process by which the WTO members arrive at the point where the entire membership is asked to adopt a particular decision—that is the subject of this paper.*

Second, the question of reform of the WTO's decision-making process is *not* a North / South issue. Large and influential developing countries are regular participants in the green room meetings. It is, instead, a classic "insider / outsider" issue, with the industrial countries and "important" developing countries on the inside, and the other 110 or so WTO members on the outside.

2. *Green rooms*

The green room or inner circle model was the organization's *de facto* way of dealing with the fact that while membership in virtually every GATT and now WTO body is open to all GATT / WTO members, once the active participation in a group / committee exceeds a certain number (say 25 or 30), discussion, debate and negotiation become increasingly cumbersome, inefficient and ultimately impossible. Organizations with a large membership traditionally deal with this problem by having a steering body with a limited membership. For example, the IMF and the World Bank have 24-member executive boards, and the UN has the Security Council. There is no corresponding limited-membership *formal* body in the WTO.

The growing criticism of the green room process is the result of an increasing number of situations in which the number of countries wanting to participate in the process exceeds the number that can be accommodated. The reasons behind the growing demands to participate suggest very strongly that this trend can only intensify:

- The membership is growing.
- Over the past 15 years a large number of developing countries—and virtually all the transition economies—have come to accept the view that a more liberal trade regime and fuller

integration into the global economy must be a key part of their development strategies. And they understand that active participation in the WTO not only contributes importantly to both goals, but also allows them to have a say in the evolution of the multilateral trading system.³

- In the Tokyo Round, the GATT began to write rules for policies applied “inside the border” (e. g. technical barriers); that process continued in the Uruguay Round (e.g. services, TRIPs), and it continues today (e.g. investment, competition rules). Virtually all of these “inside the border” issues are far more politically sensitive than tariffs and quotas. As the GATT / WTO takes on these issues, countries are less and less willing to sit on the sidelines and let other countries do the work.
- Under the GATT, many of the rules governing trade-related policies were—officially or *de facto*—optional for developing countries. Another reason for no longer being willing to sit on the sidelines is that under the WTO’s “single undertaking” every member is subject to all the rules.
- In a similar vein, whereas under the GATT any member had the power to block a dispute settlement case—that is, to block the application of a rule it objected to—that option no longer exists.

II. Two Interim Conclusions

(1) In those instances in which interest among WTO members in the issue at hand is sufficiently narrow that a green room group can be constituted without excluding any member desiring to participate, this model functions well and should continue to be used.

3 Although the vast majority of WTO members account for only a tiny proportion of world trade, a very large number of these “tiny traders” have ratios of trade-to-GDP that are higher than the corresponding ratios of the big traders. For such countries, trade and the fair and efficient functioning of the multilateral trading system are crucial to their economic futures.

(2) In those instances in which it is impossible to organize a green room meeting without excluding one or more WTO members wishing to be included, continued reliance on this model can only progressively damage the WTO's ability to function and erode its internal and external credibility (ministerial green rooms come immediately to mind). Clearly the WTO needs an efficient-size sub-group of members for the purpose of discussing, debating and negotiating draft decisions that can be put to the entire membership for adoption. *What needs changing is the basis for putting together such a sub-group, for deciding which delegations will be in the room and which delegations are excluded. The new basis needs to be one that is fully transparent, predictable, equitable and legitimate in the eyes of all WTO members.*

1. *Creation of a "WTO Consultative Board"*

The option developed in this paper for a new sub-group of WTO member countries involves creating what might be called a "WTO Consultative Board." It would not be necessary to have predetermined, regularly scheduled meetings since the Board normally would meet only when a green room meeting could not accommodate all WTO members wishing to participate.

As with green room meetings, *the WTO Consultative Board would not be empowered to take decisions that bind the general membership.*⁴ It would consult, discuss, debate and negotiate, but its output would be limited to recommendations put forward to the entire membership for approval / acceptance. And, as with the IMF and World Bank Executive Boards, the Board would be a formal part of the WTO organization chart, and the Board's composition—which members have a seat at the table and when—would be fixed (that is, *predictable*), presumably with the largest traders having individual seats and the remaining WTO members divided into groups, each with one seat that is shared among the members of the group on a rotating basis.

4 See Blackhurst, *supra*, note 1, for a discussion of the GATT's experience with the CG-18, and of the IMF and World Bank Executive Boards.

a. Minimizing the exclusivity of a WTO Consultative Board

A major challenge would be to minimize the exclusivity of the Board in the eyes of members which would have a seat at the table only on a rotating basis. The fact that the Board could *not* take decisions would be vitally important from this perspective. Surely the other major factor would be transparency. It would be crucial, as regards both substance and political acceptability, to make the work of the Board *fully* transparent and accessible to all the members. Along with increasing the political acceptability of such a Consultative Board, a high degree of transparency would facilitate subsequent efforts to get a consensus because countries which were not members of the Board would be aware of the nature of the “give and take” involved in arriving at a decision to recommend to the entire membership.⁵

b. Size of a WTO Consultative Board and the allocation of seats

The question of how many seats the Board should have would be very contentious. One option for getting around this politically charged issue would be to follow the practice of the IMF and the World Bank, whose sub-groups for discussion, debate and negotiation—that is, their respective Boards—each have 24 members.

As in the IMF and World Bank Boards, the groupings could be self-selected and could have the option of “self-changing” their composition, say once every two years. The countries in each group could also be given the freedom to decide how often to rotate the occupancy of the group’s seat at the table. In general, the principle could be to allow as much flexibility as possible, in

5 Another way to minimize the exclusivity of the Board, or at least the perceived downside to the exclusivity, would be to use broad similarities in interests and viewpoints on trade-related issues as the basis for composing the groups of WTO members which share seats. In that way, the members of any particular group—when it was not their turn to be at the table—would feel that at least their group’s seat was occupied by a country which shared many of their concerns and priorities in the trade area.

order to accommodate a variety of situations that can change over time.

Co-operation among the self-selected group members to support the member currently occupying the seat would help compensate for the shortage of experienced professionals—in Geneva and in support units back home—that plague so many of the middle and lower income WTO members. It would be an important learning process—and morale builder—for the officials involved, both in Geneva and at home. Domestically, the much more active involvement in important WTO activities of the 110 or so countries routinely excluded from green room meetings would raise the profile of the WTO, and trade policy in general, in government circles and in the private sector. Governments which have been slow to recognize that commercial diplomacy has replaced political diplomacy as the critical priority for countries pursuing economic development would be encouraged to reallocate scarce human resources away from activities, abroad and at home, that contribute little or nothing to the country's economic development, and put those resources to work on the WTO.

The latter point calls attention to one of the most damaging aspects of the green room model, with its opaque basis for deciding which delegations are allowed into the room, and its *de facto* permanent exclusion of more than three-quarters of the WTO membership. *It is only human nature that if a country's senior trade officials—the Geneva ambassador and the cabinet minister responsible for trade—feel marginalized by the WTO, they will be inclined to marginalize the WTO at home.* A new kind of subgroup of WTO members along the lines of a WTO Consultative Board could go a long way toward solving this problem.

c. Where will the opposition come from?

The strongest and most vocal opposition will come from the 20 to 30 members which are big enough to demand entry to any green room, but not big enough to demand an individual seat on the new Board. (The delegations in this category can be obtained by subtracting the United States, the European Union and Japan from either the 25 countries reportedly invited to the green

room meetings in Seattle, or from the 34 countries that drafted the Singapore Ministerial *communiqué*).

d. Predictability, transparency and—above all—legitimacy

The predictability, transparency and legitimacy of any new “sub-group process” would be critically important. From this perspective, the IMF and World Bank Boards have two very important characteristics: the Board is a formal part of the organization’s structure, and *every* member country’s “participation rights” in the Board are fully transparent and predictable. This contrasts with the green room model—or for that matter, with any informal, *ad hoc* WTO sub-group—which lacks predictability, typically suffers from serious transparency problems, and has none of the legitimacy that comes from being a *formal* part of the institution’s organizational structure. *Any informal group or forum risks collapsing in acrimony and distrust at the first serious confrontation because it would have no “structural strength” and would suffer from a “deficit of legitimacy.”* The new group must be a formal part of the organization—on the WTO organization chart and connected by a solid line, not a broken line, to the rest of the chart.

2. *A brief summing up*

It is now widely accepted that the WTO’s “legislative” bodies are working, if at all, very poorly. The risk facing the WTO is that the political challenge of getting a consensus on a fundamental reform of the decision-making process along the lines proposed in this paper, coupled with the GATT / WTO’s traditional pragmatism, will create a nearly irresistible momentum to attempt to “muddle through.” If the member countries and the Director General give in to this temptation, the prospects for the WTO realizing its full potential will be very bleak indeed.

What is not easy to understand is why the 110 or so WTO members routinely excluded from green room meetings continue to accept being *de facto* disenfranchised by the current system—by the selfishness and short-sightedness of the “34 minus 3” countries (Singapore) or the “25 minus 3” countries (Seattle) which readily admit to the need for a limited membership steering

body, but can focus only on the “feasibility” of creating one (that is, on their own unwillingness to change).

If the medium and smaller size countries want to see the creation of a formal and fully representative sub-group of WTO countries along the lines of a WTO Consultative Board, where (1) each of them would have the opportunity to periodically occupy a seat at the table, and (2) when they were not in the seat, they would know it is occupied by a fellow group member which shares their views on many issues, and which would listen to them when they want to make an input, they will have to fight for the change. The countries that have grown accustomed to “running the show” at the GATT and now the WTO are not going to hand it to them on a silver platter.

III. Lessons from History⁶

The WTO, and the GATT before it, have always needed, and for the past 17 years have lacked, a steering committee or management body. This need grows more urgent as the membership and the difficulty of managing the daily business of the Organization increase. So, a formal consultative body should be established. This second part, written by the second co-author of this paper, deals mainly with practicalities and previous experience. There is a long history of tension between formal and informal processes of consultation and negotiation in the GATT and the WTO, which throws useful light on these issues. Much of this history can most easily be presented with reference to the Green Room and the Consultative Group of Eighteen.

1. The Green Room

In talking of the “Green Room,” a distinction must be made between the informal meetings of restricted groups of Ministers which take place at Ministerial Conferences of the WTO, as at Singapore, Seattle and Doha; and the informal restricted meetings held at Ambassadorial level in the WTO, at the initia-

6 This second part was drafted by David Hartridge.

tive of the Director-General—less frequently in recent than in earlier years—in the process of managing the regular business of the Organization.

Ministerial Green Rooms are mercifully rare and always controversial. Richard Blackhurst describes the discontent of those excluded from the restricted meetings at the successful Singapore Conference of 1996 and the disastrous Seattle conference of 1999. But I do not think one can draw the conclusion that Seattle was a turning point, demonstrating conclusively the non-viability of the longstanding practice whereby the critical issues at Ministerial conferences have been negotiated in informal, non-transparent meetings of about 25 key countries, and are then presented to the full membership for adoption. The experience of Seattle—a uniquely under-prepared and ill-managed ministerial—is a bad basis for any conclusions about the handling of business in the WTO. Since then we have had the Doha Conference of 2001, at which the same processes—a Green Room of the same size and largely identical membership, together with Ministers invited as “Friends of the Chair” to conduct open consultations on subjects of particular importance—produced agreement with very little acrimony on virtually the same agenda. The great difference between Doha and Seattle was the submission to the former of a well-prepared and largely complete draft declaration: no process yet invented could have produced agreement on the basis of the draft sent to Seattle (the strongest protests about the Doha process, oddly enough, came from countries which had been in the Green Room throughout). The Doha experience is the more typical, though it no doubt benefited from the determination of governments, less than three months after September 11, to demonstrate commitment to international co-operation.

At Punta del Este in 1986 a similar restricted group of Ministers, in a 12-hour overnight meeting, agreed the Declaration which launched the Uruguay Round—on the basis, it is true, of a very highly-developed draft—with little complaint from those excluded. At the premature Geneva Ministerial of 1982, on the other hand, which came close to disaster but produced a respectable Declaration and work programme, the embarrassingly

protracted Green Room did cause resentment; manifest failure of the meeting would have called forth recriminations about the process to rival Seattle.

Restricted meetings are in principle indefensible, and they are always understandably resented by those excluded. But experience shows that they are tolerated, because they are recognized as necessary, so long as they produce results. Since much of the resentment is caused by the apparently arbitrary selection of Green Room participants (I say “apparently” because the basis of selection is well understood in fact), a major benefit of a formally constituted consultative body would be to do away with selection by providing an objective qualification for inclusion. The difficulty of obtaining agreement on the principle of such a body would of course be increased by the knowledge that its members would automatically qualify for Ministerial Green Rooms, but that is inescapable. Such initial difficulty would be greatly outweighed by the escape from invidious selection processes at future ministerials.

But since Ministerial Green Rooms are exceptional events, the case for reform needs also to be made in terms of the handling of regular WTO business at the level of Ambassadors in Geneva. Successive Directors-General have always used informal consultations with key delegations (meaning those crucial for the issue in question) as a means of resolving problems and preparing decisions by the full membership. The more formal of such meetings used to be called “Seven plus Sevens,” meaning seven developed plus seven developing countries, though the actual number and the composition varied with the subject: it would never make sense to discuss agriculture in the absence of Argentina, or textiles in the absence of Hong Kong, but the major powers would almost always be there, whatever the subject. That too made sense, since they accounted for well over 60 per cent of world trade.

The name “Green Room” came into use when Arthur Dunkel was Director-General, to designate his conference room; I claim to have originated it while Dunkel’s chef de cabinet—a dubious distinction considering the obloquy into which it has fallen. In Dunkel’s hands, the Green Room was for several years a highly

efficient tool of management. Discussions between the countries primarily concerned would take place in any case, outside the GATT, but in the Green Room the Director-General could act as a facilitator and as a spokesman for the multilateral system and the interests of the membership as a whole. The process broke down in the crisis of 1986, when disagreement over the launching of the Uruguay Round paralyzed the Preparatory Committee, forced the negotiation of the draft declaration outside the GATT building and made it impossible to convene Green Room meetings on the subject. It has been used less regularly by Dunkel's successors, but it remains a vital instrument for any Director-General, since in normal times these are the only meetings whose convocation and handling are entirely in his hands. (We should not forget the effective use made by Peter Sutherland and Renato Ruggiero of a "Committee of the Whole" in concluding the Uruguay Round and preparing the Singapore Ministerial). It is to be hoped that the insistence of Members in recent years on the "Member-driven" nature of the Organization does not translate into a curb on the initiative of the Director-General in such matters.

The creation of a formal consultative body would not make such meetings unnecessary. For many of the issues brought to the Green Room it would be too large and transparent to serve the negotiating purpose. Negotiators can rarely explore the limits of their partners' flexibility, or expose their own difficulties, in big on-the-record meetings. Nor could a formal body be convened at a few hours' notice to deal with an immediate problem, which is the great value of the Green Room. It seems to me that the real functions of a consultative body should be to provide strategic direction, debate major policy issues and anticipate problems. These were the functions performed by the Consultative Group of Eighteen between 1975 and 1985.

2. The Consultative Group of Eighteen

The CG-18, temporarily established in 1975 and on a permanent basis in 1979, was a conscious attempt to mirror in the GATT the development in the IMF of a management group in the form of the Interim Committee. Consultations by the Director-

General, Olivier Long, in 1973-4 revealed strong support for a restricted group of high officials from capitals which would not infringe on the authority of the Contracting Parties but would discuss trade problems from a political viewpoint, anticipate developments and facilitate the "concertation of policies in the trade field." It was certainly Long's hope that the CG-18 would develop over time a more explicit role in steering policy and managing the system. His original proposals were however toned down in deference to the caution of the GATT Council. Contracting Parties insisted that the CG-18 must not take any binding decisions; its advisory function was made clear in the change of its title by the Council from "Management Group" as originally proposed to "Consultative Group." But it did bring officials at Deputy Minister level to Geneva two, three or four times a year and it did make recommendations, which were often important and effective—for example the recommendation that a Ministerial meeting should be held in 1982.

Negotiating the composition of the Group had been very difficult. In addition to 18 full members, each with a second seat for an "adviser," there were nine alternate members, with the right to speak but only one seat. The member states of the EC were present as full members, each with two seats, though only the European Commission spoke for the Community. (Their presence often irritated the US—perhaps unreasonably, since they constituted a captive audience of high officials, usually full members of the 113 Committee). There was provision in the Group's mandate for "rotation of membership as appropriate," and there was regular rotation between Finland, Norway and Sweden, between Czechoslovakia, Hungary and Poland and between the ASEAN countries (Indonesia, Malaysia, Philippines, Singapore, Thailand).

Blackhurst is right in criticizing the lack of transparency in the CG-18. There seems no reason now why papers prepared for it by the Secretariat should not have been circulated to the entire membership; it is in any case nonsense to suppose that papers given to over 40 delegations are in any sense confidential. However, very detailed reports of the Group's meetings were made to the GATT Council. They reveal that it made a major contribution

to the development of the negotiating agenda and to the emergence of the WTO as it now exists. In the absence of an Agriculture Committee, it was the only forum in which agricultural policy could be discussed, and this was done in a sequence of 7 meetings in 1981-2. New subjects such as Services, TRIMS and Intellectual Property were first discussed in the CG-18 on the basis of papers by the Secretariat, along with many other subjects, which subsequently figured in the Uruguay Round agenda. In 1985 all three of its meetings were entirely devoted to the question of the launching of a new round of trade negotiations. The Group thus made a major contribution to the transition from the GATT to the WTO.

It ceased to function after 1985, for two reasons. The first was difficulty over its composition. The accession of Mexico to the GATT had made difficult the allocation of the third seat allotted to Latin American countries, and Hong Kong was insisting on its claim to membership, as the 13th largest trader in the world. Under heavy pressure Dunkel proposed the enlargement of the Group to 22 full members, and this was agreed in November 1985. The Group never met again: some members had found the original membership too large to be efficient, and were even less enthused by the enlarged membership. In addition the crisis of 1986, referred to above, made it as difficult to convene the CG-18 as the Green Room.

The second reason advanced for the failure of the Group to meet after 1985 was that it would be "inappropriate" for it to do so while the Uruguay Round negotiations were in progress. But this is hard to take seriously; there were many occasions during the Uruguay Round when a policy discussion among top officials—as in Arthur Dunkel's working dinners for the heads of CG-18 delegations—would have been invaluable. Since 1995 the need for such a group has been underlined by the informal and infrequent *ad hoc* meetings of high officials from capitals—essentially from the same countries as in the CG-18 and all informal groupings—sometimes known as the "Invisibles." These have taken place in Geneva or other cities, but always outside the WTO, to discuss the same strategic issues as the CG-18, but with no written input by the Secretariat, no conti-

nunity in the Chair or reporting to WTO Members, and of course no power to make recommendations. Restricted meetings of Ministers, known as “mini-Ministerials,” convened *ad hoc* by host countries, have also become a regular feature of trade policy discourse, and they have sometimes been valuable. But they suffer from the same lack of legitimacy (in the eyes of the excluded) and of transparency. There is no mechanism for transmitting the product of such meetings to the wider Membership. It would be healthier and more efficient if they could take place in the WTO. Meetings which cannot take place inside the WTO will happen elsewhere. To exclude restricted meetings on transparency grounds produces less transparency.

No decision to discontinue the CG-18 was ever taken, but it was a creation of the GATT and expired with it. Some thought was given to the possibility of reviving it at the time of the constitution of the WTO, but the conclusion was that this would be one step too far, given the great number of structural changes which had to be negotiated. To maintain it after 1986 would have been vastly easier than to recreate it now, but that is essentially what is involved in setting up a formal consultative body. There are important differences between the CG-18 and the board proposed by Richard Blackhurst, the most significant of them being that the CG-18 had no “constituencies” permitting representation of all Members, and very limited provision for rotation. I believe it would have developed in these directions and that it would now be very difficult, perhaps impossible, to set up any group of restricted membership without such provisions. But in most other respects—the inability to make binding decisions in particular—a new body would be much like the CG-18, though somewhat larger. In my view it too should be chaired by the Director-General, and it should meet both at official and Ministerial level, performing the functions of the “Invisibles” and mini-Ministerials, though of course not depriving any country of the right to convene what meetings it likes.

In one respect I believe the mechanism proposed by Blackhurst could not work. This is the idea that the consultative board would not meet regularly but would be convened *ad hoc* when it became impossible to accommodate in the Green Room all

countries wanting to be present. It will never be possible to accommodate all countries expressing the wish to be present, if the question is put to them. It is easier for an Ambassador to suffer arbitrary exclusion, and retain the right to complain about it, than to justify self-exclusion to his capital, and this would apply *a fortiori* at Ministerial Conferences. For these it would be better to start from the premise that the consultative board will be the Green Room participants, and to add countries representing particular interests if necessary. In the normal course of business in Geneva the consultative board should have regular scheduled meetings which can be properly prepared. It could of course be convened *ad hoc* if smaller-scale consultations on some issue became impossible, but the danger of presenting it as an ever-present on-demand alternative to small meetings is that it may make the latter impossible—or rather, force them outside. It should not de-legitimise the informal small-scale process, which will continue to be needed.

The great difficulty in constituting such a body would of course be the opposition of countries which would be excluded from it. The inclusion of a representative or “constituency” function might well be insufficient to overcome such opposition. The failure of the recent Ministerial Conference at Cancun, which was caused by breakdown in negotiations rather than the intrinsic difficulty of the decisions to be taken, underlined the necessity for new thinking about the management and decision-making procedures of the WTO. Unfortunately it also made very clear how serious would be the obstacles to any change which might be proposed.

Nevertheless, I believe a consultative board would perform vital functions, as a legitimate negotiating group at Ministerial Conferences and as a steering committee in normal times. It would be worth the inevitable pain of negotiating its membership.

Can the WTO Dispute Settlement System Deal with Competition Disputes?*

by

Prof. Dr. Dr. h. c. Claus-Dieter Ehlermann

Lothar Ehring**

Abstract

The current discussions on a future framework for competition policy within the World Trade Organization have revealed strong reservations against the full application of the WTO dispute settlement system to such a framework.

The possibility of enforcing the legal obligations resulting from the agreements negotiated within the WTO and the stronger

* This paper draws from the analysis contained in Claus-Dieter Ehlermann and Lothar Ehring, *WTO Dispute Settlement and Competition Law – Views from the Perspective of the Appellate Body’s Experience*, EUI-RSCAS Policy Paper 2002/12 and 26 *Fordham Int’l L.J.* 1505 (2003).

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force that these agreements thus have is one of the key reasons why the proponents of a WTO competition agreement favour the WTO as a negotiation forum. Nevertheless, these proponents now contemplate at most a limited future role for the WTO dispute settlement system to play within a future competition agreement.

In order to address some of the objections voiced against the full application of the dispute settlement system in this area, this paper explores the extent to which the dispute settlement system of the WTO would be suitable to apply to competition related cases. It first recalls that already under existing trade rules, national competition law and practice are not exempt from, but rather subject to, the application of the dispute settlement system. Both competition laws as such and their application in individual cases must comply with the current substantive standards of the WTO Agreement, and complaints can be brought against both. Extending the application of the dispute settlement system to a new agreement to be negotiated in the area of competition would therefore be no *qualitative* innovation.

Drawing a parallel to the area of trade remedies, this paper further argues that the standard of review applied in WTO dispute settlement would also be appropriate for competition cases. This standard of review excludes *de novo* review, but sets rather high standards for the national authorities' duties of investigation and explanation.

The system, however, shows significant weaknesses in connection with the fact-finding conducted by panels. Competition related cases are very fact-intensive and they frequently involve confidential business information, for which no generally applicable rules of procedure exist to date. For the dispute settlement system to be able to apply effectively to a review of individual decisions under a future WTO competition agreement, it would be important to overcome this impediment, which, already today, regularly creates significant practical problems. Another weakness is rooted in the non-permanent character of panels. A body composed of *ad hoc* selected members cannot be expected to conduct fact-finding with the same determination as a permanent body. It would therefore be beneficial to increase the structural independence of panel members.

I. Commitments Proposed for a Future WTO Competition Agreement

Even if, in principle, the start of negotiations on a competition agreement has been agreed at Doha, this says nothing so far about the outcome and the content. Paragraph 25 of the Doha Ministerial Declaration indicates that negotiations will probably deal with the topics clarified in the “Working Group on the Interaction between Trade and Competition Policy,” headed by Professor F. Jenny. These topics are:

[C]ore principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary co-operation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.

According to the proposals of the supporters of a multilateral competition framework, such a future agreement should include the following elements: a commitment to a set of core principles, including transparency, non-discrimination and procedural fairness; a commitment to take measures against hardcore cartels; modalities for co-operation between Members; a commitment to technical assistance to developing countries; and the establishment of a standing WTO Committee on Competition Policy.

For the Members who will sign the agreement, several of these commitments will have a twofold meaning. First, they will have to *adapt* their national laws to the requirements of the agreement, where the required rules (e.g. on hardcore cartels or procedural fairness), so far, were either absent or the existing rules insufficient. Second, these Members will have to ensure that their national rules are *applied* in accordance with the agreement.

II. The Role Foreseen for the Dispute Settlement System

Normally, the WTO dispute settlement system is available to enforce both of these two types of obligations, i.e. to review whether the laws of a Member conform to the obligations of the agreement, but also whether there is compliance in individual cases. However, for a future multilateral competition framework,

several Members propose a narrower role, if any, for the dispute settlement system.

The European Commission's initial position was that the dispute settlement system is useful both for disputes about the legislative implementation of a competition agreement and for disputes about its application in individual cases.¹ This was met with strong scepticism if not rejection from the United States, particularly regarding the review of individual national decisions in competition cases, as this could interfere with national sovereignty concerning prosecutorial discretion² and involve panels in "inappropriate reviews of case specific, highly confidential business information."³ Possibly influenced by the negative attitude of the United States and others, the European Communities modified their position by exempting the review of individual decisions from the scope of dispute settlement under a future competition agreement.⁴ To be precise, this exemption of the review of individual cases has also been framed as a limitation of e.g. the national treatment obligation of a future competition

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- 1 COM (96) 284 final, 18 June 1996, available at: <http://www.europa.eu.int/comm/competition/international/com284.html>, visited 15 August 2003.
 - 2 For a demonstration that the exercise of such prosecutorial discretion already today is bound by GATT rules, see *infra* text accompanying note 20.
 - 3 Joel I. Klein, *A Note of Caution with Respect to a WTO Agenda on Competition Policy*, address to the Royal Institute of International Affairs (Chatham House) London, 18 November 1996, available at: <http://www.usdoj.gov/atr/public/speeches/jikspch.htm>, visited 15 August 2003; Joel I. Klein, *A Reality Check on Antitrust Rules in the World Trade Organisation, and a Practical Way Forward on International Antitrust*, address before the OECD Conference on Trade and Competition (30 June 1999), OECD, *Trade and Competition Policies: Exploring the Ways Forward* (1999).
 - 4 *Communication from the European Community and its Member States to the WTO Working Group on the Interaction Between Trade and Competition Policy* of 14 March 2001, WT/WGTCP/W/160, page 3; Communication from the Commission to the Council and to the European Parliament, *The EU Approach to the Millennium Round*, COM (99) 0331 Final. See also, Ignacio Garcia Berceo and Stefan D. Amarasinha, "Moving the Trade and Competition Debate Forward," 4 *Journal of International Economic Law*, 481, 494 (2001).

agreement to outlawing *de jure* discrimination and as not banning *de facto* discrimination.⁵ To avoid a possible misunderstanding, it must be emphasized that, according to a different, but common usage of this terminology, *de facto* discrimination can also be found in a piece of competition legislation itself, not only in its application, and *de jure* discrimination arguably also in the manner the administrative authority applies the law, not only in the law itself. *De jure* versus *de facto* therefore matches the distinction between *law* versus *application in individual cases* only if one uses these terms in such a sense (as the submissions of the European Communities do to some extent).

The annual reports of the Working Group on the Interaction Between Trade and Competition Policy reflect that several proponents of a WTO competition agreement foresee at most a limited role for the dispute settlement system in this field and that this system should, in any case, not apply to individual decisions.⁶ The Working Group has not discussed these questions in great detail during the past few years. In 2003, it has devoted specific attention to the nature and scope of compliance mechanisms that might be applicable under a multilateral framework on competition policy. Some delegations have suggested that a system of voluntary peer review might provide a less adversarial compliance mechanism better suited to competition law enforcement.⁷

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- 5 *Communication from the European Communities and its Member States, A Multilateral Framework Agreement on Competition Policy*, WT/WGTCP/W/152, 25 September 2000, at 6; *Report (2002) of the WTO Working Group on the Interaction between Trade and Competition Policy to the General Council*, WT/WGTCP/6, 9 December 2002, para. 20; *Report of the Meeting of 26-27 September 2002*, WT/WGTCP/M/19, para. 63; *Report of the Meeting of 20 November 2002*, WT/WGTCP/M/20, para. 5.
- 6 WTO, *Report (2002) supra*, note 5, para. 20; *Report (2001)*, WT/WGTCP/5 of 8 October 2001, para. 87; see also, *Report (1999)*, WT/WGTCP/3 of 11 October 1999, para. 79.
- 7 See Contribution of Canada, WT/WGTCP/W/226, at 6-7. On dispute settlement and peer review, see also the *Communication from the European Communities and its Member States, Dispute Settlement and Peer Review*, WT/WGTCP/W/229, 14 May 2003.

III. The Situation *de Lege Lata*

In order to answer the question of the appropriateness of WTO dispute settlement in a multilateral competition framework it is worthwhile to explore the current legal situation. This examination will show that, already today, it is possible to invoke the dispute settlement system in order to review the compatibility of national competition laws and their application in individual cases with existing WTO law.

This analysis will focus on the so-called violation complaint under Article XXIII:1(a) of the GATT 1994, given the high statistical prevalence of this type of disputes, several of which had links to competition related issues.⁸ Nevertheless, most of the issues discussed in relation to dispute settlement are also valid for non-violation and situation complaints, which present a particular interest in the area of competition. For that reason, these two types of complaints will be addressed separately towards the end of the article. The *Kodak – Fuji* dispute has also demonstrated the potential role of the non-violation complaint in the area of competition law.⁹

A. The review of competition laws as such

National competition legislation must comply with the substantive requirements of the WTO Agreement. Of particular relevance are the rules of non-discrimination contained in the GATT 1994, the GATS and the TRIPS Agreement, i.e. the obligations of most-favoured-nation and national treatment of imported goods. For the sake of simplicity and brevity, but also because this principle is likely to have the greatest practical relevance, this paper focuses on the principle of national treatment of the GATT 1994.

8 See, for example, the violation claims in the Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper (Japan – Film)*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179; or the Panel Report, WT/DS161/R, WT/DS169/R, and the Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, adopted 10 January 2001.

9 Panel Report, *Japan – Film*, *supra*, note 8.

As regards the scope of application of Article III:4 of the GATT 1994, a national competition act falls within the category of “laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use” of goods. The verb “affecting” has correctly been interpreted broadly as covering “any laws or regulations which might adversely modify the conditions of competition” of imports.¹⁰ However, since Article III:4 of the GATT 1994 expressly applies only to governmental *treatment* accorded in respect of “laws, regulations and requirements,” it would not seem to be a possible yardstick of legal scrutiny wherever competition rules are totally non-existent.

It is not overly likely,¹¹ yet certainly not excluded, that competition laws as such (*per se*) violate Article III:4. Competition laws as such (*per se*) will seldom treat imports less favourably than like domestic goods, be it *de jure* or *de facto*. This is especially true if the competition law at issue applies to all products irrespective of their nature and origin. Such a law could only violate Article III:4 of the GATT 1994 where imports have to be treated differently from like domestic goods in order to afford both equally favourable treatment.¹² The situation is different, however, where there are special laws or sub-legislative regulations, which apply only to a certain category of products, for instance (block) exemptions. If there is a divergence in the treatment of some imports (not falling under the exemption) and some different, but like domestic goods (covered by the exemption) and this divergence is simultaneously a competitive disadvantage for the excluded imports, there *may* be a breach of Article III:4 of the

10 Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60, para. 12. See also Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, paras. 209 and 210, with further references.

11 See also, Ignacio Garcia Bercero and Stefan D. Amarasingha, *supra*, note 4, at 494.

12 See Panel Report, *United States – Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345, para. 5.11.

GATT 1994. Whether such a regime violates the national treatment obligation will depend on whether the mere differentiation is sufficient or whether there has to be a disadvantage for like imports, those covered and those not covered by the block exemption, taken together, compared with like domestic goods, taken together. This question is yet to be resolved with final clarity in the WTO jurisprudence.¹³

Where a piece of competition legislation exceptionally affords like imports less favourable treatment, this treatment might not be mandatory, but be left to the discretion of the competent authorities. In such a case, the traditional GATT doctrine would apply and allow only mandatory legislation to be challenged as GATT inconsistent as such.¹⁴ In contrast, in the case of non-mandatory (discretionary) legislation, the complainant must wait for an instance of GATT inconsistent application.¹⁵ In this sense, the proposed limitation of dispute settlement in a future competition agreement to laws as such might become problematic. It would prevent panels from avoiding addressing laws as such, and the mandatory / discretionary distinction might even come under pressure, as it would give no recourse under that agreement against the WTO-inconsistent application of discretionary legislation.

A competition agreement to be negotiated within the WTO would increase the number of legal requirements to which national competition laws are subject. Such an agreement would probably also contain express obligations as to the introduction of competition laws, for instance those addressing hard core

13 See Lothar Ehring, "De Facto Discrimination in WTO Law: National and Most-Favoured-Nation Treatment – or Equal Treatment?", 36 *Journal of World Trade*, 921-948 (2002).

14 Ultimately, it depends on the WTO provision in question, whether it precludes only mandatory inconsistent laws or also discretionary ones. See Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815, paras. 7.53-7.54.

15 Appellate Body Report, *United States – Anti-Dumping Act of 1916 (US – 1916 Act)*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, paras. 88 and 89, with references to past jurisprudence.

cartels. These obligations would go beyond those that, already today, can be derived from isolated provisions of the WTO agreements, for instance, Article VIII of the GATS. In addition to Article VIII of the GATS, the Telecommunications Annex to the GATS requires that service providers in other Members be given access to public telecommunications networks on reasonable and non-discriminatory terms. The Telecommunications Reference Paper on Regulatory Principles further provides for certain “competitive safeguards.” Under the terms of the Reference Paper, the WTO Members who signed it are obliged to maintain “[a]ppropriate measures [...] for the purpose of preventing [...] major suppliers from engaging in or continuing anti-competitive practices” (paragraph 1.1). Members must also ensure interconnection with major suppliers under non-discriminatory terms, in a timely manner, on transparent, reasonable, cost-oriented and unbundled terms (paragraph 2). The “appropriate measures” which Members must maintain arguably include both the enactment of competition laws and their enforcement in individual cases. In 2000, the United States brought against Mexico the first complaint under the Reference Paper,¹⁶ for which the panel report is expected soon.

Beyond Article VIII and the Reference Paper, the GATS also addresses restrictive business practices of non-monopoly service suppliers in Article IX. In Article 40, the TRIPS Agreement does not only allow Members to enact laws against the anti-competitive abuse of licences on intellectual property rights. It also obliges Members to enter into consultations with another Member which believes that its competition laws are being infringed by the licensing practices of a foreign intellectual property right owner. The thesis that trade policy chiefly deals with (negative) prohibitions directed at Members and not with positive obligations to take action¹⁷ is no longer tenable. The TRIPS Agreement is the best example of a host of far-reaching positive obligations to take action, that are likely to exceed by far what

16 *Mexico – Measures Affecting Telecommunications Services*, Request for Consultations by the United States of 17 August 2000, WT/DS204/1.

17 Daniel K. Tarullo, “Norms and Institutions in Global Competition Policy,” 94 *American Journal of International Law*, 478-504, at 489 (2000).

can be expected from a competition agreement even under a best case scenario.

B. The review of individual competition decisions

More interesting and complicated than the question of the review of competition laws as such is the issue of reviewing individual cases in which competition authorities apply competition laws. Taking again Article III:4 of the GATT 1994 as a prime example, this provision expressly applies to “laws, regulations and requirements.” Individual decisions of competition authorities can fall under the concept of “requirements.” At least one panel report clearly expressed itself in favour of understanding individual decisions as falling within that category.¹⁸ In addition, Article III:4 does not prohibit less favourable treatment “*through* laws, regulations and requirements,” but “*in respect of* all laws regulations and requirements.” It would seem plausible to hold that the application of a law qualifies as “treatment [...] in respect of” that law.

Individual competition decisions can be made by the executive or by courts. Decisions by administrative authorities are typical in Europe, whereas in the United States such decisions are left to the courts. For the application of Article III:4, this distinction is irrelevant as States are responsible for the acts of their courts as they are responsible for the actions taken by their administrative authorities. There is also no prerequisite of the exhaustion of domestic remedies before a Member can turn to the WTO dispute settlement system.

Article III:4, can even apply to instances where a competition authority or a court has *failed* to act, unless there is complete inaction which would appear not to qualify as “treatment” in the sense of Article III:4. There certainly *can* be less favourable governmental treatment, where the competition authorities have

18 Panel Report, *Canada – Administration of the Foreign Investment Review Act (FIRA)*, adopted 7 February 1984, BISD 30S/140. In the same direction: Panel Report, *EEC – Regulations of Imports of Parts and Components*, adopted 16 May 1990, BISD 37/132.

taken no action in one case but have acted in another, similar case relating to like products. An example would be that where a competition authority refrains from intervening against a buying cartel which refuses to purchase imports, and this non-intervention departs from that authority's practice with regard to buying cartels harming like domestic products.¹⁹

A different example of a violation of Article III:4 would be the situation in which a competition authority authorizes an exclusive retail system to the benefit of a domestic producer, whilst prohibiting a similar exclusive retail system for like imported goods. Such challenges will probably remain the exception and, where individual decisions by competition authorities contravene Article III:4, the Member concerned may invoke Article XX(d) as a justification. Although in practice it may well be difficult to prove that there has been a violation of the national treatment obligation, these examples make clear that, already today, the national treatment obligation limits the prosecutorial discretion, which some competition authorities enjoy.²⁰ Accordingly, the WTO dispute settlement system applies to individual decisions in the area of competition.

In addition to Article III:4 of the GATT 1994, other existing provisions of WTO law may be relevant to the conduct of national competition authorities in individual cases. For example, Article 11.3 of the Agreement on Safeguards prohibits Members from encouraging or supporting non-governmental measures equivalent to a voluntary import or export restraint. Article 11.3 thus prohibits governmental encouragement and support of import or export cartels. It has been suggested in the literature that the terms "encourage or support" could be interpreted broadly so as to cover the non-application of existing anti-cartel

19 Mitsuo Matsushita, "Restrictive Business Practices and the WTO/GATT Dispute Settlement Process," in *International Trade Law and the GATT / WTO Dispute Settlement System*, 357, 370 (Ernst-Ulrich Petersmann, ed., 1997).

20 Robert Anderson and Peter Holmes, "Competition Policy and the Future of the Multilateral Trading System," 5 *Journal of International Economic Law* 531, 533 (2002). See *supra* text accompanying note 2.

legislation,²¹ and that Article 11.3 could be the basis for building a jurisprudence relating to restrictive business practices.²² From a textual point of view, “support” seems to mean more than just “tolerate.”²³ On the other hand, one may argue that the intentional non-application of competition laws that would normally (have to) be applied can be a strong form of support. It has also been suggested that the *authorization* of import or export cartels as it exists in some national competition laws could qualify as a positive contribution to a restrictive business practice because it brings that practice about.²⁴ It is again a question of whether a legislative exemption (possibly coupled with an approval requirement) suffices for satisfying the condition “encourage or support.”²⁵ This question does not arise in the event of (informal) governmental guidance or suggestion, as this is precisely the kind of governmental contribution that the words “encourage or support” contemplate.²⁶

The result is clear: not only competition laws of WTO Members, but also their application in individual cases already today are subject to the dispute settlement system. Extending this system to a binding competition agreement to be negotiated within the WTO would therefore be no qualitative *novum*. However, in quantitative terms, such an agreement would of course extend

21 Frieder Roessler, “The Concept of Nullification and Impairment in the Legal System of the World Trade Organization,” in *International Trade Law and the GATT / WTO Dispute Settlement System*, 123, 140 (Ernst-Ulrich Petersmann, ed., 1997).

22 Frieder Roessler, “Should Principles of Competition Policy be Incorporated into WTO Law Through Non-Violation Complaints?,” 2 *Journal of International Economic Law*, 413, 421 (1999).

23 See also Mitsuo Matsushita, *supra*, note 19, at 369: “too remote a linkage with any governmental action.”

24 *Id.*, at 368.

25 One may argue that a legislative exemption is no more a positive contribution (“encourage or support” arguably require a positive contribution) than an administrative inaction where the law does prohibit the cartel. See, however, Mitsuo Matsushita, *supra*, note 19, at 368–369.

26 Mitsuo Matsushita, *supra*, note 19, at 368–369.

the obligations of WTO Members in the area of competition policy and the scope of the WTO dispute settlement system.

It is clear that where the government's role has a different quality than supervising private competitors, additional WTO obligations can become relevant. For instance, a government's positive contribution²⁷ to anti-competitive behaviour amounts to a violation of Article XI:1 of the GATT 1994 and possibly of Article 11 of the Agreement on Safeguards, where this behaviour has the effect of restricting imports or exports. In other cases, such a contribution can violate the national treatment obligation. Pursuant to Article 3.4 of the Agreement on Technical Barriers to Trade, Members must not encourage private testing and certification organizations to discriminate against foreign products. Where the government itself becomes the economic operator having exclusive import or export rights, Article XVII of the GATT 1994 mandates the respect of the GATT's non-discrimination disciplines and transactions to be made "solely in accordance with commercial considerations." Finally, the *grant* of monopoly rights can contravene the national treatment obligation where the monopoly is bestowed on a domestic operator for reasons of nationality.

IV. Standard of Review

A. General remarks

An important question of a procedural nature is whether the WTO dispute settlement system allows for an appropriate international review of national decisions in the field of competition. At least in developed legal systems, such administrative and / or judicial proceedings ensure not only an optimal clarification of the facts and the law, but also procedural fairness. These proceedings demand not only special legal expertise, but also a good understanding of the economic context and of economics itself. The WTO dispute settlement system is able to meet these demands, given that in competition disputes panels could be

²⁷ *Id.*, at 368, uses the term "precipitation."

composed of experts who are familiar with the questions arising in competition law.²⁸ The current panel system may well be problematic in many regards,²⁹ but flexibility in the selection of panelists allows for a tailor-made composition of panels of experts in the particular area of the dispute. A future WTO competition agreement could also expressly provide for the selection of panelists to ensure that panels have the relevant specific expertise. Finally, it should be recalled that panels can resort to experts, who could also be experts on economic, competition related questions. All of this should be able to counter the perceived risk of “contamination” by trade policy considerations.

As regards the actual conduct of the panel’s review, the dispute settlement system applies a standard of review that would be appropriate for competition related disputes. National competition proceedings are not the only instances in which an optimal exploration of the facts must be reconciled with procedural fairness. Similar problems arise in procedures about safeguard measures or anti-dumping and countervailing duties. In all these procedures, it would be inept to repeat the entire investigation that has been conducted by the national authorities and / or courts. A WTO panel would not even be in the position to do so. On the other hand, it would be highly unsatisfactory if a WTO panel were to review only compliance with purely formal, procedural aspects in the national investigation procedure. The optimal standard of review therefore has to be positioned between these two extremes.

The panel’s standard of review is generally stipulated by Article 11 of the DSU.³⁰ In *EC – Hormones*, the Appellate Body defined this standard as neither *de novo* review as such, nor “total deference,” but rather the “objective assessment of the facts.”³¹

28 Article 8 of the DSU.

29 See *infra*, section C.

30 Appellate Body Report, *EC – Measures concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 115–117.

31 *Ibid.*, para. 117 with references to previous panel reports.

The Appellate Body Report in *Argentina – Footwear* stated with regard to the investigative obligations of national authorities under Article 4 of the Agreement on Safeguards that a panel must assess whether the national authorities have examined all the relevant facts and provided a reasoned explanation of how the facts support their determination.³² In *US – Wheat Gluten*, the Appellate Body refined the national authorities' investigative obligations in safeguard cases and thereby further clarified the panels' standard of review. According to the Appellate Body, Articles 3 and 4 of the Agreement on Safeguards require national authorities to look for and evaluate relevant information *ex officio*, irrespective of whether any interested party involved in the national proceedings has relied upon it.³³

In *US – Lamb Meat*, the Appellate Body acknowledged that “panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities,” but that “this does *not* mean that panels must simply *accept* the conclusions of the competent authorities.” Instead, they must critically examine the competent authorities' explanation as to whether it fully addresses the nature, and the complexities, of the data, and responds to other plausible interpretations of that data.³⁴ The most recent Appellate Body Report about the standard of review under Article 11 of the DSU relates to a special safeguard measure imposed under the Agreement on Textiles and Clothing. In this Report, the Appellate Body starts out by stating that the duties of competent authorities simultaneously define the duties of panels in reviewing the investigations and determinations carried out by competent authorities. The Appellate Body further reasons that

32 Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear (EC)*, WT/DS121/AB/R, adopted 12 January 2000, para. 121.

33 Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US – Wheat Gluten)*, WT/DS166/AB/R, adopted 19 January 2001, para. 55.

34 Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, paras. 103 and 106.

the panel must put itself in the place of that Member at the time it makes its determination and consequently not consider facts (data) which did not exist at that point in time.³⁵

In the absence of a divergent special provision, the standard of review set out for panels in Article 11 of the DSU also applies to the review of actions taken by national authorities or courts in the area of competition—to the extent that these actions (or inactions) are covered by existing WTO law. The clarifications derived from the Agreement on Safeguards do not directly apply to individual decisions in the area of competition. They, however, correspond to the internal logic of investigations in this area and are therefore suitable for an application by analogy.

B. The special standard of review in article 17.6 of the anti-dumping agreement

Only one of the WTO agreements, namely the Anti-Dumping Agreement in Article 17.6, sets out a special standard of review that departs from Article 11 of the DSU. This special provision was meant to give Members a greater margin of manoeuvre than Article 11 of the DSU when they apply the Anti-Dumping Agreement. In the academic literature, it has been suggested that the margin given by Article 17.6(i) should also be allowed within a competition agreement to be negotiated within the WTO.³⁶ However, according to the findings of the Appellate Body, Article 17.6(i) ultimately does not differ from Article 11 of the DSU with regard to the standard applying to the *assessment* of facts. In *US – Hot-Rolled Steel*, the Appellate Body stated that it would be inconceivable for the “assessment of the facts” required from panels under Article 17.6(i) to be anything other than “objec-

35 Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, paras. 73 and 78.

36 Maria-Chiara Malaguti, “Restrictive Business Practices in International Trade and the Role of the World Trade Organization,” 32 *Journal of World Trade*, Vol. 3, 117, 145 (1998).

tive.”³⁷ With regard to *evaluating* facts, Article 17.6(i) respects a certain margin of appreciation of national authorities that is not subject to review by requiring no more than that this evaluation be “unbiased and objective.”

It seems that no one so far recommended using the special (legal) standard of review of Article 17.6(ii) of the Anti-Dumping Agreement for a future competition agreement. It may be argued that subparagraph (ii) indeed provides for a departure from the general standard of *legal* review applicable under Article 11 of the DSU. As regards the extent of this departure, one must first ask whether the application of the rules of treaty interpretation can truly result in more than one permissible interpretation.³⁸ If or where this is the case, the next question would be to what extent Article 17.6(ii) produces different outcomes from the generally applicable principle “*in dubio mitius*.” The rules of a future WTO competition agreement will presumably be formulated in a much more general and open manner and therefore accord a greater margin of manoeuvre than the detailed and precise provisions of the Anti-Dumping Agreement, to which Article 17.6(ii) applies. Consequently, there will be less need for a provision such as Article 17.6(ii).

Competition laws and individual decisions in the field of competition law are thus to be reviewed—to the extent that they fall under existing WTO obligations—in accordance with the standard of review set out in Article 11 of the DSU. Provided that one agrees with the proposition that the described jurisprudence on Article 11 can be transferred to the area of competition, this standard excludes *de novo* review when applied to measures adopted following a national investigation. It, however, specifies

37 Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US – Hot-Rolled Steel)*, WT/DS184/AB/R, adopted 23 August 2001, para. 55.

38 One should not be excessively dogmatic and sceptical about such a possibility. In many legal orders, there are principles of interpretation requiring that laws be interpreted, wherever possible, in accordance with, for instance, superior law. These principles of interpretation are far from being inoperative in practice.

relatively demanding requirements with regard to the duties of investigation and justification of competent national authorities or courts.

V. Fact-Finding: A Weak Spot in the WTO Dispute Settlement System

A. *The panels' right to seek information, the Members' duty to surrender information and the panels' right to draw negative inferences*

By nature, decisions in the area of competition are fact intensive, but this is similar to investigations about safeguards and anti-dumping or countervailing duties. Resistance against the application of the GATT / WTO dispute settlement system to restrictive business practices also stems from the belief that the powers of investigation of panels are inadequate.³⁹ It is therefore worth examining whether the investigation powers offered by the current dispute settlement system are adequate.

Fact-finding is reserved to the panels because the Appellate Body's action is limited to a review of legal questions (Article 17.6 of the DSU). Article 13 of the DSU entitles panels to seek information from any appropriate source for the exploration and establishment of the facts necessary to adjudicate on a dispute. This right is broad and comprehensive,⁴⁰ and has been understood as an unconditional right, which also covers as a source the Members which are parties to the dispute.⁴¹

That a Member "should respond promptly and fully" to any such request for information appears to weaken the panels' right, but it has nevertheless been understood as embodying a full legal

39 See the majority opinion of the 1958 GATT expert group, BISD 9S/176.

40 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, paras. 104 and 106.

41 Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft)*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, para. 185.

duty of parties to surrender requested information.⁴² If a Member violates this obligation under Article 13 of the DSU (as happened in *Canada – Aircraft*), the panel may draw negative inferences from the attitude of the non-co-operating Member. The Appellate Body derived this right—the use of which is to the discretion of the panel—from the normal function of panels as confirmed by Annex V of the Agreement on Subsidies and Countervailing Measures,⁴³ which specifically provides for adverse inferences against non-co-operating parties. The Appellate Body did not hesitate to apply the right to also draw negative inferences with respect to the Agreement on Safeguards. However, also in this case, the Appellate Body came to the conclusion that the panel did not overstep the boundaries of its discretion by refraining from drawing negative inferences.⁴⁴

B. The absence of standard rules of procedure for panels and the problem of confidential information

Despite the general obligation of Members to share information and the right of panels to draw negative inferences, there are serious weaknesses in the panel procedure related to the investigation of facts. In contrast to the Appellate Body's own Working Procedures (Article 17.9 of the DSU), there are no such standard procedural rules for panel proceedings, although their existence would be desirable.⁴⁵ The Working Procedures set out for panels in Appendix 3 to the DSU are very rudimentary, which is why Article 12.1 authorizes panels to adopt additional or different rules after consulting the parties. Standard working procedures would contribute to the investigation of facts only if it

42 *Ibid.*, paras. 188 and 189. This interpretation is one of the very few cases in which the Appellate Body went beyond the ordinary meaning of the text and based its interpretation on the object and purpose of the provision.

43 Appellate Body Report, *Canada – Aircraft*, *supra*, note 41, paras. 198-203.

44 Appellate Body Report, *US – Wheat Gluten*, *supra*, note 33, paras. 170-176.

45 Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003, footnote 68 to para. 79, with references to previous reports.

were possible to solve the structural problem of the surrender of confidential information.

The structural problem of confidential information is well known in the area of competition law or anti-dumping. On the one hand, there is the interest of ensuring an optimal clarification of the facts, which militates in favour of using confidential information. On the other hand, principles of “due process” require that the principle of equality between the parties be respected. It is therefore necessary to make confidential information that one party uses available to the other party. How can this fundamental procedural right be reconciled with the legitimate interest of protecting confidentiality, an interest that is particularly relevant with regard to commercial secrets?

All the WTO agreements that are relevant in the present context require that confidential information be treated as such and not be disclosed. Article 6.5 of the Anti-Dumping Agreement, for instance, also provides for an obligation to furnish a non-confidential summary, unless it is exceptionally not possible to give such a summary. In Article 6.2, the Anti-Dumping Agreement attempts to live up to the principle of due process by requiring that all interested parties have a full opportunity to defend their interests. Article 6.9 obliges the authorities to inform all interested parties of the essential facts under consideration before making a final determination. Ultimately, however, the tension between the establishment of the truth and the protection of confidentiality remains unresolved, as Article 12.2.2 requires a public notice of an affirmative conclusion of an investigation to contain all relevant information, “due regard being paid to the requirement for the protection of confidential information.”

In *Thailand – H-Beams* the panel attempted to derive from Article 3.1 in conjunction with the already mentioned Article 17.6 of the Anti-Dumping Agreement that it is prohibited to rely on confidential considerations that have not been made available to the parties for the determination of the definitive anti-dumping duty. The Appellate Body disagreed and reasoned that neither Article 3.1 nor Article 17.6 prevent the competent national authority from relying on confidential information, as these is-

sues were comprehensively dealt with in other provisions, notably Articles 6 and 12.⁴⁶

In Articles 12.2, 12.3, 12.4 and 12.8, the Agreement on Subsidies and Countervailing Measures contains partly identical, partly similar provisions. The Agreement on Safeguards is less detailed, but Article 3.2 also guarantees the protection of confidential information. *Mutatis mutandis*, the conclusions of the Appellate Body in *Thailand – H-Beams* may probably also be applied here.

The protection of confidential information is not limited to investigations before national authorities, but extends to panel proceedings. Article 13 of the DSU stipulates that confidential information not be revealed without formal authorization. Under Article 18.2 of the DSU, Members must treat as confidential information submitted by another Member which that Member has designated as confidential, and paragraph 3 of the Working Procedures for panels in Appendix 3 to the DSU repeats this obligation. Consequently, the conflict between the clarification of the facts, the protection of confidential information and the principle of due process also arises at the level of WTO dispute settlement. None of the existing procedural rules resolve this conflict either way. Individual panels tried to defuse it by adopting *ad hoc* procedural rules. In the relationship between the United States and the European Communities, all these attempts failed. The United States then refused to make confidential information available. Communicating it only to the panel was not possible due to the prohibition of *ex parte* communications (Article 18.1 of the DSU).

Where no procedural rules for the protection of confidential information can be adopted, a fall back option for the panel is to convince parties to submit information that is aggregated, indexed and / or partly blackened. Such information can be useful to show the development of individual factors over a set period of

46 Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, paras. 117 and 118.

time, without exposing firm-specific details. This fall back option, however, is not a sufficient solution in each and every case, especially where information about only one or two commercial actors is involved.

Even if a panel adopts *ad hoc* procedural rules for the communication of confidential information, this is not yet any guarantee that a party will actually make such information available. This is apparent from the already mentioned case *Canada – Aircraft*, in which Canada refused to communicate confidential information, although the *ad hoc* procedural rules that the panel had adopted essentially corresponded to those proposed by Canada itself.⁴⁷ Without the co-operation of the parties, the currently practised procedure for sharing and protecting information does not work.

In such a case it may well be appropriate that a panel draw negative inferences from the behaviour of the non-co-operating party. This, however, demands quite a bit of courage from panelists who have been selected for an individual case.⁴⁸ In addition, negative inferences are not always the right answer, for instance, where a panel does not succeed in adopting *ad hoc* procedures for the communication of confidential information. In contrast, where the refusal to transmit confidential information appears to be unjustified or even ill-minded, a panel should, in discharging its fact-finding duty, take this into account as an element weighing against the party concerned. The weight to be attributed to this element is the panel's decision and obviously depends on all the other factual elements before that panel.⁴⁹ In making this decision, the panel as the sole trier of facts enjoys a degree of "discretion," since the appellate review is limited to compliance with *legal* standards.

47 Appellate Body Report, *Canada – Aircraft*, *supra*, note 41, para. 195.

48 On structural weaknesses of the panel system, see further section C., *infra*.

49 See also Appellate Body Report, *US – Wheat Gluten*, *supra*, note 33, para. 174.

The Anti-Dumping Agreement, as well as the Agreement on Subsidies and Countervailing Measures, expressly provide that in certain situations the competent national authority may decide on the basis of “available information.”⁵⁰ Those rules practically allow national authorities to do the same as panels under the principle of negative inferences. One could think about generalizing these rules and about extending them to all cases of refused transmission of confidential information. As long as the resort to such rules remains the decision of the body to which the confidential information has not been made available, there should be no fundamental objection. A *systematic* and *automatic* resort to negative inferences that would set aside the other factual elements before the panel, however, would be highly questionable. The problem of confidential information can, therefore, not be solved alone through the instrument of negative inferences or the decision on the basis of best information available.

Decisions in the area of competition, by nature, are not only fact intensive. They also require knowledge and evaluation of confidential information. In competition law, confidential information is even more important than in the areas covered by the Agreement on Safeguards, the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures. The problem of the treatment of confidential information has correctly been labelled a “serious systemic issue.”⁵¹ Already today, its resolution is urgent. In the long run, the WTO dispute settlement system can only be applied satisfactorily to the three mentioned areas, if the conflict between clarification of facts, protection of confidentiality and the principle of due process can be resolved in a sound manner. For a future WTO competition agreement, the solution of the tension between the establishment of the truth, the protection of confidential information and procedural fairness is even more important. This dilemma is

50 Article 6.8 and Annex II of the Anti-Dumping Agreement and paragraph 8 of Appendix V of the Agreement on Subsidies and Countervailing Duties. On the interpretation and application of Article 6.8 and of Annex II of the Anti-Dumping Agreement, see Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, note 37, paras. 77–110.

51 Appellate Body Report, *US – Wheat Gluten*, *supra*, note 33, para. 170.

maybe the most significant obstacle that would have to be overcome for a satisfactory arrangement for the settlement of disputes in individual competition cases.

In addition to the quasi-judicial settlement of disputes by panels and the Appellate Body, the WTO agreements normally provide for discussions in special Committees that are responsible for the application and supervision of the implementation of the respective agreements. A future competition agreement should establish a similar committee for questions related to competition. A sort of peer review of individual decisions in the area of competition would be highly desirable. According to some of the current proposals, a peer review mechanism is to play an important role in a future WTO competition agreement, to some extent, as an alternative to dispute settlement.⁵² The absence of a satisfactory solution to the problem of confidential information would, however, also stand in the way of such a peer review, given that a competent peer review depends on the knowledge of all relevant facts on which the scrutinized decision has been based. It can be presumed that the agreement on a procedure for the protection of confidential information raises at least as important problems for a system of peer review, as it does for the quasi-judicial dispute settlement system.⁵³

C. The problem of the panel structure

In contrast to the Appellate Body, which is a permanent institution, panels are established and composed *ad hoc* for each dispute. Panel members are independent and Article 8.2 of the DSU requires explicitly that they be selected with a view to ensuring their independence. For the same reasons, Article 8.3 of the DSU excludes citizens of Members whose governments are parties or third parties in the dispute from serving as panelists, unless the

52 WTO, *Report (2001)*, *supra*, note 6, paras. 88-90.

53 The information transmitted to a committee responsible for this peer review would become available to officials of as many as (currently) 146 Members (plus perhaps observers), compared to the much lower number of officials of the (few) Members involved in a dispute governed by rules of confidentiality.

parties to the dispute agree otherwise. Many panelists exercise this function only once, whereas others are re-appointed. Serving on a panel is an honour and a personal distinction. It is therefore not surprising if a panel member is interested in being appointed for another panel in the future. Panel members are generally highly qualified persons and there is no doubt about their personal independence. The rules of the WTO dispute settlement system, however, do little to guarantee this independence in an institutional sense. There are only some safeguards based on the obligations contained in the Rules of Conduct.

In contrast to the Appellate Body Members who are appointed for several years, one cannot expect that the ad hoc appointed panel members act as resolutely as the members of a permanent institution with regard to the outlined problems of fact finding. This is particularly true of the problems related to confidential information and negative inferences. An additional facet of the weak institutional independence of panelists arises from the main profession of the individuals concerned. Many panelists are Geneva based diplomats or capital based trade officials, which means that they already have a full-time job and meet in Geneva for only a couple of weeks. Outside of the dispute, they may often deal with the diplomats or officials of the parties to the dispute on other trade matters. The very people participating in the oral hearing of the panel, i.e. the representatives of the parties and panelists, may find themselves around the negotiating table the next day.

In the current reform negotiations on the DSU, the European Communities have made the case for modifying the structure of panels and for guaranteeing the independence of panel members in an institutional manner.⁵⁴ Two means appear to be available to achieve that objective. One possibility and proposal in the current DSU reform negotiations⁵⁵ is the establishment of a

54 *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding*, Communication to the DSB Special Session, TN/DS/W/1, 13 March 2002, p. 2.

55 *Ibid.*

permanent panel body with fixed membership, which could include the creation of chambers for different subject-matters (agreements). This solution would probably increase the administrative cost of panel proceedings, and concerns in that regard have accordingly been expressed in the negotiations.⁵⁶ A different, less radical possibility would be the establishment of a closed list of potential panel members. Such a list would also have to be of limited length. There are also possible combinations of the mentioned suggestions: for instance, the panel chairperson could be part of a standing panel body and the other members be drawn from a list or selected according to the specific expertise required.

Reforming the panel structure would significantly enhance the institutional independence of panelists. If the Members of the WTO wish to move in that direction, the panel structure would again have to receive priority in the current negotiations on the revision of the Dispute Settlement Understanding, which resumed after the Doha Ministerial Conference and for which the General Council has extended the initial May 2003 deadline to 31 May 2004. After the start of the negotiations, when the European Communities presented and defended their proposal, the panel structure was at the centre of the discussion, but it has lost prominence since, maybe because it involves a structural and fundamental reform. Accordingly, the last (May 2003) version of the Chairman's text does not include any aspect of the proposal to establish a permanent panel body, but the continuation of negotiations is not limited to that text for its basis; it also includes the proposals submitted by Members. The reform of the panel structure would become even more important than it already is now if the WTO dispute settlement system were to be extended to a new competition agreement.

56 See *India's Questions to the European Communities and its Member States on their Proposal Relating to Improvements of the DSU*, Communication to the DSB Special Session, TN/DS/W/5, 7 May 2002, p. 3.

VI. The Non-violation Complaint

This paper so far focused on the most common form of complaint under the WTO dispute settlement system, the so-called violation complaint. The paper would, however, be incomplete if it did not even briefly mention the much less frequent non-violation complaint. A successful GATT complaint depends on the nullification or impairment of benefits accruing to a Member directly or indirectly under one of the agreements, or the impediment of the attainment of any objective of an agreement. According to Article XXIII:1(b) of the GATT 1994, this condition can also be satisfied by the application by another Member of any measure that does not conflict with the agreement.

Not many non-violation complaints have so far been brought before panels and it has been stated that this remedy “should be approached with caution and should remain [...] exceptional.”⁵⁷ In this vein, it has been suggested in the literature that the non-violation complaint should not be used as a remedy against restrictive business practices without prior normative guidance from the membership of the WTO.⁵⁸ Another argument is the historic evolution of the multilateral trading system from a consultation and negotiation forum to binding third-party adjudication which must not “add to or diminish the rights and obligations” provided in the WTO Agreement (Article 3.2 of the DSU).⁵⁹

Non-violation complaints accordingly may appear not to be the intuitive remedy to be taken wherever restrictive business practices impede imports. Yet, the potential, and practically difficult,⁶⁰ role of the non-violation complaint in this field has not only been demonstrated by the *Kodak – Fuji* dispute, but has

57 Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 186; Panel Report, *Japan – Film*, *supra*, note 8, para. 10.37.

58 Frieder Roessler, *supra*, note 22, at 420.

59 *Id.*

60 Robert Anderson and Peter Holmes, *supra*, note 20, at 551.

been discussed already many years earlier. The GATT expert group assessing restrictive business practices under Article XXIII of the GATT 1947 specifically dealt with the question of whether non-violation complaints against restrictive business practices should be possible.⁶¹ There is no doubt that restrictive business practices can obstruct market access similarly to a governmental import restriction and they therefore can impede the value of a trade concession. Accordingly, Jagdish Bhagwati argued in 1994 that, through non-violation complaints, competition policy related questions could be brought before the GATT.⁶² Finally, the above argument that dispute settlement must not “add to or diminish the rights and obligations” under the WTO Agreement can easily be turned on its head: panels and the Appellate Body must not disregard what the non-violation complaint already covers.

A non-violation complaint is successful only if three cumulative conditions are satisfied: (1) the application of a measure by a Member; (2) the existence of a concession or an advantage resulting in a benefit accruing to another Member directly or indirectly under the agreement in question, and (3) the nullification or impairment of this benefit as a consequence of the measure of the other Member.⁶³ Anti-competitive behaviour of private actors without governmental link does not satisfy the first condition. Competition related norms—such as a formal competition act—certainly fall within the concept of a Member’s measure. The same should be true about individual decisions in the area of competition. Text and purpose of Article XXIII:1(b) of the GATT 1994 militate in favour of a broad interpretation of the concept “measure.”⁶⁴ It would be more difficult to qualify inaction of a competition authority as a measure. Complete inaction

61 BISD 9S/176.

62 Quoted in Frieder Roessler, *supra*, note 22, at 414.

63 Panel Report, *Japan – Film*, *supra*, note 8, para. 10.41.

64 *Ibid.*, paras. 10.42-10.60.

is not the application of a measure,⁶⁵ but a measure might be seen in a positive decision not to intervene in a particular case of anti-competitive private behaviour,⁶⁶ in an abrogation of a piece of competition legislation, in an exemption or in the combination of instances of intervention and of non-intervention. The limits imposed on the application of Article XXIII:1(b) of the GATT 1994 therefore seem to be similar to those relevant for Article XXIII:1(a) combined with Article III:4 of the GATT 1994. In other words: the non-violation complaint also depends on the existence of some competition related norms and / or their application. In contrast, it does not cover the case where market access concessions are nullified or impaired by nothing more than private agreements.⁶⁷

The two other conditions of a valid non-violation complaint do not give rise to any particularity that would have to be discussed in the present context. For the sake of brevity, these conditions will not be discussed here. Instead, one may refer to the thorough reasoning in the panel report in *Kodak – Fuji*.⁶⁸

VII. The Situation Complaint

The preceding analysis has shown that competition related actions of Members already *de lege lata* must comply with important WTO obligations and that, in addition, non-violation complaints may be filed with regard to a Member's measures taken in the area of competition. It has also been established,

65 Petros C. Mavroidis and Sally J. Van Siclen, "The Application of the GATT / WTO Dispute Resolution System to Competition Issues," 31 *Journal of World Trade*, Vol. 5, 5, at 11 (1997).

66 On the other hand, such non-intervention can be seen as toleration and hence passivity. See, however, Bernard M. Hoekman and Petros Mavroidis, "Competition, Competition Policy, and the GATT," 17 *World Economy*, 121, 141 and 145 (1994).

67 The situation is different, of course, where a Member's government in some way contributes to the anti-competitive private behaviour or to its effects.

68 Panel Report, *Japan – Film*, *supra*, note 8, paras. 10.61-10.81 and 10.82-10.89, respectively.

however, that such obligations, and equally a non-violating measure—unusual circumstances aside—require the existence of competition laws or other positive action by a Member. Purely private conduct combined with the absence of competition laws or their non-application⁶⁹ can most probably be caught only by the so-called situation complaint. For such a situation complaint, however, there is no precedent in the history of the GATT / WTO dispute settlement system so far. Situation complaints have already been raised in a number of cases,⁷⁰ but none of them resulted in a panel or Appellate Body report with findings based on Article XXIII:1(c) of the GATT 1994.

Should such a complaint on the basis of governmental inaction against private anti-competitive behaviour be brought in the future, one may expect the objection that the obligation to adopt or enforce competition laws must not be introduced into WTO law through the back door of the rather extraordinary situation complaint. However, even if it has remained largely unused to date, the situation complaint is an established and confirmed⁷¹ part of WTO law. Therefore, what this complaint covers, is already part of the world trading system and would not be introduced as a new dimension. In the literature, it has specifically been suggested that (legislative or administrative) governmental inaction against privately erected market barriers may be a case of application of the situation complaint.⁷² The fear that the situation complaint could give rise to an obligation to adopt or enforce competition laws is also exaggerated in that the quasi-judicial rules and procedures of the Dispute Settlement Under-

69 Except in the case where inaction in one case is coupled with positive action in another, similar case.

70 See GATT, *Analytical Index: Guide to GATT Law and Practice*, Vol. 1 (6th ed. 1995), II.A.2.(5)(b).

71 See Article 26.2 of the DSU. See also, Frieder Roessler, *supra*, note 21, at 140.

72 Frieder Roessler, *supra*, note 21, at 139-140; Petros C. Mavroidis and Sally J. Van Siclen, *supra*, note 65, at 12, note 10; Mitsuo Matsushita, *supra*, note 19, at 370-371.

standing apply only up to the circulation of the panel report.⁷³ Regarding the adoption and the surveillance and implementation of recommendations and rulings, the old dispute settlement rules and procedures contained in the Decision of 12 April 1989 continue to apply.⁷⁴ It remains that the solution, which is adopted at the conclusion of a situation dispute (and accepted by the respondent), may provide for the responding government's intervention against the anti-competitive private behaviour. Certainly, given the role of situation complaints in practice, it is not the most likely scenario that a situation complaint of the kind described will emerge in the current dispute settlement system,⁷⁵ and others have questioned whether this would provide an appropriate forum,⁷⁶ or even argued that such a course of action would be "risky" and "premature."⁷⁷

Should such a situation complaint nevertheless be brought, the panel concerned would have to develop the legal standards to be employed for the decision about its merits. In the literature, it has been suggested that, similarly to non-violation complaints, the complainant would have to establish that it had a reasonable expectation that the situation would not occur and, in addition, a reasonable expectation that the government would intervene to correct this measure.⁷⁸ It cannot be ruled out that the conditions of Article XXIII:1(c) would be easier to satisfy than just suggested, given that a cartel can erect barriers to the market access of foreign competitors that are equivalent to a governmental import restriction (as regards the effect on importers). Clearly, the difficulties of the fact-finding process in a situation dispute arising from restrictive business practices are likely to

73 Article 26.2 of the DSU. This also excludes an appeal against the panel report.

74 BISD 36S/61-67.

75 Petros C. Mavroidis and Sally J. Van Siclen, *supra*, note 65, at 12, note 10.

76 Bernard M. Hoekman and Petros Mavroidis, *supra*, note 66, at 139.

77 Mitsuo Matsushita, *supra*, note 19, at 370-371.

78 Frieder Roessler, *supra*, note 21, at 139-140.

be significant,⁷⁹ which reaffirms the statements made in this paper in that connection.⁸⁰

VIII. Conclusions and Summary

The conclusion is simple: to the extent that existing WTO law imposes standards for the design and application of competition laws, the dispute settlement system of the WTO applies. Already today, it therefore potentially *has to deal* with competition disputes. The dispute settlement system also *can deal* with competition disputes and with disputes under a future competition agreement, as it provides for an appropriate standard of review. Its (partial) non-application to new and additional rules to be negotiated within a future WTO competition agreement (possibly the price to pay to achieve such an agreement) would be a step back—not in a formal sense, but in a substantive sense. In addition, the full application of the dispute settlement system should not present huge problems if the scope of the substantive rules in a future competition agreement is limited to very general obligations.

The WTO dispute settlement system, however, shows a number of weaknesses in the area of fact-finding, which should become particularly noticeable in the examination of competition related individual decisions by domestic competition authorities, be it under existing WTO law or under a new competition agreement. These weaknesses are present in the procedure followed by panels, and the most serious weakness relates to the problem of the communication of confidential information. There has not been a satisfactory solution to this problem so far, although the need for a solution is pressing already today. The current reform of the WTO dispute settlement system should provide an opportunity to find such a solution. The current DSU reform should also be used in order to improve the panel structure. It should guarantee greater institutional independence.

79 Frieder Roessler, *supra*, note 21, at 140.

80 In section C., *supra*.

If dispute settlement in a future competition agreement were restricted to laws as such, of course, several of the problems related to fact finding in individual cases are not likely to come up in such disputes. They can, however, still come up in disputes involving individual competition cases under other relevant WTO agreements discussed in this paper. Similarly, a limitation of the prohibition of discrimination to *de jure* discrimination could encourage Members to challenge (the more frequent) *de facto* discriminatory measures under these other existing agreements, namely the GATT 1994.

Is There a Need for Restructuring the Collaboration among the WTO and UN Agencies so as to Harness their Complementarities?

by

Gary P. Sampson *

I. Introduction

The objectives of the General Agreement on Tariffs and Trade (GATT) were far reaching; to raise standards of living, achieve full employment along with a large and steadily growing volume of real income and develop the full use of the world's resources while expanding the production and exchange of goods. These are also the goals of the WTO, with the important addition being the optimal use of the world's resources "in accordance with the objective of sustainable development."

At the most general level, these objectives provide an example of the WTO and the UN Agencies pursuing common goals, and therefore the need for "collaboration among the WTO and the United Nations Agencies to harness their complementarities." One specific example relates to sustainable development. Not only does it now appear as an objective of the WTO; at the meeting in Doha in Qatar in November 2001, the trade ministers

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strongly reaffirmed their “commitment to the objective of sustainable development...” They expressed their conviction that:

[T]he aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.

At the United Nations World Summit on Sustainable Development in September 2002 in Johannesburg, ministers committed themselves to continue:

[T]o promote open, equitable, rules-based, predictable and non-discriminatory multilateral trading and financial systems that benefit all countries in the pursuit of sustainable development and [...] support the successful completion of the work programme contained in the Doha Ministerial Declaration...

They recognised “the major role that trade can play in achieving sustainable development and in eradicating poverty”; “we encourage WTO members to pursue the work programme agreed at the Fourth WTO Ministerial Conference.”

Such political declarations are very much “tops-down” in nature, frequently stating the desirability of consistency and mutual supportiveness between institutions pursuing common goals. Notwithstanding such declarations, there appears to be a widespread view that there is scope for greater co-operation between the WTO and the United Nations Agencies. It is argued in this paper that useful as such declarations may be, what is important for there to be effective co-operation is to identify the specific areas where complementarities and overlaps exist in the work of the WTO and the UN Agencies. Knowing what the substantive areas are would facilitate the identification of any areas where restructuring the collaboration could lead to a harnessing of the complementarities of these institutions.

While space does not permit all such areas to be identified—and indeed it is a considerable task—a selection of areas are presented on the basis that they are all quite different in nature but do provide examples of specific areas of potential collaboration. The argument made in this paper is that identifying such areas would permit a “bottoms up” approach to collaboration to be

pursued. It could play a potentially important role in complementing political declarations of good intent.

II. Areas of Complementarity

The agreements reached in the Uruguay Round greatly expanded the responsibilities of the original GATT. Rules relating to intellectual property rights and trade in services became part of the agenda, and competition policy, investment, government procurement and trade facilitation have emerged as prime candidates for new WTO agreements. The declaration launching the Doha Development Round not only calls for modalities for negotiations in all these areas but also launched negotiations in the very controversial area of trade and environment. Of the new agreements that are now part of the WTO agenda, the nature of the rules they contain has become far more important from a domestic regulatory perspective than the earlier focus on border protection. They relate to sensitive areas such as financial and telecommunication services, patents and copyright, environmental subsidies and support measures for agriculture. These rules extend well beyond border measures and reach deep into regulatory structures of the member countries.

Given the ambitious objectives of the WTO and the extension of the subject matter covered by the WTO Agreements, it is not surprising that there is considerable overlap between the very specific subject matter dealt with by the WTO and that dealt with by the United Nations Agencies. There are many examples.

The Trade Related Intellectual Property Rights (TRIPS) Agreement and its relationship to the Convention on Biological Diversity (CBD) is regularly singled out. The linkage comes from the fact that the CBD recognises the sovereign rights of States over their natural resources and their authority to determine access to their genetic resources. The objective of the Convention is "the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of their genetic resources." The TRIPS Agreement makes no reference to the CBD or access and benefits sharing, or to traditional knowledge. As the CBD

recognises that access, where granted, shall be on mutually agreed terms and subject to prior informed consent of the provider party, intellectual property rights are clearly important. In this respect the question is raised as to whether instruments contained in the TRIPS Agreement promote the equitable sharing of benefits between commercial users of genetic resources and indigenous communities. Not surprisingly, ministers in Doha instructed the Council for TRIPS to examine the relationship between the TRIPS Agreement and the United Nations Convention on Biological Diversity.¹

Another example of the interface between WTO rules and United Nations treaties comes from recent dispute settlement cases at the WTO dealing with the environment and public health. Unlike the GATT process, it moves forward automatically with Panel and Appellate Body reports adopted unless there is a consensus against them. The rule of negative consensus backed up by a mechanism providing for compensation and sanctions in the case of non-compliance has greatly increased the attractiveness of the process for some looking for a more effective compliance mechanism than that found in—for example—multilateral environment agreements negotiated under the auspices of the United Nations. The result is that:

Purists want environmental regulations left to specialised agencies, whereas many environmentalists want them enforced through the WTO. The argument for using the WTO is simple, for unlike most other international organisations, the WTO has a mechanism for enforcing its rulings: trade sanctions. The WTO convenes panels of experts to rule on trade disputes among member governments. If the losing government refuses to comply with the ruling, the panel authorises the winning government to impose trade sanctions.²

1 See World Trade Organization – Ministerial Conference (Fourth Session, Doha, 9-14 November) (2001), *Ministerial Declaration* WT/MIN(01)/DEC/W/1 (Paragraph 19).

2 Michael M. Weinstein and Steve Charnovitz, “The Greening of the WTO,” *Foreign Affairs*, November-December 2001.

The result is that the WTO dispute settlement process finds itself dealing with cases relating to non-traditional trade areas such as the environment and public health.

The so-called Shrimp – Turtle dispute provides a good example of the complementarities between WTO rules and UN Agreements. In this case, the Appellate Body was required to determine if a trade measure that had been invoked related to the conservation of an exhaustible natural resource and therefore qualified for provisional justification under the GATT 1994 exceptions article. At issue was whether a living creature should be considered to be an exhaustible natural resource. The Appellate Body ruled that in the light of contemporary international law, living species, which are in principle renewable, “are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities.” In taking this decision, the existence of a Multilateral Environmental Agreement (MEA) was critical. As “all of the seven recognised species of sea turtles are listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),” the Appellate Body concluded that the five species of sea turtles involved in the dispute constitute “exhaustible natural resources” within the meaning of Article XX(g) of the GATT 1994.³ The UN Convention on International Trade in Endangered Species had an important complementary role to play.

There are other cases where complementarities are potentially very important. In another case the Appellate Body noted that the more “vital and important” the policy pursued by a national government, the easier it would be to prove that a non-conforming WTO measure was “necessary” in the context of Article XX of GATT 1994 to meet the objectives of the policy concerned. In this case, the public health objective being pursued was characterized as “vital and important in the highest

3 See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, (12 October 1998), paragraph 128.

degree.”⁴ This then begs the question as to whose responsibility is it to decide whether the objective pursued is vital and important in the highest degree. The World Health Organisation (WHO) of the United Nations is certainly one candidate for providing an input. The European Commission has also proposed a role for the WHO in settling questions surrounding compulsory licensing, access to essential medicines and the TRIPS Agreement.

Quite apart from specific WTO agreements and the dispute settlement mechanism, it is the view of many that the every day work of the WTO impacts on matters dealt with by United Nations Agencies. Human rights is one example. In reporting to the fifty-fifth session of the General Assembly the UN Secretary-General stated that:

[The] goals and principles of the WTO Agreements and those of human rights do share much in common. Goals of economic growth, increasing living standards, full employment and the optimal use of the world's resources are conducive to the promotion of human rights, in particular the right to development. Parallels can also be drawn between the principles of fair competition and non-discrimination under trade law and equality and non-discrimination under human rights law. Further, the special and differential treatment offered to developing countries under the WTO rules reflects notions of affirmative action under human rights law.⁵

Some areas dealt with by United Nations bodies have been proposed as candidates for collaboration with the WTO. Here an example is core labour standards and the appropriate relationship between the WTO and the International Labour Office. In Singapore in December 1996, trade ministers renewed their commitment to the observance of internationally recognized core labour standards. They affirmed both that the International Labour Organisation (ILO) is the competent body to set and deal

4 *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report and Panel Report, adopted on 5 April 2001, WT/DS135.

5 UN Document A/55/342: *Globalization and Its Impact on the Full Enjoyment of All Human Rights*, Preliminary Report of the Secretary-General, Fifty-fifth session of the General Assembly, UN, p. 4.

with these standards, as well as their support for its work in promoting them. They stated their belief that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards and rejected the use of labour standards for protectionist purposes, agreeing that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, they noted that the WTO and ILO Secretariats will continue their existing collaboration.

The need for collaboration to increase the complementarities of the WTO and the United Nations and its specialised agencies is formally recognised by the WTO. Article V of the Agreement Establishing the WTO requires “the General Council [to] make appropriate arrangements for effective co-operation with other intergovernmental organizations that have responsibilities related to those of the WTO” (paragraph 1).

III. What Role for the WTO?

While there is political recognition of the need for collaboration between the WTO and United Nations bodies, controversy surrounds whether the WTO is the appropriate body to deal with a number of matters that have gravitated towards it. The WTO is fiercely criticised by public interest groups who argue that its rules constitute an unwanted intrusion into the domestic affairs of sovereign states; that they impede the proper workings of democratically elected governments by denying them, for example, the possibility to restrict imports of goods produced in an environmentally unfriendly manner or without respecting core labour standards. A common cry is that there should be an acceptance on the part of the trade community that those responsible for trade policy should recognise that social norms are inextricably linked with the international economic system, and provide the common moral and legal underpinnings for the global economy. It is argued that integrating social norms into all aspects of economic policy-making—including trade policy—would ensure that markets are not only open and efficient, but also fair and just.

Desirable though this goal may be, the question to address is in what way could WTO concepts, principles, rules and processes be adjusted to enable the integration of such norms into the WTO. From a practical policy perspective, many of the proposals involve changing fundamentally the manner in which the WTO operates. There is frequently a call, for example, for the WTO to modify the interpretation of non-discrimination.

As things stand, and very loosely put, non-discrimination means that products that compete in the same market and are physically similar can not be discriminated against in the trading system because of the manner in which they were produced. It is argued that the role of the WTO be rendered more “useful” by permitting discrimination in trade in order to enforce standards that achieve objectives addressed by the United Nations and its specialised agencies: human rights (High Commission for Human Rights), public health (World Health Organisation), labour standards (International Labour Office) and the environment (United Nations Environment Program). For many—and particularly developing countries—discrimination in trade is an option only available to powerful countries; considered an encroachment on national sovereignty; nothing more than thinly disguised protectionism; and therefore staunchly opposed.

There is, however, clearly a gap to be filled. The thought of consuming imported products that have degraded the environment or been produced without respect for core labour standards is anathema to public interest groups concerned about environment and social conditions beyond their borders. If the WTO is to find itself in the position of legitimising trade discrimination for the implementation of social and other norms that are not universally held—and that is what is being asked of the WTO by some today—the reach of WTO rules would increase dramatically.

In very practical terms, this interpretation of non-discrimination means that from a trade policy perspective, goods produced in an environmentally unfriendly manner, or without respecting core labour standards, are like any other. With this understanding, it is not the role of trade officials to judge the appropriateness or otherwise of national standards adopted to meet national goals in non-trade areas. From an international

relations perspective, this interpretation serves to minimise any unwanted encroachment on national sovereignty, with powerful countries riding roughshod over less powerful ones, by forcing them to produce goods according to the preferred environmental or other standards of the importing country. From a multilateral agreement perspective, this interpretation leaves the necessary space for existing treaties to be enforced and new ones negotiated to deal with the establishment and enforcement of commitments relating to the environment, labour standards, human rights and other social norms.

A strong argument can be made that a trade policy organisation such as the WTO should not be responsible for the non-trade issues that are gravitating towards it. The United Nations and its specialized agencies are charged with advancing the causes of development, the environment, human rights, and labour. A complementary case can be made that they should be strengthened—and given the resources they need to successfully carry out their tasks—in order for the WTO to go ahead and deal with a narrower agenda than what it is now acquiring. Not surprisingly, this view has been expressed on a number of occasions by Kofi Annan, the Secretary General of the United Nations as well as a number of Heads of specialised UN agencies.⁶

However, it seems there is not the same willingness to forgo national sovereignty and accept strong compliance mechanisms in those treaties negotiated under the auspices of the United Nations and its specialized agencies as in the WTO. As Peter Sutherland *et al.* recently remarked:

The weakness of other multilateral institutions, and the inadequacy of existing decision-making *fora*, has increased the demands on the WTO to deal with issues not heretofore within its mandate. Labour and environmental issues are the two most notable cases [...] These pressures have been brought to bear on the WTO not only because of the attraction of its unique enforcement power, but also because the institutions that might

6 See the chapters by Mary Robinson and Kofi Annan, in *The Role of the WTO in Global Governance*, Gary P. Sampson (ed.), United Nations University Press, Tokyo, 2000.

be expected to deal with labour and environment issues either do not exist or are weak.

IV. Multilateral Environment Agreements and the WTO

Against this backdrop, an important question is how to proceed in practice. One interesting case study is the relationship between the WTO and the trade provisions in the United Nations Multilateral Environment Agreements (MEAs). With the coming of the WTO, the Committee on Trade and Environment was created with broad terms of reference. Through intensive discussion in the ensuing years it has in my view been particularly effective in “harnessing complementarities.” It has promoted a greater understanding on the part of trade and environment officials of their respective concerns and the policy tools available to deal with them. This has been achieved through practical initiatives including the WTO organising “trade and environment” symposia attended by national government officials, academics, representatives of the United Nations and specialised agencies etc; joint technical co-operation missions involving both WTO and UNEP staff; observer status for MEAs in the Committee on Trade and the Environment (CTE); and regular presentations by representatives of MEAs to the CTE on the trade related aspects of their agreements. This has certainly contributed to the fact that there has never been a dispute brought to the WTO relating to a WTO inconsistent measure provided for in an MEA.

These exchanges have arguably led to a better understanding of the goals of trade and environment policy and the respective roles of the MEA Treaties and Secretariats as well as that of the United Nations Environment Program (UNEP).⁷ At the Doha

7 Mutually supportive statements have been a feature of both the Doha Ministerial and the World Summit on Sustainable Development. In November 2001, trade ministers in Qatar told the world that:

We strongly reaffirm our commitment to the objective of sustainable development [...] We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.

Ministerial meeting, trade ministers welcomed “the WTO’s continued co-operation with UNEP and other inter-governmental environmental organizations” and encouraged “efforts to promote co-operation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development...” In concrete terms, pursuant to discussion in the CTE, ministers agreed at the Doha Ministerial to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.

As far as “restructuring” is concerned, there have been proposals for changes in WTO rules and procedures to accommodate MEAs. One aspect of the debate has centred on the possibility of a conflict arising over trade-related measures contained in MEAs: namely, their potential inconsistency with WTO rules, and how conflict in these rules could be avoided or dealt with. Given the importance of the global trade and environment regimes, any clash over the application of rules agreed to among nations would have unfortunate ramifications for both regimes. Given the importance of the issue, trade ministers agreed in Doha to negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements.

It has been suggested that an “environmental window” be created through providing for exceptions to WTO inconsistent measures being taken in light of the provisions of environment agreements. This has not met with the unanimous approval of WTO members. Nevertheless, it can be argued that it is very much in the interests of the WTO to have effective multilateral environment agreements to ensure that trade related disputes do not gravitate towards the WTO. To achieve this, any WTO

(contd.) _____

Shortly after the meeting in Doha, environment ministers called for: [U]rgent action at all levels to continue to promote open, equitable, rules-based, predictable and non-discriminatory multilateral trading and financial systems that benefit all countries in the pursuit of sustainable development. We support the successful completion of the work program in the Doha Ministerial Declaration...

inconsistent measures should be clearly identified and agreed to by the parties to the MEA. The environment agreements would set the standards for environmental protection and enforce them. If this means that if WTO members forgo their WTO rights not to be discriminated against if certain environmental standards are not met then so be it. This course of action however requires “effective” (from a WTO perspective) MEAs, characterised by clearly specified trade measures taken for environmental purposes, broad-based support in terms of country membership and a robust dispute settlement system.⁸ Unfortunately this is not the case today.

While there has been clear evidence of collaboration to harness complementarities in trade and environment, it is difficult to envisage similar processes being established in the WTO for other areas where the UN has responsibilities. It is hard to imagine the creation of a Committee on Trade and Human Rights or Labour Standards within the WTO. Developing countries are far too suspicious of hidden protectionist intentions behind any such initiatives, believing that these issues should be dealt with in the United Nations and the specialised agencies with the mandate and expertise to deal with them.

V. Conclusion

In a perfect world, meeting the challenges facing the global economy requires a coherent approach and institutional structure at the global level. This means the existence of institutions that determine the substantive policies and public processes with a clear delineation of the responsibilities of the various actors involved. The goals of the institutions should be to facilitate the attainment of agreed policy objectives through

⁸ Further, with a view to enhancing the mutual supportiveness of trade and environment, Ministers agreed:

[T]o negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs), procedures for regular information exchange between MEA Secretariats and the relevant WTO committees...

co-operation, while providing for the avoidance and resolution of any disputes that may arise in the pursuance of these objectives. Good governance requires a set of such institutions which are coherent, mutually consistent, and supportive, and which operate in an effective, accountable and legitimate manner. At the international level, these are the characteristics of an effective global governance structure characterised by collaboration among the WTO and UN Agencies in order to harness their complementarities.

I would like to make two proposals as to how to proceed. One is “bottoms up” in nature and the other “tops down.” Both are potentially far reaching, but far from radical in the sense that they both have been experienced as past GATT initiatives. One relates to the clarification of WTO rules. It has been remarked that WTO jurisprudence has not yet been clarified with respect to the relationship between WTO rules and a number of areas of concern to the United Nations Agencies. Examples given include the impact of human rights obligations and the interpretation of the TRIPs Agreement, as well as the numerous WTO exceptions protecting national policy for non-trade concerns. In this respect:

Closer co-operation between the WTO and UN Specialized Agencies could facilitate clarification of the extent to which human rights (e.g. those recognized in the law of the International Labour Organisation (ILO) and of the World Health Organization) are relevant also for the interpretation and application of WTO rules.⁹

The first proposal is based on the fact that in the Uruguay Round, the Articles of the GATT were reviewed. It is perhaps time to address once again the question of whether an Understanding or an interpretation is required to clarify the grounds for deviating from—or seeking an exception from—the non-discrimination obligation of the WTO. The optimal manner to deal with the solution to the problems confronting the WTO in this do not lie with *de facto* rule making through litigation.

9 Ernst-Ulrich Petersmann, “Human Rights and the Law of the World Trade Organization,” *Journal of World Trade*, 37(2): 241-281, 2003.

The second proposal is “tops down” and relates to the fact that there is no world government to determine the appropriate division of labour among existing multilateral institutions, or to decide when new organizations need to be created or existing ones closed down. In this context, attention has been drawn to a need for a global process with concerted, broad, and high-level political leadership that could review—*inter alia*—the appropriate distribution of tasks between the WTO and the United Nations Agencies. A summit meeting of heads of state—a Globalisation Summit—has been proposed by Peter Sutherland—another former Director General of the WTO—to strengthen the United Nations institutions and address global problems that require global solutions. The current Director General, Dr. Supachai has proposed a high level panel to resolve some of the threatened divisions over the pending trade and non-trade issues facing the WTO at present.¹⁰

In the Uruguay Round, a group was created to examine ways in which the WTO and the Bretton Woods institutions could bring greater coherence to global economic policy-making. The “so called” FOGS (Functioning of the GATT System) Group produced a Ministerial Declaration which recognized that “difficulties, the origins of which lie outside the trade field, can not be redressed through measures taken in the trade field alone.” The policy prescriptions of the FOGS Group look remarkably relevant for the problems confronting the global economy of today. For example, ministers declared that the “inter-linkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies.” The outcome of the Declaration was the negotiation of formal agreements between the WTO and the Bretton-Woods institutions on how to ensure consistent and mutually supportive policies in their own operations.

10 See chapters by Peter Sutherland *et. al.* and Dr. Supachai, in Gary P. Sampson (ed.), *The Role of the WTO in Global Governance*, *op. cit.*

My second proposal then, is that a FOWTOS (Functioning of the World Trade Organization System) Group be formed to make recommendations on how to bring greater coherence to policy-making at the global level—as the FOGS Group successfully did—but extending its mandate to review and make proposals on collaboration among the WTO and UN Agencies with a view to a possible restructuring of the relationship.

Conference Agenda

Friday 27 June 2003

CHALLENGES TO THE POLITICAL LEGITIMACY OF THE WTO SYSTEM

- 09h00 **Welcome**
by Prof. *Yves Mény*
President of the European University Institute
- 09h15 **The “Human Rights Approach to International Trade” Advocated by UN Human Rights Bodies and by the International Labour Organization: Is It Relevant for WTO Law and Policy?**
- Report: Prof. *Ernst-Ulrich Petersmann*
 - Comment: WTO Representative of the EC
- 10h00 **How Can Parliamentary Participation in WTO Rule-Making and Democratic Control Be Made More Effective in the WTO?**
- Reports: **US Perspectives**
 Prof. *Gregory Shaffer*
 EU Perspectives
 Prof. *Meinhard Hilf*
 - Comments: Member of European Parliament
 Member of US Congress
- 11h15 **“Do we Need Cosmopolitics?” (Pascal Lamy)? Transparency, Public Debate and Participation by NGOs in the WTO**
- Report: *Steve Charnovitz*
 - Comment: Amb. *Julio Lacarte*

**CHALLENGES TO THE ECONOMIC LEGITIMACY, EFFICIENCY
AND COMPETITION CULTURE OF THE WTO SYSTEM**

14h15 **The WTO Objective of Non-discriminatory
Conditions of Trade: Are Consumer Welfare,
Producer Welfare and Total Citizen Welfare
Adequately Balanced in WTO Rules?**

- Reports: Prof. *Patrick Messerlin*
 Prof. *Petros Mavroidis*
- Comments: WTO Representative of
 New Zealand
 WTO Representative of Chile

15h00 **Is there a Need for Additional WTO
Competition Rules Promoting
Non-discriminatory Competition,
Competition Laws and Competition Institutions
in WTO Members?**

- Report: Prof. *François Souty*
- Comment: WTO Representative of
 the United States

16h00 **Is There a Need for Additional WTO
Investment Rules on Market Access and
National Treatment of Foreign Investors?**

- Report: Prof. *E. M. Graham*
- Comment: WTO Representative of Brazil

17h00 **Are the Competition Rules in the
WTO Agreement on Trade-Related
Intellectual Property Rights Adequate?**

- Report: Prof. *Frederick M. Abbott*
- Comments: WTO Representative of Singapore
 WTO Representative of Argentina

Saturday 28 June 2003

**INSTITUTIONAL CAPACITY OF THE WTO TO IMPLEMENT
THE DOHA DEVELOPMENT ROUND AGREEMENTS**

09h45 **Welcome**

by Prof. *Helen Wallace*
Director of the Robert Schuman Centre, EUI

10h00 **How to Improve the Capacity of the
Intergovernmental and Administrative WTO
Institutions to Fulfil their Mandate?**

- Report: Prof. *Richard Balckhurst* and
 David Hartridge
- Comment: WTO Representative of
 the United Kingdom

11h00 **Can the WTO Dispute Settlement System Deal
with Competition and Investment Disputes?**

- Report: **Competition Related Disputes**
 Prof. *Claus-Dieter Ehlermann* and
 Lothar Ehring
- Comment: WTO Representative of Canada

10h00 **Is There a Need for Restructuring the
Collaboration among the WTO and UN
Specialized Agencies so as to Harness
their Complementarity?**

- Report: Prof. *Gary Sampson*
- Comment: WTO Representative of
 South Africa

13h00 **Concluding Discussion**

- Chaired by: Amb. *Carlo Trojan*

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