

*Developing Countries  
in the Doha Round*

**WTO Decision-making Procedures  
and Negotiations on Trade  
in Agriculture and Services**

*edited by*  
**Ernst-Ulrich Petersmann**



European University Institute  
**Robert Schuman Centre**  
*for advanced studies*

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**Robert Schuman Centre for Advanced Studies  
European University Institute  
Florence, Italy**

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*For further information:*

Transatlantic Programme  
Robert Schuman Centre for Advanced Studies  
European University Institute  
Via delle Fontanelle, 19  
50016 San Domenico di Fiesole (FI), Italy  
Fax: + 39 055 4685 770  
E-mail: [atlantic@iue.it](mailto:atlantic@iue.it)  
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*WTO Negotiators  
Meet the Academics:  
Developing Countries  
in the Doha Round*

**Foreword**

What has been called, for some time now, the development dimension of trade negotiations has always been a touchy subject, ripe with deeply held and seemingly immovable positions.

Development within the WTO means very different things to different people. For some, in the roughest terms, it is centred on the realization that opening up to international trade and investment flows can bring a powerful boost to growth and higher living standards in poorer countries. A related broad position is focused on the internal policy discipline brought about by enacting multilateral commitments, a discipline which helps balance domestic interest groups.

Others (again in very broad terms) emphasize that the effort of development needs to be supported by preferential treatment and exemptions from obligations. Within this current, there are different opinions on how deep this special treatment should go and how long it should be sustained.

I, for myself, believe that we cannot build a truly multilateral trading system where the emphasis lies on carving out exemptions and finding ways to avoid commitments.

It is clear that freer trade must be married to deep internal reform in order to deploy its considerable benefits, and that this reform is often difficult. This is why transitional periods—fixed and credible—are needed, and why flexibilities—precisely defined and limited—have to be found to make sound policy politically feasible.

But if one goes around forever avoiding the pain of reform, it is very likely that development will be slow in coming, if it comes at all.

My own country, Mexico, has learned this the hard way. We started our own trade opening in 1986, in the middle of deep economic crisis brought about by



years of mismanagement, cronyism and overregulation. There were—there still are—powerful interests opposed to reform, but international commitments, both multilateral and regional, have helped offset these forces and create the internal constituencies that support free trade, clear rules and a lean state. Almost twenty years later, Mexico is the world's eighth trading power, and annual export growth of 12% on average over the past 10 years has been responsible for half of total GDP growth during that period. Of course, these results would be even better with the adoption of additional outstanding reforms.

Wherever one stands on the trade and development debate, what seems to be clear is that the development dimension has to be solved for the multilateral trading system to maintain its strength and, more immediately, for the Doha Round to arrive to safe port. This is not an issue we can dodge anymore.

And the only way I know of solving it is through open-minded discussion, aimed at abandoning entrenched positions, finding common ground and devising creative approaches to the problem.

The third annual conference on preparing the Doha Development Round, organized by the Robert Shuman Centre for Advanced Studies of the European University Institute, under the motto 'WTO negotiators meet the academics', has provided an excellent forum for this kind of discussion. It is especially heartening that a discussion of this quality could take place in mid-2004, when trade negotiators were busy hammering out a set of frameworks to keep the Round on track.

I will not attempt to comment on the results of the discussion. They are reflected, in all their richness, in the pages of this book. I am certain that it will not only deepen everybody's understanding of the issues, but will also spark new ideas and creative solutions to the problem of trade and development. And that is precisely what is most needed at this juncture.

*Eduardo Pérez Motta*

Ambassador of Mexico to the WTO at Geneva

## *Introduction and Summary*

*Ernst-Ulrich Petersmann*

European University Institute, Florence

*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care.*

Article 25, Universal Declaration of Human Rights

*Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*

Preamble text of all UN human rights covenants

In July 2004, the annual conference on *Preparing the Doha Development Round: WTO Negotiators Meet the Academics* at the Robert Schuman Centre for Advanced Studies of the European University Institute in Florence discussed the role of *Developing Countries in the Doha Round: WTO Decision-Making Procedures and WTO Negotiations on Trade in Agricultural Goods and Services*. As in the 2002 conference<sup>1</sup> and 2003 conference,<sup>2</sup> leading academics presented papers on the pertinent subjects of the Doha Development Round of the World Trade Organization (WTO), and WTO negotiators commented on these reports, eliciting stimulating discussions among WTO ambassadors, other practitioners from developed and less-developed WTO member countries, economists, political scientists and legal academics. This introduction begins with an overview of the various proposals for defining the ‘development objectives’ of the Doha

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1 Cf. E. U. Petersmann (ed), *Preparing the Doha Development Round: Improvements and Clarifications of the WTO Dispute Settlement Understanding*, EUI/RSCAS 2002.

2 Cf. E. U. Petersmann (ed), *Preparing the Doha Development Round: Challenges to the Legitimacy and Efficiency of the World Trading System*, EUI/RSCAS 2004.

Round (section I) before summarizing the conference papers published in this book and the conference discussions at Florence (sections II-VI).

## I. How to Define the ‘Development’ Objectives of the Doha Round?

More than three-quarters of the 148 WTO Members and of the more than 25 accession candidates for WTO membership are less-developed countries (LDCs). The soon universal WTO membership reflects the fact that, notwithstanding their enormous diversity, LDCs can promote their sustainable development, domestic employment and national income more effectively through international trade than through reliance on foreign development aid. The Doha Ministerial Declaration of 14 November 2001 noted not only that the ‘multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years’ (para. 1); it also emphasized that ‘international trade can play a major role in the promotion of economic development and the alleviation of poverty’ (para. 2).<sup>3</sup> The Doha Declaration launched a new round of multilateral WTO negotiations on 21 subjects and additional ‘implementation problems’ that LDCs have confronted in their implementation of the existing WTO agreements.<sup>4</sup> In the Declaration, WTO Members ‘recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates’, and place the ‘needs and interests’ of developing countries ‘at the heart of the Work Programme adopted in this Declaration’ (para. 2). In pursuit of this development focus, WTO Members commit themselves:

[T]o continue to make positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed

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3 Cf. *The Doha Declarations*, WTO 2002, at 2.

4 For a useful overview and economic analysis of the ‘Doha Development Agenda’ and of the various WTO decisions adopted at Doha clarifying the obligations of LDCs with respect to issues such as agriculture, subsidies, textiles and clothing, technical barriers to trade, trade-related investment measures, rules of origin and other ‘implementation problems’, see: *The Doha Declarations* (note 3); *Understanding the WTO*, WTO 2003, chapter 5; *World Trade Report 2003*, WTO 2003, Part II B.

technical assistance and capacity-building programmes have important roles to play (para. 2).

More specific trade and development objectives include, *inter alia*, the ‘objective of duty-free, quota-free market access for products originating from least-developed countries’ (para. 42); an ‘Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries’ (para. 43); more effective ‘special and differential treatment’ of LDCs (para. 44); as well as a work programme for the ‘fuller integration of small, vulnerable economies into the multilateral trading system’ (para. 35). Yet, the controversies over the ‘Singapore issues’ (trade-related competition rules, investment rules, trade facilitation, transparency in government procurement) and over how to differentiate WTO rules more effectively in favour of LDCs also reveal profound disagreements over the appropriate priorities and strategies of the WTO. The focus of the 2004 EUI conference on the development dimensions of the Doha Round was justified by the Decision adopted a few weeks later by the WTO General Council on 1 August 2004 which ‘rededicates and recommits Members to fulfilling the development dimension of the Doha Development Agenda’ and provides that, apart from trade facilitation, the other Singapore issues ‘will not form part of the Work Programme ... and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.’<sup>5</sup>

#### **A. Should WTO Rules and the Doha Round Negotiations Focus More on Poverty Reduction?**

The discussions at the conference in Florence confirmed that—apart from the agreed three priority areas of the Development Round, i.e. (1) better market access for goods and services from LDCs, (2) a re-balancing of WTO rules in favour of LDCs (including more effective special and differential treatment), and (3) improved technical and capacity-building assistance for LDCs—WTO negotiators and academics continue to hold diverse views on how to make WTO rules more responsive to the needs of producers, traders and consumers in LDCs. In view of the fact that about half of the population in LDCs live on less than \$2 per day, poverty reduction is today widely accepted as the central goal of development policy. Part IV of the General Agreement on Trade and Tariffs (GATT 1947) on ‘Trade and Development’ and the explicit WTO objective of ‘sustainable development’ have long since recognized that trade and development cannot be separated. As market reforms and trade are essential for ‘pro-poor growth’, should poverty reduction also become a priority of WTO

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5 WT/L/579 of 2 August 2004, paras. 1 (d) and (g).

rules and of the Doha Round negotiations, as suggested by some of the critics of the WTO?<sup>6</sup> Or are trade rules and trade institutions not well suited to addressing the manifold aspects of ‘poverty’ (such as the domestic causes of poverty, the vulnerability of the losers in international competition) in a comprehensive manner, as many trade experts claim?<sup>7</sup>

Economists have long since emphasized that economic liberty, division of labour and competition will induce the *homo economicus* to maximize her individual and social welfare:

The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity, but of surmounting a hundred impertinent obstructions with which the folly of human laws too often encumbers its operations.<sup>8</sup>

Hence, most economists claim that ‘the world needs more globalization, not less’;<sup>9</sup> and that globalization—contrary to its critics—is also socially, not just economically, benign, and ‘has a human face.’<sup>10</sup> Yet, how can these economic assumptions be reconciled with the fact that, according to UN statistics, out of a total of 6,16 billion human beings in 2001, some 2,73 billion were reported to be living on \$2/day or less, and nearly 1,1 billion of these below the \$1/day international poverty line? How should the world trading system embodied in the WTO respond to the fact that such—often avoidable—poverty problems undermine the enjoyment of basic human rights and the legitimacy of national and international governing institutions? Does WTO law leave enough ‘policy space’ to WTO Members for addressing poverty-related problems, such as the production of traded goods (e.g. by the approximately 250 million children between 5 and 14 years old working outside their household) in violation of universally agreed ‘core labour standards?’<sup>11</sup> Does the WTO system—as it is

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6 Cf. e.g. Kenneth W. Abbott, *Development Policy in the New Millennium and the Doha Development Round*, 2003, chapter II.

7 See e.g. Michael Finger, *The Doha Agenda and Development: A View from the Uruguay Round*, 2002. The complex interrelationships between trade liberalization and poverty alleviation are explained in: *World Trade Report 2003*, WTO 2003, at 109-117.

8 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), 1976, book IV, chapter 5.

9 M. Wolf, *Why Globalization Works*, 2004, at 320.

10 In this sense: J. Bhagwati, *In Defense of Globalization*, 2004, chapters 2 and 19.

11 Even though incorporation of a ‘positive social clause’ into WTO law continues to be opposed by LDCs, WTO law permits non-discriminatory internal regulations and ‘general

claimed by some of its critics—<sup>12</sup>contribute to the number (some 800 million human beings) who are undernourished, or to the more than 880 million lacking access to basic health services, by justifying the numerous trade barriers and trade distortions that restrict the trade and income opportunities of LDCs?

Most economists reply that the persistence of severe poverty has local causes, like bad governance, unfavourable population policies, geography, religious or oppressive cultural traditions: 'Since the success of the economy depends on the quality of the state, the inequality in the quality of states guarantees persistent inequality among individuals.'<sup>13</sup> Some deduce as a result of this that global inequality and poverty are 'not a question of justice.'<sup>14</sup> Also legal philosophers like John Rawls—even if they consider a national economic order as unjust if it leaves basic human needs and human rights unfulfilled on a massive and avoidable scale—infer from the domestic origins of poverty that overcoming worldwide poverty requires, first of all, better *national* policies and better social institutions inside poor countries, notwithstanding international moral duties of assistance.<sup>15</sup> The explicit development objectives of the Doha Round, and the acceptance by every WTO Member of human rights obligations under UN law, reflect the recognition of such moral and legal obligations to reduce unnecessary poverty and widespread human rights violations inside WTO member countries. There is also economic evidence that WTO rules have—as claimed in the Preamble of the WTO Agreement—contributed to 'raising standards of living ... and expanding the production of and trade in goods and services' for the benefit of LDCs: 'Developing countries that increased their integration into the world economy over the past two decades achieved higher growth in

... continued

exceptions' for 'measures necessary to protect public morals' (cf. GATT Article XX,a, GATS Article XIV,a, Article 8 TRIPS Agreement) that could justify trade restrictions on goods produced in violation of universally agreed core labour standards and human rights.

12 Cf. e.g. T. Pogge, *World Poverty and Human Rights*, 2002, at 15-19.

13 M. Wolf (note 9), at 316.

14 *The Economist* of 11 March 2004.

15 Cf. J. Rawls, *Law of Peoples*, 1999, e.g. at 37-38, 106-120. For a criticism of Rawls' 'purely domestic poverty hypothesis' and of his support only for moral obligations of international assistance, see T. Pogge (note 12), according to whom the world trading system and the more advantaged citizens of the affluent countries could easily prevent the avoidable, life-threatening poverty in the world and must be held morally responsible for 'harming the global poor', including the often avoidable death of about 14 million people each year dying from poverty-related diseases.

incomes, longer life expectancy, and better schooling.<sup>16</sup> China's and India's experiences in achieving faster growth and poverty reduction through greater integration into the world economy confirm once again that international trade can play a major positive role in reducing poverty in LDCs.<sup>17</sup> Yet, notwithstanding the Doha Round Declaration's explicit recognition of the contribution of international trade to 'the alleviation of poverty' (para. 2) and its reaffirmed commitment to 'sustainable development' (para. 10), the only limited mandate for negotiations on trade and environment (cf. paras. 31-33) and the lack of more specific WTO provisions on poverty reduction illustrate that the implications of the WTO's development objectives for the conduct, agenda and future results of the consensus-based Doha Round negotiations remain controversial.

### **B. Should WTO Rules Focus More on Individual Freedom and Empowerment?**

According to a long tradition in economic thought—from Adam Smith via Friedrich Hayek up to Nobel Prize-winning economist Amartya Sen—, market economies and economic welfare are only instruments for enabling and promoting individual freedom as the ultimate goal of economic life and the most efficient means of realizing general welfare.<sup>18</sup> There are far-reaching differences between the liberal Smithian conception of freedom (e.g. as non-interference into individual liberty), the constitutional Hayekian conception (e.g. of liberty as constitutional, legislative and judicial guarantees against arbitrary domination of the individual), Sen's social empowerment concept of positive individual

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16 N. Stern, Introduction to: *Development, Trade and the WTO*, World Bank 2002, at xi. See also: *Global Economic Prospects and the Developing Countries: Making World Trade Work for the World's Poor*, World Bank 2002.

17 See e.g. the *Least Developed Countries Report 2004*, UNCTAD 2004; L. A. Winters, 'Trade Policies for Poverty Alleviation', in: *Development, Trade and the WTO*, World Bank 2002, 28-37. China's trade surplus vis-à-vis the US amounted to more than \$100 billion in 2004, and vis-à-vis the Eurozone to more than \$48 billion during the first 10 months of 2004.

18 On defining economic development not only in terms of *Pareto efficient* satisfaction of utilitarian consumer preferences, but also in terms of individual decisional autonomy, individual 'immunity from encroachment', and substantive 'opportunity to achieve', see A. Sen, *Rationality and Freedom*, 2002, e.g. chapter 17 on 'markets and freedoms.' See also F. A. Hayek, *The Constitution of Liberty*, 1960, at 35: 'Economic considerations are merely those by which we reconcile and adjust our different purposes, none of which, in the last resort, are economic (except those of the miser or the man for whom making money has become an end in itself).'

freedom,<sup>19</sup> and the related conceptions of the individual (e.g. as an atomistic, autonomous being or as individuals embedded in economic and social relationships).<sup>20</sup> Yet, all three approaches to defining economic development not only in quantitative macroeconomic terms but more broadly as freedom, and especially Sen's conception of freedom as empowerment and human capacity for personal self-development, are more consistent with the universal recognition of human rights (including the so-called 'human right to development'), and with the empirical fact that most individuals survive by trading the fruits of their labour in exchange for goods and services necessary for satisfying their basic needs and for living the life they have reason to value, than the macroeconomic, state-centred conceptions of national income cherished by many economists and WTO governments.<sup>21</sup> The 'development as freedom approach' further emphasizes the empirical and theoretical linkages between economic and political freedoms and social opportunities of education and health care.<sup>22</sup> The UN Development Reports increasingly acknowledge that human rights and constitutional freedoms empower citizens not only to become better 'democratic citizens'; they also set incentives for investments, savings, a welfare-enhancing division of labour and consumer-driven competition.<sup>23</sup> Some specialized UN Agencies (like the ILO, FAO, WHO, UNESCO) explicitly define their objectives in terms of human rights (e.g. core labour rights, human rights to food, health and education). Others, like the World Bank, recognize in their policies that 'sustainable development is impossible without human rights', just as 'the advancement of an interconnected set of human rights is impossible without development.'<sup>24</sup>

The WTO's annual reports have endorsed the view that 'the development process is about expanding the opportunities of people to choose a life they have reason to value', including the 'empowerment' of poor people 'to take greater control of their own destiny'; the reports also point to the positive relationships

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19 On the different liberal, republican and human rights concepts of freedom see, e.g., P. Pettit, *Republicanism. A Theory of Freedom and Government*, 1997.

20 On the evolving perceptions of the individual in economics see e.g. J. B. Davis, *The Theory of the Individual in Economics*, 2003.

21 Cf. E. U. Petersmann, 'The Human Rights Approach Advocated by the UN High Commissioner for Human Rights and by the ILO: Is it Relevant for WTO Law and Policy?' *Journal of International Economic Law* 2004, 603-625.

22 Cf. A. Sen, *Development as Freedom*, 1999, e.g. chapters 6 and 7 on the importance of democracy for preventing famines and other 'market failures.'

23 *Human Development Report 2000: Human Rights and Human Development*, UNDP 2000.

24 *Development and Human Rights. The Role of the World Bank*, World Bank 1998, at 2.



between rule of law, democracy and openness to trade that remains the single most important source of development financing for many LDCs.<sup>25</sup> In the discussions at Florence, South Africa's WTO Ambassador Faizel Ismail and other participants explicitly endorsed Amartya Sen's definition of development 'as a process of expanding the real freedoms that people enjoy' as well as 'the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation.'<sup>26</sup> Yet, notwithstanding the academic criticism that power-oriented and state-centred conceptions of trade policy and international law may run counter to the universal 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world',<sup>27</sup> WTO diplomats insist on the *intergovernmental* structures of the WTO and avoid human rights discourse in WTO bodies. The focus on macroeconomic development rather than 'human development' is hardly ever challenged inside the WTO, for instance by linking the rights and obligations of governments to the rights and obligations of their citizens investing, producing, trading, consuming, and often struggling to survive on scarce goods and services.<sup>28</sup> This narrow focus of WTO negotiations on trade barriers, trade distortions, and on the use of 'optimal policy instruments' for correcting market failures and supplying public goods (like poverty reduction) reflects the prevailing view—also defended by economists and WTO negotiators in our conference discussions at Florence—that the WTO 'needs to be specific, focused and enforceable', and 'the WTO, though enormously successful, has

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25 *World Trade Report 2003*, WTO 2002, at 79,81,95,97. The *World Trade Report 2004*, WTO, 2004, emphasizes the importance of high-quality institutions to a well-functioning economy, for instance so as to ensure that private agents cannot frustrate market opportunities by rendering markets incontestable (see e.g. pages 152-161 on the complementary objectives of trade and competition rules and policies).

26 A. Sen (note 22), at 3. Ambassador Ismail's oral presentation, at the conference in Florence, on the relevance of Sen's individualist development approach for the intergovernmental Doha Round negotiations is published separately in the contribution by Faizel Ismail on 'A Development Perspective on the WTO July 2004 General Council Decision', in E. U. Petersmann (ed), *Reforming the World Trading System: Efficiency, Legitimacy and Democratic Governance*, 2005, chapter 2.

27 This quoted text from the Preambles of the 1948 Universal Declaration on Human Rights and of all major UN human rights conventions has been universally endorsed by all 191 UN member states long since.

28 The UN High Commissioner for Human Rights, by contrast, has emphasized in his reports on the human rights dimensions of WTO law that rights of governments under WTO rules (such as the 'general exceptions' in GATT Article XX) can imply obligations under human rights law to protect citizens against adverse trade effects (cf. note 21 above).

already strayed too far from its primary function of promoting trade liberalization.<sup>29</sup>

The Preamble of the WTO Agreement commits WTO Members to the promotion of ‘sustainable development.’ Certain precise and unconditional WTO rules could have been construed—in conformity with the UN resolutions on the human right to development and to ‘a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized’ (cf. Article 28 UDHR)—<sup>30</sup> as also protecting individual freedom and empowering individuals (e.g. to invoke certain WTO obligations in domestic administrative or court proceedings). As ‘the multilateral trading system is composed not only of States but also, indeed mostly, of individual economic operators’, WTO dispute settlement panels have emphasized that ‘one of the primary objects of the GATT/WTO ... is to produce certain market conditions which would allow ... individual activity to flourish’ by protecting the international division of labour against discriminatory trade restrictions and other distortions.<sup>31</sup> The same dispute settlement panel emphasized, however, that ‘[n]either the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect’, i.e. creating rights and obligations not only for WTO members but also individual rights for traders, producers and consumers.<sup>32</sup> WTO rules continue to be construed as protecting private actors only in *indirect* ways, for instance by requiring governments to liberalize market access, protect non-discriminatory conditions of competition and individual property rights, secure individual access to domestic courts, and accept *amicus curiae* briefs in support of WTO dispute settlement proceedings. Private complaints (e.g. pursuant to Section 301 of the US Trade Act and the corresponding Trade Barriers Regulation of the EC) also lead to ‘public private partnerships’<sup>33</sup> in

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29 M. Wolf (note 9), at 319.

30 On ‘first’, ‘second’ and ‘third generation’ human rights, including the still contested rights to development and democratic governance, see e.g. C. Tomuschat, *Human Rights. Between Idealism and Realism*, 2003, chapter 3.

31 See: *United States – Sections 301-310 of the Trade Act of 1974*, Panel report adopted on 27 January 2000, WT/DS152/R, paras. 7.72-73 *et seq.*

32 See the panel report in note 31, at para. 7.72. The Panel makes the following important reservation: ‘The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudice any decisions by national courts on this issue.’

33 Cf. G. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation*, 2003.

WTO dispute settlement proceedings, and trigger domestic anti-dumping, countervailing duty and safeguard proceedings. Yet, WTO rules neither directly empower citizens nor protect citizen rights directly.

The underlying assumption of ‘benevolent governments’ implementing their WTO obligations in the public interest, the treatment of citizens as mere objects of WTO law, and the frequent lack of democratic participation in trade policy-making, are increasingly challenged from democratic citizen perspectives—not only by non-governmental organizations (NGOs) but also by WTO diplomats such as former WTO Director-General Mike Moore: as governments derive their rights and legitimacy from their citizens and WTO rules affect the daily lives of billions of people outside the WTO, WTO Members should engage citizens, civil society, national parliaments and other stakeholders and trade-related organizations more actively in international trade governance.<sup>34</sup> Just as democracies and domestic economies depend on citizen rights and on empowering private economic actors, so could world trade, WTO law and WTO governance benefit from treating traders, producers and consumers as legal subjects and democratic owners of the WTO and as self-interested guardians of respect for WTO rules in national legal systems.<sup>35</sup> The widespread protectionist abuses of government powers in WTO member states suggest it is time for rethinking the unrealistic benevolent government assumptions of WTO rules, notably the contradictions between the decentralized structures of citizen-driven world trade and democracies, on the one hand, and centralized bureaucratic trade governance, on the other, often without adequate regard to democratic citizen rights, to inclusive democratic decision-making, parliamentary accountability, and to the potential of preventing intergovernmental trade disputes and mutually harmful ‘trade wars’ by means of decentralized enforcement of WTO rules in domestic courts by self-interested citizens.<sup>36</sup>

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34 Cf. Mike Moore, *A World without Walls: Freedom, Development, Free Trade and Global Governance*, 2003, notably Part III (discussing the need for engaging civil society, corporate social responsibility and rethinking international trade governance). See also Mike Moore (ed), *Doha and Beyond: The Future of the Multilateral Trading System*, 2004, notably chapter 6 by Sylvia Ostry on the inadequate external transparency of the WTO and the contribution of more participatory decision-making to the legitimacy and efficiency of ‘bi-level trade governance’ at national and international levels.

35 Cf. e.g. R. Bhala, *International Trade Law: Theory and Practice*, 2nd ed. 2001, at 610: ‘If the GATT/WTO regime is a just one in the sense [of] Kant or his modern-day disciples who defend liberal democratic theory, then the central focus of this regime must be on the protection and the service of the individual.’

36 On the lack of effective democratic participatory processes in trade-policy making inside many WTO Members see e.g. Ostry (note 34 above). On prevention of intergovernmental

### **C. Trade Preferences and Non-reciprocity for LDCs: Corrective Justice rather than Redistributive Justice for LDCs?**

UN human rights law defines ‘justice’ in terms of respect for the ‘inherent dignity and the equal and inalienable rights of all members of the human family.’<sup>37</sup> As long as WTO law purports to serve the interests of states without regard to justice (which is nowhere mentioned in WTO law) and to respect by WTO members for human rights, justice-related claims for redistribution cannot be convincingly based on WTO law.<sup>38</sup> The claims by LDCs for a ‘New International Economic Order’ (NIEO) founded on non-reciprocal, preferential treatment of LDCs and stabilization of their commodity prices were incorporated into Part IV of GATT 1947 on ‘Trade and Development’ as well as into the 1979 GATT Decision on ‘Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.’<sup>39</sup> The moral legitimacy of these majority claims by often non-democratic governments, and the economic efficiency of the proposed NIEO strategy, remained, however, contested.<sup>40</sup> There is broad agreement today that the numerous exceptions to trade preferences for LDCs (e.g. for cotton, textiles and agricultural exports), and the exemption of LDCs from GATT and WTO obligations to open markets and adjust to competition, have contributed to a welfare-reducing protectionism

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trade disputes e.g. in EU law (where the EC Court of Justice rendered only two judgments on intergovernmental disputes among EC member states over the past 50 years) see: E. U. Petersmann, ‘Prevention and Settlement of Transatlantic Economic Disputes’, in: E. U. Petersmann and M. Pollack (eds), *Transatlantic Economic Disputes: The EU, the US and the WTO*, 2003, chapter 1.

37 See note 27 above.

38 Cf. e.g. J. Rawls, *A Theory of Justice*, rev. ed. 1999, according to whom equal liberties must be protected before ‘social and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity’ (at 72, 266-267). In his *Law of Peoples* (see note 15), Rawls declined to extend these ‘difference’ and ‘equal opportunity’ principles to international relations on the ground that, in international relations, states must tolerate the right to self-determination of ‘decent peoples’ even if the latter do not comply with modern human rights law. This Rawlsian conception of an ‘international law of peoples’ is widely criticized on moral grounds (e.g. by T. Pogge, *Realizing Rawls*, 1989) as well as on legal grounds (e.g. by F. Teson, *Philosophy of International Law*, 1998, chapter 4; A. Buchanan, *Justice, Legitimacy and Self-Determination*, 2004, chapter 4): ‘Rawlsian tolerance’ vis-à-vis violations of universally recognized human rights is neither moral nor conducive to the promotion of ‘democratic peace’ and human rights in LDCs.

39 Decision of 28 November 1979, GATT doc. L/4903.

40 See: R. Hudec, *Developing Countries in the GATT Legal System*, 1987.

not only inside LDCs, but also against competitive exports from LDCs. Merely moral claims for ‘corrective justice’ by means of correcting the past ‘marginalization’ of many LDCs under GATT 1947 remain less convincing than economic and legal claims based on the obvious benefits for LDCs of open markets, respect for human rights and implementation of the existing WTO obligations to make ‘positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.’<sup>41</sup> Economic evidence confirms that ‘developing countries may be best served by full integration into the reciprocity-based world trade regime rather than continued GSP-style special preferences’,<sup>42</sup> notably in labour-intensive sectors like agriculture and textiles where LDCs enjoy obvious competitive advantages.

In India’s challenge of the EC’s generalized system of tariff preferences (GSP), a WTO dispute settlement panel held, in December 2003, that the term ‘non-discriminatory’ in the WTO’s ‘enabling clause’ required ‘that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of *a priori* limitations’ and preferential treatment for the least-developed among the LDCs.<sup>43</sup> On appeal, the WTO Appellate Body report of April 2004 reversed this panel finding by concluding:

[T]hat the term ‘non-discriminatory’ ... does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that ... identical

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41 The quoted text is from the Preamble to the WTO Agreement and was re-affirmed in the Doha Declaration (note 3), at para. 2. Frank Garcia, *Trade, Inequality and Justice: Toward a Liberal Theory of Just Trade*, 2003, proposes a justice-based ‘difference principle’ also for the world of trade: ‘International social and economic inequalities are just only if they result in compensating benefits for all, and in particular for the least advantaged states’ (at 134). Yet, contrary to Garcia’s assumption that social and economic inequalities among developed and less-developed countries are a result of inherent differences in their natural endowments (i.e. an arbitrary distribution of ‘natural primary goods’ in terms of Rawls’ theory of justice), economists emphasize that ‘rich countries are rich because their citizens produce more per head, not because they have secured privileged access to ‘the planet’s goods’, or to its resources’ (D. Henderson, *The Role of Business in Modern World: Progress, Pressures and Prospects for the Market Economy*, 2004, at 83).

42 C. Ozden and E. Reinhardt, *The Perversity of Preferences: GSP and Developing Country Trade Policies 1979-2000*, World Bank Research Paper 2003, at 1, 22.

43 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R of 1 December 2003, paras. 7.161, 7.176.

treatment is available to all similarly-situated GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond.<sup>44</sup>

The Appellate Body recognized that 'Members' respective needs and concerns at different levels of economic development may vary', and emphasized that (1) the existence of a 'development, financial (or) trade need must be assessed according to an objective standard'<sup>45</sup> and (2) 'the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences', without imposing 'unjustifiable burdens on other Members.'<sup>46</sup> In response to these important clarifications of WTO rules, the EU Commission has proposed a new GSP system aimed at promoting 'sustainable development' by differentiating tariff preferences depending on whether LDCs have ratified and effectively implemented the major UN human rights conventions, ILO conventions, UN environmental convention, UN conventions on drugs and the UN Convention against corruption.<sup>47</sup> It remains to be seen whether such justice—and needs—based differentiation among LDCs will also evolve into a new paradigm for interpreting the 'sustainable development' objectives of the WTO.

#### ***D. How to Render the Doha Round Negotiations More Effective? An African Perspective***

'Recognizing the challenges posed by an expanding WTO membership', the Doha Declaration endorsed the need to ensure internal transparency and effective participation of all WTO Members (para. 10). Yet, neither the 2001 Doha Declaration nor the General Council Decision of 1 August 2004 provide for negotiations on institutional WTO reforms, for example so as to provide for more effective participation of all less-developed WTO Members (e.g. through a representative WTO Executive Body with rotating membership) and to set incentives for traders and civil society to support more actively a rules-based

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44 WT/DS246/AB/R of 7 April 2004, paras. 173, 190.

45 WT/DS246/AB/R, paras. 161-163.

46 WT/DS246/AB/R, paras. 164-167.

47 Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year period from 2006 to 2015*, COM(2004) 461 final, Brussels 7.7.2004.

trading system.<sup>48</sup> Many recent expert reports on the development dimensions of the Doha Round—even if they ask ‘what would an agreement based on principles of economic analysis and social justice, not on economic power and special interests, look like?’—<sup>49</sup> are short on the necessary institutional reforms in LDCs and in the WTO and offer no citizen-oriented development strategy or rights-based definition of social justice.

At our conference discussions in Florence in July 2004, the definition by Nobel laureate Amartya Sen of development as a process of expanding human freedom was explicitly applied to the WTO by Faizel Ismail—the Head of the South African Delegation to the WTO in Geneva and Chairman of the WTO negotiations on special and differential treatment—in order to identify four types of ‘unfreedom’ (Sen) that must be removed so as to integrate a genuine development dimension into WTO rules and the Doha Round negotiations.<sup>50</sup>

### 1. Fair trade opportunities

First, applying Sen’s argument that ‘unfreedom’ and deprivation can result from denying people the economic opportunities and favourable consequences that markets offer and support, Faizel Ismail argues that the Doha Round negotiations must remove the market access barriers that developing countries experience in exporting their products to developed countries and, thereby, create more opportunities for them to advance their development. The Doha Round objective of realizing more fair trade and development opportunities, notably through better market access for agricultural goods and services exported from LDCs and the phasing-out of trade-distorting subsidies for competing exports (e.g. of cotton and sugar) from developed countries, was

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48 For a discussion of such institutional reforms see e.g. the contributions by R. Blackhurst, D. Hartridge and G. Sampson to the 2003 conference book (note 2 above, Part III) and the new Report prepared by an independent Consultative Board chaired by Peter Sutherland, *The Future of the WTO*, WTO 2004, which endorses both the proposed establishment of a WTO Consultative Body composed by senior WTO representatives on a rotating basis, as well as enhanced powers for the WTO Director-General and the establishment of a chief executive officer at the rank of a deputy Director-General. On the two complementary strategies for strengthening the WTO system through intergovernmental, interest-based bargaining and ‘public diplomacy’ (e.g. soliciting national parliaments and civil society for trade reforms) see Abbott (note 6), at 53-55.

49 J. E. Stiglitz and A. Charlton, *The Development Round of Trade Negotiations in the Aftermath of Cancun*, 2004, at 1.

50 Cf. Faizel Ismail (note 26 above).

discussed in various conference papers (e.g. by Profs. Tangermann, Trachtman, VanDuzer and Winters) published in this volume.

## **2. Capacity-building**

Second, following Sen's interpretation of poverty not only as low incomes but as a deprivation of basic capabilities, Ismail calls for increasing the capacity of developing countries, especially of the poorest and most marginalised, to develop their comparative advantage to produce and export so as to provide the necessary human, institutional, productive and export capabilities they need to level the playing field in the WTO trading system. The Doha Round negotiations on 'technical cooperation and capacity-building' for LDCs were analyzed in various conference papers (e.g. by Profs. Shaffer and Hoekman). The 'July 2004 framework agreements' adopted by the WTO General Council on 1 August 2004,<sup>51</sup> for instance, by calling for:

[D]eveloping countries and in particular the least-developed countries to be provided with enhanced trade-related technical assistance and capacity-building to increase their effective participation in the negotiations, to facilitate their implementation of WTO rules and to enable them to adjust and diversify their economies,

recognized the need to help developing countries not only in implementing WTO rules, but also in negotiating new rules and promoting coherence in multilateral decision-making (e.g. by the WTO, the World Bank and the IMF).

## **3. More balanced WTO rules**

Third, in accordance with Sen's arguments in support of government regulation enabling markets to work effectively and promoting social justice as the foundation and objective of public policies, Ismail urges WTO Members to review WTO rules and the 'outstanding implementation issues' (regarding, for instance, the imbalanced WTO rules on intellectual property rights, investment measures and anti-dumping, and the ineffectiveness of existing WTO rules on 'special and differential treatment' of LDCs) so as to render WTO rules more balanced and more effective for LDCs. Establishing a fair balance between the costs and benefits of new WTO rules for LDCs, and thereby enhancing the legitimacy and sustainability of WTO rules, was discussed in various papers (e.g. by Profs. Cottier, Hoekman and Panizzon) at Florence. The July 2004 framework agreements explicitly link some of the implementation commitments of LDCs to

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51 WTO WT/L/579, 2 August 2004.



their capacity, for instance by stating that ‘the extent and timing of entering into commitments shall be related to the implementation capacities of developing and least-developed countries.’<sup>52</sup>

#### 4. Democratic trade governance

Finally, using Sen’s refutation of the view that denial of civil and political liberties and of democratic decision-making may facilitate rapid economic development, Ismail argues that it is only by participating actively in the Doha Round negotiations that developing countries can effectively voice and defend their interests in more transparent and more inclusive negotiations and rule-making in the WTO. This need for procedural and institutional WTO reforms so as to ensure that new Doha Round agreements advance developing countries’ interests, promote development in poor countries, and enhance collaboration of the WTO with other multilateral development organizations, is discussed and endorsed in various conference papers (e.g. by Profs. Odell, Ehlermann, Ehring and Hoekman) and in other recent expert reports.<sup>53</sup> Many members of parliaments and other civil society representatives increasingly criticize the fact that international trade rules are arrived at in a way that is so distinctly different from other democratic legislation.<sup>54</sup> According to WTO critics, the ‘result is agreements, like Chapter 11 of NAFTA or the TRIPS Agreement, which contain provisions which would never have been accepted by a democratic parliament with open discussion in a deliberative process.’<sup>55</sup> Even though the Doha Declaration does not specify a mandate for institutional reforms, the obvious need for a more transparent and more inclusive WTO decision-making system may prompt WTO Members—as at the end of the Uruguay Round—to include institutional and decision-making reforms into the final package of Agreements

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52 Cf. WTO WT/L/579, Annex D, para. 2 (regarding the modalities on trade facilitation).

53 Cf. e.g. J. E. Stiglitz and A. Charlton, (note 49 above), who propose, *inter alia*, more representative and more democratic WTO decision-making procedures, an expanded WTO Secretariat, and ‘a new body within the WTO responsible for assessing the impacts of proposed trade provisions on development and developing countries and also for assessing the ‘trade diversion’ as against ‘trade creation’ effects of bilateral and regional agreements’ (at 44).

54 See e.g. the contributions by M. Hilf, E. Mann, G. Shaffer and D. Skaggs to the book edited by Petersmann (note 26 above).

55 Stiglitz and Charlton (note 49), at 43.

and arrangements for their implementation.<sup>56</sup> In the view of Ambassador Ismail, the ‘July 2004 package’, adopted only a few weeks after our conference at Florence, made a significant contribution to the needed re-orientation of the development dimension of the WTO’s trading system.

## II. The Future of the WTO: The View of Peter Sutherland

Many reform proposals by Ambassador Ismail—for instance regarding WTO decision-making, which was called ‘medieval’ by EU Trade Commissioner Pascal Lamy—<sup>57</sup> as well as additional challenges (such as the necessary renewal of the US fast-track legislation for extending the US negotiating authority) were addressed in the keynote speech on *The Future of the WTO* by Peter Sutherland, former Director-General of GATT and the WTO and current Chairman of BP who also chairs a Consultative Board set up by WTO Director-General Supachai Panitchpakdi to advise him on institutional reforms of the WTO.<sup>58</sup> Sutherland recalled that the Doha Round superseded the built-in agenda agreed in the Uruguay Round and had been launched at a time when many Uruguay Round commitments had not yet been fully implemented and globalisation was being seriously questioned. Given its over-ambitious agenda, the various delays in the Doha Round negotiations had to be accepted with equanimity, and a successful conclusion of the negotiations before 2006/7 remained unlikely.

Even though the Doha Round had a more limited scale compared with the Uruguay Round, its objectives—such as the phasing-out of export subsidies in agriculture, liberalization of market access for non-agricultural goods and services, trade-facilitation and other reforms for the benefit of LDCs—were of enormous potential significance. In order to remain credible, the WTO had to be seen as capable of delivering, not only in the remarkable fields of dispute settlement and accession negotiations, but also in the Doha Round negotiations which would enable business people, farmers, traders, services suppliers and other citizens to create more economic welfare. There were political limits to gap filling through reliance on dispute settlement in the WTO. The nexus and interaction between ministers, senior officials and Geneva-based diplomats were

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56 This may be politically facilitated by the strong emphasis on institutional WTO reforms in the advisory report by Peter Sutherland, *The Future of the World Trade Organization* (see note 48 above).

57 Cf. Pascal Lamy, ‘Europe and The Future of Economic Governance’, *Journal of Common Market Studies*, 2004, 5-21, at 9.

58 The Consultative Board has published its advisory report early in 2005 (see note 48).

crucial for improving the WTO as an instrument of bi-level negotiations and for creating deal-making situations.

Sutherland emphasised that, in order to deliver favourable results for developing countries, market liberalization commitments had to be supplemented by special and differential treatment and a large amount of non-discretionary technical assistance to aid implementation. Yet, if poor countries did not use the WTO for economic and regulatory reforms, then the WTO was unlikely to deliver benefits to the poor. The WTO also had to demonstrate to the US Congress that WTO negotiations and the domestic implementation of WTO dispute settlement rulings were worthwhile. For, apart from the implementation of the Uruguay Round Agreements, the WTO accession of China and the successful WTO dispute settlement system, the WTO had so far achieved little in terms of additional trade liberalization; without the US, very little of value was achieved in the WTO, and the Doha Round opportunities would be lost for all. The WTO also remained essential for driving the process of domestic regulatory reforms in China, Russia and in many developing countries, which needed the WTO more than developed countries. As import protection (e.g. of domestic service providers) operated as a tax on domestic consumers and exporters, the existing exemptions of LDCs from WTO disciplines were often harmful for LDCs. Making the WTO negotiation machinery more effective and WTO rules valid for the coming decades would require further reflection, notably on the following four key issues:

- First, the institutional framework had to reflect the need that ministers had to understand better the realities and practical requirements of negotiations in Geneva—just as the Geneva negotiations had to be rendered more effective by building into their consultative procedures the domestic political and economic environments of trade policy decision-making in capitals where future Doha Round agreements would have to be approved.
- Second, even though the consensus practice gave WTO decisions credibility and protected weak WTO Members, there could be occasions where deviating from consensus might be necessary in order to prevent WTO decision-making processes from becoming too long and frustrating.
- Third, WTO Members should review the future need for broad trade rounds with large agendas. Even if it appeared unlikely that e.g. agricultural trade could be reformed outside comprehensive rounds and package deals, the possibility of successful sectoral negotiations—and of separating rule-making from market access bargaining—needed to be examined.
- Finally, the dangerous Balkanisation of the global trading system as a result of the ever increasing number of bilateral and regional trade agreements ran counter to the increasingly global view of trade and investment taken by the private sector. The complementarity of global and regional trade

agreements had to be promoted more effectively (e.g. by establishing a date for free trade under the WTO) so as to reduce the extra business costs associated with the chaotic multiplication of preferential duties and import regimes. Regional agreements could help to prepare additional worldwide trade liberalization, but needed to be subjected to stronger WTO disciplines.

In the discussions on the proposals by Sutherland, one WTO Ambassador criticized the WTO practice of setting unrealistic deadlines which, in the course of the Doha Round negotiations, had been repeatedly missed. Other WTO Ambassadors expressed the view that the 'framework agreements' to be adopted later in July 2004 offered a pragmatic substitute for giving additional focus to, and maintaining the momentum of the Doha Round negotiations, notwithstanding the facts that the US elections in fall 2004, the renewal of the US negotiation mandate due in 2005, and the change of the EU Commission, would inevitably delay the WTO negotiations. One WTO negotiator regretted the lack of ambition of the Doha Round Declaration regarding the needed institutional reforms of the WTO. Several WTO negotiators commented on how WTO Ministerial Meetings could be rendered more effective (e.g. by clarifying beforehand, or avoiding, technically complex negotiation issues), and how more decentralized negotiating procedures could be improved. Another WTO negotiator said that a substantial part of the WTO Membership were frustrated by the slow progress of consensus-based WTO negotiations among more than 150 countries. Many LDCs continued to doubt the fairness of WTO rules and whether trade liberalization was in their best interest. Sutherland's view that the Doha Round had been initiated too early before the implementation of the Uruguay Round agreements, was challenged by another WTO negotiator on the ground that the Doha Round would help the EU and the US to reform their agricultural protectionism in exchange for additional WTO market liberalization commitments and other WTO reforms. Domestic political support inside the EU and the US (e.g. by business) would not suffice to overcome the protectionist pressures from agricultural lobbies without additional WTO reforms promising additional export opportunities. The various WTO initiatives for involving business and NGO representatives in discussions on the Doha Round agenda could enhance political support. The paradigm of a 'member-driven WTO' was criticized on the grounds that the WTO Director-General lacked adequate powers to defend the collective interests of the WTO. There was broad agreement in the discussion that parliamentary control and democratic accountability in the trade policy area were the primary responsibility of WTO member states. Prof. Petersmann argued, however, that the information asymmetries regarding WTO negotiations, the frequent lack of participatory trade policy-making and effective parliamentary control of trade policy-making at national levels, and the focus of national trade policies on national interests justified the proposals for an advisory WTO parliamentary body so as to ensure

first-hand information on WTO matters for national parliaments and set incentives for collective parliamentary support of the rules-based trading system as a worldwide 'public good'.

As regards the negotiations on reforms of the WTO dispute settlement procedures, several WTO negotiators drew attention to certain long-term problems, such as the need for a higher quality of WTO panellists (e.g. by providing for full-time panellists with sufficient time and incentives to follow the WTO jurisprudence) and for more effective legal remedies and incentives for domestic implementation of WTO dispute settlement findings. The systemic tensions between global WTO rules and the more than 200 regional free trade agreements could be easier resolved by the elimination of customs duties than by WTO negotiations on rules of origin for the multiplicity of preferential arrangements. Regional trade agreements could not resolve many trade problems that could be tackled only on a broader multilateral basis in the WTO (such as EU and US agricultural protectionism, abuses of anti-dumping procedures). Yet, regionalism could sometimes be an inevitable second-best solution before regional rules could be multilateralized in the WTO. Even though the WTO and the development focus of the Doha Round faced many problems, the large number of countries participating in the Round, or negotiating their accession to the WTO, was evidence for the global importance of the WTO.

As the 49 least-developed countries accounted for less than 1 percent of world trade, the EU's initiative for a 'Round for free' for the G90 countries (including the least-developed countries and other African, Caribbean and Pacific APC countries) was welcomed as an important contribution to the 'development agenda' and to consensus-building for a final 'single undertaking.' Whereas the Group of 20 (G20) WTO Members led by Brazil, China and India had a clear trade agenda *vis-à-vis* the Group of 8 (G8) industrialized countries (e.g. regarding the phasing out of agricultural export subsidies), the G90 group of WTO Members had more diverse development concerns (e.g. about the erosion of their trade preferences, cotton trade). The single-undertaking method required the consensus of all these countries regarding the final outcome of the Doha Round negotiations. Several speakers said that concluding the Doha Round might necessitate institutional WTO reforms and more development-oriented, package-deals with obvious advantages for all LDCs. National parliaments and civil society no longer took the legitimacy of 'member-driven', reciprocal trade bargaining in the WTO for granted and insisted on stronger involvement by parliaments and NGOs.

### III. WTO Decision-making Procedures, ‘Member-driven’ Rule-making and WTO Consensus Practices: Are They Adequate?

Whether the Doha Round negotiations will result in new WTO agreements actually promoting development needs and poverty reduction in poor countries will largely depend on the negotiation strategies of LDCs in the Doha Round negotiations. One session of the 2004 EUI conference was therefore devoted to reviewing the apparent problems and deficiencies in WTO decision-making procedures. The lack of any reference in WTO law to the traditional safeguards of input-legitimacy (e.g. respect for human rights, democratic procedures) and output-legitimacy (such as consumer welfare, distributive social justice), and the widespread scepticism in national parliaments and civil society vis-à-vis producer-driven trade bargaining in the WTO, had already been identified in the 2003 EUI conference on *Challenges to the Legitimacy and Efficiency of the World Trading System*<sup>59</sup> as constitutional weaknesses of WTO negotiations and WTO law.

The Doha Declaration emphasises that, ‘with the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking.’<sup>60</sup> As only 30 WTO Members account for about 90% of world trade, consensus-based negotiations among 148 WTO Members may be neither necessary nor effective if all liberalisation were to be extended, without reciprocity, to the more than hundred small developing countries. The ‘member-driven’ consensus practices in WTO negotiations, the lack of powers of the WTO Director-General to initiate proposals defending the collective interests of all WTO Members, and the diversity of interests among less-developed ‘trading countries’ and other developing countries which sometimes appear to regard the WTO as just another development agency offering rights without obligations,<sup>61</sup> make a successful conclusion of the Doha

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59 See note 2 above.

60 WT/MIN(01)/DEC/W/1 of 14 November 2001, para. 47.

61 The definition of the development dimension of the Doha Round remains controversial also among developing countries. See, e.g., the contributions by J. Bhagwati who argues that the development dimension requires poor countries to liberalise their own trade and open up their own economies, and by T. Ademola Oyejide, who believes that poor countries should not liberalise too hastily and should not be subject to the same trade rules as developed countries, in: M. Moore (note 34), chapters 5 and 7. Whereas estimates by the World Bank and others suggest that developing countries could receive bigger gains from their own trade liberalisation than from the trade liberalisation by developed countries, the recent study by

Round negotiations exceedingly difficult. In order to deliver its promise of a 'Development Round' which also benefits poor people in LDCs, changes in the interest-based bargaining methods of WTO negotiations and stronger negotiation capacities of LDCs appear necessary.

### **A. How to Improve WTO Negotiations? The Role of the Chair**

In contrast to academic proposals for improving global governance by expanding the jurisdiction of the WTO and of WTO 'package deal negotiations',<sup>62</sup> the conference paper by *Prof. Odell on Chairing a WTO Negotiation* makes proposals for improving WTO negotiation methods within the existing legal framework of WTO rules. Depending on the subject (e.g. agriculture), the current Doha Development Round negotiations involve far more negotiators (e.g. 80-100) compared with the preceding Uruguay Round negotiations (usually no more than up to 40 negotiators), which renders trade-offs more difficult. Prof. Odell explains why efforts by WTO Members to negotiate multilateral decisions have been less efficient and less legitimate than many would prefer. Two of the three most recent WTO Ministerial Conferences had ended in frustrating impasses and contributed to increased recourse to WTO dispute settlement challenges (e.g. of agricultural subsidies). As long as WTO Members fail to agree on formal changes to WTO negotiation and decision-making procedures, it remains important to enhance the limited but significant capacity of WTO chairs to influence the efficiency of consensus building, the resulting distribution of gains and losses, and its legitimacy. Odell offers various reasons why rational governments delegate influence to a mediator and consensus-builder, and why developing WTO Members show greater willingness to stand firm and block consensus in order to increase their gains and reduce their losses from negotiations. He criticises the lack of explicit authority of the WTO Director-General to advance original proposals, as well as the absence of a representative WTO Executive Body that could function as a site for more efficient consensus-building. Also chairpersons lack authority to

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Stiglitz and Charlton (note 49) focuses on 'unilateral concessions by the developed countries, both to redress the imbalances of the past and to further the development of the poorest countries of the world.'

62 Cf. e.g. A. T. Guzman, *Global Governance and the WTO*, UC Berkeley Public Law Research Paper No. 89-2002, who makes a suggestion to 'internalize' the 'external effects' of WTO rules on non-trade issues by transforming the WTO into a single place for 'Mega-Rounds' on trade and non-trade issues (such as environmental standards and human rights) permitting trade commitments to be balanced by non-trade obligations.

originate substantive proposals for WTO negotiations (even though they may do so indirectly through their respective WTO delegation) or to make policy decisions for any other WTO Member. Odell describes WTO mediation tactics (including observation, diagnosis, communication tactics), formulation tactics (e.g. use of a single negotiating text, compromise packages, 'reservation values') as well as manipulation tactics (e.g. threats by the chair to abandon mediation efforts as a means of stimulating further concessions). Odell concludes that deadlocks in multilateral WTO negotiations are more difficult to resolve today than under GATT 1947. A WTO chair-mediator has limited but significant influence on the efficiency and legitimacy of negotiations, for instance by diagnosing impasses, separating bluffs from true reservation values, imagining integrative multi-issue deals, deciding when to offer a single negotiating text and how to weight the demands of diverse members, and by pushing particular members in certain directions or waiting before ending a stalemate. As long as WTO Members cannot agree on formal changes to WTO procedures and WTO institutions, they will continue to depend in part on their chairpersons to mediate and build consensus.

In concluding his presentation, Prof. Odell drew attention to his forthcoming book on policy lessons from eight recent empirical studies on the involvement and strategies of developing countries in regional and multilateral trade negotiations as well as in negotiations to settle disputes under existing rules.<sup>63</sup> This book offers empirically grounded explanations of why developing countries' international trade agreements depend on the international negotiation processes producing these agreements, notably the negotiating strategies (e.g. agenda-setting, counter-proposals, threats, promises, mutual gains) and 'bargaining coalitions' of official negotiators and mediators; their interaction with international officials and non-state actors (such as NGOs, mass media, domestic constituencies); and the influence of market developments, technological change, power structures, international rules and domestic politics. One important conclusion of these empirical studies is that less-developed WTO members have more bargaining options (e.g. to file alternative WTO dispute settlement proceedings) and bargaining leverage (e.g. to block WTO consensus decisions) than countries negotiating trade agreements outside the WTO.

In the discussions on the paper by Odell, several WTO negotiators referred to the particular context of WTO negotiations, such as the WTO's weak institutional structure, the inherent slowness of consensus-based rule-making,

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63 Cf. J. S. Odell and A. Ortiz Mena, *How to Negotiate Over Trade: A Summary of New Research for Developing Countries*, February 2004, available at <http://www.ruig-gian.org/conf/conferences.htm>. See also J. Odell, *Negotiating the World Economy*, 2000.



the 'single undertaking' method of WTO negotiations, the availability of alternative dispute settlement strategies, the peculiar 'Geneva culture', and the ultimate WTO objective of shaping and implementing decisions at national levels. The 2003 WTO ministerial conference at Cancun had been poorly managed (e.g. the preparatory documents had been distributed too late and the actual negotiations had begun only on the 4<sup>th</sup> conference day). The lessons from Cancun included, *inter alia*, the need for nominating the 'facilitators' at least one month before the beginning of ministerial conferences; a clearer distribution of tasks among the host country chair, the WTO Director-General and the facilitators; limitation of the outdated concept of a 'member-driven WTO' by assigning a stronger mandate to the WTO Director-General (similar to the role of the UN Secretary-General and the Presidents of the Bretton Woods institutions) who should play a stronger policy role and initiate and facilitate compromises; maintenance of the perceived neutrality of the conference chair; more effective use of the independent expertise of the WTO Secretariat, especially for secretariat advice to less-developed countries with inadequate staff at Geneva; more involvement of ministers so as to strengthen their collective 'WTO ownership'; better preparation of ministerial conferences through informal groups and a representative, advisory WTO body with consensus-building tasks and rotating WTO membership from all regions. As each WTO chair was confronted with unique circumstances and had to choose his tactics depending on the particular issues and situations, it was difficult to generalize on the appropriate negotiation strategies and to compare the tactics by different chairs in different situations. The individual style, behaviour and judgments of successful chairs could not be easily captured in academic theories. Yet, even though magic formulas did not exist, a list of negotiation options, alternative methods and other important factors (such as the perceived independence of a chair) could help inform the right choices that ultimately depended on the state of negotiations, the available time, the substantive issues and external factors.

Several speakers said that additional research on the impact of institutional changes on decision-making processes could help better understanding and evaluation of the range of options for WTO reforms. For example, the proposed introduction of majority-voting in circumscribed areas could entail more WTO dispute settlement proceedings and more domestic criticism of an alleged 'democratic deficit' in WTO decision-making. The formation of several groups of LDCs (like the G20 and the G90) was seen as a positive factor that facilitated multilateral negotiations, even if not all countries within a group had identical interests.

In order to illustrate the importance of the style and role of the chair, Prof. Ehlermann referred to the 2003 Italian EU Presidency and controversial chairmanship by President Berlusconi that had been less successful in resolving the same issues than the much better prepared 2004 Irish EU Presidency and

low-key presidential style of President Ahern. In the EU, the negotiation positions were more predictable than in WTO negotiations. Prof. Wallace pointed to the various advantages of rotating Presidencies (as inside the EU) provided the outgoing Presidency handed its insights over to the successor; the incoming EU Presidency was usually well prepared for maintaining the momentum of, and giving new impetus to, negotiations in the EU. Notwithstanding the vast literature on negotiation theories (like the 'Harvard School') and on negotiation practices in certain areas (like the Law of the Sea negotiations), there appeared to be a dearth of academic literature for training 'trade negotiators.' Several WTO negotiators indicated that, even though WTO negotiations tended to be dominated by substantive problems, courses for training negotiators (e.g. through simulations, menus of negotiation tactics) could be useful. WTO delegates often did not know their 'bottom line' until the end of WTO negotiations when they received their final instructions from domestic capitals. There was broad support for strengthening the independent leadership role of the WTO Director-General (e.g. by making him *ex officio* chair of the WTO's General Council) and for avoiding new WTO chairs with inadequate experience.

### **B. WTO Decision-making Procedures: Are They Adequate?**

The paper by Prof. Ehlermann and Lothar Ehring examines the question: *Are WTO Decision-Making Procedures Adequate for Making, Revising and Implementing Worldwide and 'Plurilateral' Rules?* The authors recall that, at a time when global governance is more necessary than ever before, the WTO offers an important forum for worldwide rule-making and rule-enforcement. Yet, signs of inefficient decision-making have appeared regularly in WTO negotiations on new WTO rules and on applying or revising existing WTO rules. Effectiveness and efficiency are not the sole benchmarks for evaluating WTO decision-making because transparency, participation, accountability and other aspects of democratic legitimacy cannot be discounted. As formal changes of WTO decision-making rules are difficult to achieve, Ehlermann and Ehring explore, first, the scope for improving WTO decision-making practices within the framework of existing WTO rules. With regard to procedures for implementing WTO rules, the WTO Dispute Settlement Body (DSB) decides by consensus or 'qualified consensus' (e.g. for the establishment of panels, the adoption of dispute settlement reports, authorisation of retaliation); other WTO bodies 'shall continue the practice of decision-making by consensus followed under GATT 1947' subject to the proviso that, 'where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting' (Article IX:1 of the WTO Agreement). Compared with other worldwide organizations, the WTO's consensus-practice remains exceptional and had prevented the WTO's 'legislative branch' from agreeing on new WTO rules and

correcting, if necessary, the progressive development of WTO rules through the ever larger number of WTO dispute settlement findings.

According to Ehlermann and Ehring, the possibility of adopting authoritative interpretations of WTO rules by a three-quarters majority of WTO Members (cf. Article IX:2) constitutes a necessary instrument of checks and balances vis-à-vis the WTO's quasi-judiciary. The WTO consensus practice has so far prevented authoritative interpretations and creates a trade-off between the ability of easily objecting to, and the difficulty of achieving desired decisions. Ehlermann and Ehring criticise the political paralysis and imbalance resulting from the burdensome consensus practice: legislative responses to judicial developments have been prevented, and the WTO's (quasi)judiciary eludes effective control and loses legitimacy. The authors suggest abolishing the taboo of resorting to majority decision-making and increasing the costs of blocking a consensus, for example by resorting to voting after 'negotiations in the shadow of a possible vote' have failed, and by actively using the existing procedural requirement of referring a matter to the General Council if subordinate WTO bodies are unable to reach a decision by consensus. WTO Members should also use the existing possibilities of adopting authoritative interpretations by a three-quarters majority (cf. Article IX:2) and of concluding agreements among interested WTO Members (cf. Article X). The creation of a representative, high-level Steering Group with rotating membership could further promote more effective decision-making in the WTO.

In the discussions, WTO negotiators expressed support for many of the suggestions made by Ehlermann and Ehring. One problem was that the effectiveness of WTO decision-making was closely linked to the inclusiveness, transparency and legitimacy of decision-making procedures; determination of the 'critical mass' necessary for legitimate majority votes—or for selecting a representative composition of the proposed WTO Steering-Committee—could prove to be difficult. It was said that many WTO negotiators in Geneva disagreed with the view that intergovernmental bargaining lacked democratic accountability or democratic legitimacy. One ambassador said that the consensus practice—although it had resulted in legislative paralysis—seemed to suit everybody; for instance, notwithstanding the widespread criticism by WTO Members of the WTO jurisprudence admitting *amicus curiae* briefs, no WTO Member had asked for the adoption of a contrary authoritative interpretation of the relevant DSU rules by majority vote. WTO Members seemed to prefer the deeply-rooted *status quo*. Majority votes on authoritative interpretations correcting Appellate Body interpretations could unduly politicize WTO decision-making. In the United States, majority voting in the WTO was perceived as a potential threat to the system. Also LDCs preferred the consensus practice that offered LDCs a more rules-based counter-weight to the alternative of power-oriented majority politics. One negotiator said that the 'single undertaking

principle' for the conclusion of additional WTO agreements reinforced the protection granted to every WTO Member by the WTO consensus practice. Another WTO ambassador suggested that, if inclusive and transparent WTO procedures could not overcome a 'single veto', WTO chairpersons could feel morally justified to declare a 'sufficient consensus' (as had been practiced e.g. when the GATT Council had established the Oilseeds Panel notwithstanding the veto by the French Council representative). Recourse to 'plurilateral WTO agreements' among a limited number of interested WTO members offered additional flexibility for adopting WTO rules which, if such rules proved to be beneficial, could later be accepted by additional WTO members. If the agreed addition of such a plurilateral agreement to Annex 4 of the WTO Agreement were 'blocked' pursuant to Article X:9 of the WTO Agreement, the contracting parties remained free to adopt the same plurilateral agreement outside the WTO. Such an exclusion from the WTO legal system of legitimate agreements among a limited number of WTO members could weaken the WTO system if the 'blocking' of the needed consensus for adding additional agreements to Annex 4 of the WTO Agreement was not convincingly justified and the advantages (e.g. in terms of transparency and most-favoured-nation treatment) of administering such plurilateral agreements inside the WTO were unnecessarily lost. Another speaker recalled that, even inside the European Union, the EU Council could overrule EU Commission proposals only by consensus and majority voting in the EU Council required 'qualified majorities.'

One ambassador proposed to explore how the capacity of the WTO for rule-making could be enhanced independently from periodic rounds of negotiations on reciprocal trade liberalization. Several WTO negotiators supported the proposals of granting the WTO Director-General additional powers (e.g. for defending collective WTO interests by initiating 'public interest proposals') and of creating a representative WTO Consultative Body<sup>64</sup> provided its rotating membership would offer a place to every WTO Member and its proceedings were fully transparent. Such an additional consultative structure could strengthen the leadership role of the WTO Director-General. The alternative proposal of creating a WTO Executive Committee (similar to those in the Bretton Woods institutions—yet without weighted voting) could help to make WTO decision-making on administrative matters more effective. Just as the lack of an explicit mandate—in the 1986 Punta del Este Declaration—for institutional reforms had not prevented the Uruguay Round negotiators from negotiating rules on replacing the GATT 1947 by a new WTO, so the absence of a mandate

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64 Cf. R. Blackhurst and D. Hartridge, 'Improving the Capacity of WTO Institutions to Fulfil their Mandate', in: Petersmann (note 2), at 233-248.

for institutional WTO reforms in the 2001 Doha Declaration did not prevent the Doha Round negotiators from agreeing on certain procedural and institutional WTO reforms that might prove necessary for implementing future Doha Round Agreements in an effective manner. Several WTO negotiators regretted the continuing 'WTO ownership deficit' and 'confidence deficit' in the WTO, notably experienced by many LDCs which continued to distrust the legalistic WTO dispute settlement system.

#### **IV. Building Blocks for Concluding the Doha Round Negotiations on Agriculture**

The Uruguay Round Agreement on Agriculture (AoA) was the first comprehensive attempt at reducing the systemic distortions of international trade in agricultural products that have undermined the effective application of GATT rules to agricultural trade since March 1955 when the United States extracted a 'GATT waiver' without time-limit, in exchange for withdrawing its threat of leaving the GATT, for its restrictions on agricultural imports under the US Agricultural Adjustment Act. Just as the Uruguay Round of trade negotiations remained on the brink of failure until an agreement was reached on the liberalisation of trade in agricultural goods, a successful conclusion of the Doha Round negotiations is widely seen as impossible without substantial market access commitments and subsidy reduction commitments for agriculture.

##### **A. How to Forge a Compromise in the Agricultural Negotiations?**

*Stefan Tangermann*, in his conference paper on *How to Forge a Compromise in the Agricultural Negotiations*, explains why the AoA had not resulted in a fundamental liberalisation of agriculture in the OECD area, and why the Doha Work Programme of 1 August 2004 is still far away from the full modalities with numerical reduction commitments that WTO Members had originally hoped they could have already agreed by March 2003. He recalls the OECD statistics indicating that, since the entry into force of the Uruguay Round Agreements in 1995, overall trade protection decreased more than overall financial farm support in the 30 OECD member countries. Negotiating proposals tabled so far in the Doha Round appear to suggest that cuts in border protection and output payments may be deeper in the Doha Round Agreements than in the Uruguay Round Agreements. Price and output support behind border protection remains an inefficient means of supporting farm incomes because only a small share of the money transferred to agriculture through such policies ends up in the farmer's pocket. Such trade-distorting support also fails to deal effectively with market failures like positive or negative externalities (e.g. in terms of the effects

of agricultural production on biodiversity and the environment) and public goods (e.g. maintenance of a pleasing landscape, provision of food security). Moving from border protection and output-related farm payments to support decoupled from production is necessary for improving domestic agricultural policies. In terms of WTO categories of domestic support, this means shifting support out of the 'amber' and 'blue boxes' into the 'green box' of domestic support measures, even if such 'box shifting'—as allowed by the AoA—is unlikely to eliminate all trade-distorting effects.

As regards stricter rules and disciplines on the interrelated, diverse forms of import protection, domestic support and export subsidies, Tangermann recalls that a watertight distinction between domestic support and export support is difficult to strike in exporting countries, as confirmed in the WTO dispute settlement findings on *Canada Dairy* and *EC Sugar*. Hence, the export competition disciplines must be complemented by appropriate disciplines on domestic support in order to avoid domestic cross-subsidisation of exports, just as domestic support disciplines must be complemented by disciplines on import protection so as to limit the scope for lifting domestic market prices above the level of world market prices. According to Tangermann, the most significant achievement of the WTO Decision of 1 August 2004 is the agreement 'to establish detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date', which will finally remove the biggest difference in treatment of agriculture compared with WTO rules for non-agricultural goods. It remains to be seen how equivalence between all export support measures can be defined in legally justiciable terms. The agreement to establish a new overall limit on all trade-distorting domestic support, and to negotiate reductions in *de minimis* support, will limit the scope for 'box shifting.' Agricultural policy reform through the Doha Round agreements offers a potential win-win situation rendering national policies as well as trade policies more effective.

The commentator on the paper by Prof. Tangermann, *Ambassador Harbinson* who chaired the Doha Round negotiations on agriculture until 2003, emphasized the interrelationships between the three compartments of the agricultural negotiations (i.e. tariffication, domestic support, export subsidies). As import tariffs, domestic support and export subsidies were all designed to maintain high prices and protect domestic producers, removal of one of these pillars could undermine the entire protection system. The Doha Round negotiations had to make progress in each of these three areas. Even though the reduction commitments resulting from the Uruguay Round negotiations had been limited, the AoA had been a major achievement of the Uruguay Round and provided the framework for the ongoing Doha Round negotiations on additional liberalization of trade in agriculture. The recent presentation by the current chairman, Ambassador Groser, of the proposed elements for

'modalities' for additional reduction commitments in market access protection, internal support and export subsidies were promising. Harbinson suggested four elements for keeping the negotiations on the present positive track: first, the 'end game' cannot be started before more detailed options for achieving the objectives of the negotiations in all three pillars have been elaborated. Secondly, detailed timeframes and benchmarks should be agreed by the next WTO Ministerial Conference at Hong Kong in December 2005. Thirdly, while the Round cannot be completed until the agriculture negotiations are ripe for conclusion, agreement to conclude the agriculture negotiations will depend on roughly equivalent progress in other areas such as NAMA (non-agricultural market access), trade in services and WTO rules on trade remedies. Fourthly, in order to maintain the procedural dynamism in the agriculture negotiations, participants must continue to search for creative ways of finalising detailed modalities for further reforms of the increasingly unsustainable *status quo* in agricultural trade policies.

In the discussion, one ambassador recalled that the AoA had helped the EU to reduce EU export refunds from 10 to less than 3 billion Euros. The AoA continued to provide the framework of the Doha Round negotiations on agriculture and offered WTO Members an opportunity for integrating their domestic agricultural reforms (e.g. in the EU) into new WTO disciplines. As regards the interrelationships between tariffication, domestic support and export subsidies, it was said that liberalization of market access was crucial because—without import protection—subsidized exports could re-enter the market of the exporting country. Another WTO negotiator referred to the 'decoupling' of domestic subsidies and agricultural production inside the EU as a precedent for the Doha Round negotiations. The WTO export subsidy commitments had also helped to liberalize international commodity markets. In order to resolve the problem that food aid and export credits could distort agricultural trade as in the case of export subsidies, it was suggested to replace food aid by financial aid. The successful conclusion of the agricultural negotiations could necessitate changes in the agricultural protection systems of some countries (like Switzerland) whose prohibitive import tariffs would have to be replaced by import quotas. There was agreement that international food aid required greater WTO disciplines.

In the WTO General Council Decision of 1 August 2004,<sup>65</sup> which was approved a few weeks after the conference in Florence, WTO Members agreed for the first time to eliminate all forms of agricultural export subsidies by a date

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65 WTO document WT/L/579 – Decision adopted by the General Council on 1 August 2004.

to be determined through negotiations, including also export credits, export credit guarantees or insurance programmes that are not in conformity with new disciplines to be established, trade-distorting practices of exporting state trading enterprises as well as of food aid. They have also taken on commitments to substantially reduce and otherwise discipline trade distorting domestic support in agriculture, and to undertake substantial improvements in market access for all agricultural products. In contrast to the quantitative parameters for domestic support and export support commitments, the market access provisions of the framework agreement of 1 August 2004 remain less precise. Special and differential treatment for developing countries will include not only longer time frames and lower reduction commitments but also the ability to designate some products as 'special products' which will be eligible for more flexible treatment and a new Special Safeguard Mechanism for developing countries. The WTO Decision of 1 August 2004 also confirms that the trade-related aspects of cotton, which had become a 'deal breaker' at the insistence of least-developed countries in Africa during the Cancùn ministerial conference, will be addressed 'ambitiously, expeditiously and specifically' within the agricultural negotiations and will encompass all three pillars of market access, domestic support and export competition. A Sub-Committee on Cotton will be established, which will report periodically to the main Agriculture Negotiating Group.

### ***B. Strategic Use of WTO Dispute Settlement Proceedings for Advancing WTO Negotiations on Agricultural Subsidies***

*Ernst-Ulrich Petersmann*, in his conference paper on *Strategic Use of WTO Dispute Settlement Proceedings for Advancing WTO Negotiations on Agriculture*, notes that, up to the end of GATT's Kennedy Round (1964-1967), the large number of GATT disputes over agricultural restrictions and subsidies seemed to have influenced GATT negotiations on agriculture only marginally. The 'GATT 1947 bicycle' rolled and, through periodic intergovernmental trade liberalisation commitments, created the necessary political momentum for liberalising domestic market access barriers. Petersmann gives detailed evidence of how, during the Tokyo Round (1973-1979) as well as during the Uruguay Round (1986-1994), the large number of agricultural dispute settlement proceedings influenced the bargaining power, negotiating positions, the final contents and progressive development of the 1979 and 1994 Agreements on Subsidies as well as the Uruguay Round Agreement on Agriculture. The 'peace clause' in Article 13 of the Agreement on Agriculture did not prevent, out of more than 317 complaints under the DSU from 1995 up to October 2004, more than 140 disputes related to agricultural, fishery and forestry products. More than 46 dispute settlement panels were established in order to examine the alleged WTO-inconsistency of agricultural market access restrictions (e.g. for imports of salmon, desiccated coconut, bananas, hormone-fed beef, poultry products,



apples, milk and dairy products, beef, wheat gluten, lamb, vegetable oils, sardines, peaches), domestic subsidies (e.g. for dairy, cotton, sugar) and export subsidies (e.g. for dairy products, cotton, sugar). A large number of dispute settlement findings established violations of export subsidy reduction commitments under the Agreement on Agriculture (e.g. for Canadian dairy, US cotton, EC sugar), and of the subsidy disciplines in the Agreement on Subsidies (e.g. as regards US Foreign Sales Corporations, US cotton), and clarified the contested meaning of certain WTO rules (such as GATT Article XVII on 'state trading enterprises', Article 6 of the Subsidy Agreement relating to 'serious prejudice', the classification of 'green box subsidies' pursuant to the Agreement on Agriculture). According to Petersmann, two major policy conclusions emerge from this WTO dispute settlement practice:

- First, there is clear evidence that GATT/WTO dispute settlement proceedings influence GATT/WTO Rounds of multilateral trade negotiations, and *vice versa*. The fact that litigation strategies (e.g. Brazil's successful 2003 complaints against US subsidies for cotton and EC subsidies for sugar) can change the bargaining power and bargaining positions in WTO negotiations illustrates that the 'GATT 1947 bicycle' has been transformed into a 'WTO tricycle': intergovernmental negotiations, the interpretation of WTO rules, and their domestic implementation by WTO Members are increasingly influenced by WTO jurisprudence.
- The unstable and slowly moving 'WTO tricycle' needs to be transformed into a four-wheel drive by empowering the WTO Director-General to defend the collective interests of WTO Members against producer-driven intergovernmental bargaining, nationalist agricultural legislation, and single-interest NGOs. Improving the institutional capacity of the WTO could enhance the quality and culture of WTO negotiations by promoting better 'deliberative politics' and more 'principled' rather than merely 'positional bargaining.' This could strengthen political support and public understanding of WTO rules by democratic legislatures and civil society. Without such support, the intergovernmental and domestic 'two-level negotiations' on the reduction of the numerous trade distortions in agricultural trade are bound to be much more difficult.

In the discussion, several WTO negotiators confirmed the close interrelationships between intergovernmental negotiations on additional agricultural WTO disciplines and WTO dispute settlement proceedings clarifying the often contested meaning of existing AoA provisions (notably on export subsidies) and their complex interrelationships with the WTO Agreement on Subsidies. Whether the large number of WTO disputes challenging agricultural import tariffs and subsidies reflect a disrespect of existing WTO disciplines, or rather grey areas within the rules, was often difficult to say. As market liberalization had to overcome many protectionist pressures, the clarification of

contested AoA provisions and of related practices (such as ‘box-shifting’) through WTO dispute settlement proceedings and multilateral surveillance could help to reach agreement on additional reforms. The ‘WTO tricycle’ was more effective than GATT’s bicycle, notwithstanding the desirability and systemic advantages of a future four-wheel drive for the WTO.

## **V. Less-developed WTO Members in the Doha Round Negotiations**

*Ambassador Meyer* introduced this fourth conference session on specific developing country concerns in the Doha Round negotiations by saying that it still remained to be clarified how the substantive build-up of technical and capacity-building assistance for less-developed WTO member countries should be integrated into the Doha Round negotiations. There were also no clear methods for evaluating and monitoring this bilaterally and multilaterally financed assistance (e.g. the numerous regional seminars and technical assistance missions by WTO staff) and its coordination with the assistance programmes of other international organizations and with local institutions inside receiving countries. For example, assistance related to particular Doha Round proposals (e.g. on poor countries’ access to generic medicines, better export opportunities for cotton from African exporting countries, the role of LDCs in WTO dispute settlement proceedings) could be criticized as undue interference into the Doha Round negotiations.

### **A. Beyond Special and Differential Treatment of LDCs?**

The conference paper by *Bernard Hoekman* on *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment (S&D)* recalled that efforts to realize the Doha Round objective of strengthening WTO provisions on special and differential treatment of developing countries by making such S&D provisions ‘more precise, effective and operational’<sup>66</sup> have so far failed. The ‘adjustment burden’ of new WTO rules will fall on developing countries to the extent that such rules reflect ‘best practices’ already applied in developed countries. If the Doha Round is to become a Development Round, the resource capacity constraints and lesser ability of developing countries to implement new rules will need to be addressed more effectively. The ‘old approach’ to S&D—based on (1) preferences that were often subject to political

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66 Doha Ministerial Declaration (note 3 above), para. 44.

conditions and excluded 'sensitive products', (2) opt-outs from WTO rules, and (3) arbitrary transition periods without economic foundation—had not effectively promoted development for a number of reasons, such as: trade preferences are increasingly being eroded; most S&D provisions were exhortatory or disadvantageous; and exempting less-developed countries from WTO disciplines excluded them from the major source of gains from trade liberalisation—namely, the reform of their own policies. A new approach should provide for acceptance of the core rules by all WTO Members and greater reliance on explicit cost-benefit analyses so as to identify the net implementation benefits and implementation costs of WTO rules with due regard to different circumstances in individual developing countries. Through a cooperative, country-specific 'enabling mechanism', based on credible commitments by high-income countries to assist developing countries in implementing 'resource-intensive' WTO rules and exploiting new trade opportunities, a new 'multilateral trade and development body' should offer country-specific technical and financial assistance for implementing WTO rules ('aid for trade'), for instance by helping to enhance the 'supply capacity' of exporting countries and financing trade adjustment costs. The phasing-out of the Multilateral Textiles Agreement, the erosion of LDC preferences, and the EU's initiative for liberalizing all imports from Least Developed Countries ('Everything But Arms') would entail adjustment problems in many LDCs that should be compensated by financial adjustment mechanisms.

### **B. Technical Assistance and Capacity-building for LDCs**

*Gregory Shaffer's* conference paper examined the question: *Can WTO Technical Assistance and Capacity Building Serve Developing Countries?* Shaffer began with an overview of the multiple capacity constraints which less-developed countries face in advancing their interests in WTO meetings, WTO negotiations, rule-implementation and WTO dispute settlement proceedings. He then examined competing rationales for trade-related capacity building and technical assistance by the WTO, such as promoting internal trade-related capacity in governments rather than in the private sector. Shaffer described the evolution of WTO capacity building programmes (e.g. the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries carried out by WTO, UNCTAD, ITC, UNDP, IMF and the World Bank since 1997, the Doha Development Agenda Global Trust Fund created in 2001) and discussed their various difficulties and uncertain future after the end of the Doha Round. The much more active engagement of developing countries in the Doha Round than in previous GATT negotiations reflects their 'much greater "ownership" of the technical assistance provided.' As developing countries will need to work closer with their private sectors in order to take advantage of WTO rules, Shaffer suggests making WTO trade-related capacity building more effective by

involving broader-based constituencies in developing countries and promoting regional cooperation among developing countries.

### **C. Developing Countries in the Doha Round**

*Ambassador Meyer* commented on the following four elements of Hoekman's presentation:

1. As regards the problems of LDCs in implementing complex WTO agreements, *Ambassador Meyer* suggested the provision of additional flexibility in the existing categories of LDCs and for multilateral surveillance so as to better focus exceptions from WTO rules on those LDCs with proven implementation problems due to a low level of development of their domestic institutions.
2. Even though the GSP remained 'second-best', initiatives to eliminate tariffs and quotas over time for LDCs, to grant tariff preferences to small textile exporters among LDCs, to make the level of GSP preferences more predictable, and to harmonize the GSP conditions of preference-granting countries, remained important.
3. *Ambassador Meyer* agreed that, since many among the 88 Doha Round proposals for renegotiating S&D provisions were unlikely to enhance development in LDCs, there was a need to focus on those S&D provisions that could be shown to promote trade and development in LDCs efficiently.
4. As regards Hoekman's plea for defending core WTO principles against being undermined by S&D provisions, *Ambassador Meyer* welcomed the decreasing use of Article XVIII GATT by LDCs and wondered whether the S&D criteria used by Hoekman (such as importance of tariffs as fiscal revenue, adjustment costs) would have to be complemented by additional criteria (e.g. development level, market size and sectoral problems of LDCs).

The comments by *Ambassador Meyer* on the conference paper by Prof. Shaffer focused on the following three problems:

1. Even though Trade-Related Technical Cooperation (TRTC) for helping LDCs to participate in the Doha Round negotiations and for enhancing domestic expertise and well-functioning institutions in LDCs for implementing WTO obligations had been massively increased over the past years, the annual contribution by the WTO (ca. 36 million Swiss Francs) remained small compared with other international and national donors and diverted the limited WTO staff from its main function of supporting WTO deliberations, negotiations and implementation of WTO rules.

2. Notwithstanding Shaffer's arguments for a longer-term perspective of TRTC, Ambassador Meyer justified the close link between TRTC and the Doha Round negotiations and WTO discussions by arguing that it can improve the relevance and effectiveness of the assistance (e.g. of capacity building during the transition periods for implementing WTO obligations and for enabling LDCs to build up customs and transport facilitating institutions).
3. Even though Shaffer was right that capacity-building (e.g. for successful use of the WTO dispute settlement system) could occasionally run counter to the negotiating interests of the donor countries, there was hardly any evidence that the Doha Round negotiations (e.g. on the phasing-out of cotton subsidies) had adversely affected TRTC.

In the discussion, there was broad support for the need to review and re-conceptualize S&D provisions. The 'ownership deficit' in the WTO was largely due to the fact that many LDCs felt they were neither adequately represented in WTO bodies nor adequately accommodated by WTO rules. So far, the capacity of the WTO to deliver effective S&D and comprehensive TRTC had been very limited. It was said that negotiations on S&D and TRTC were rendered difficult by the often conflicting interests among LDCs and their often diverse negotiating positions (e.g. African G90 countries demanding further flexibility of WTO rules vs. Latin-American G20 countries defending the unity of the WTO system). Developing objective criteria and new 'soft rules' for further differentiating among LDCs and the least-developed among them was perceived by some LDCs as a potential threat to the political unity of LDC positions.

It was said that the flexible WTO practice of 'self-selection' (i.e. any country can declare itself to be an LDC) complicated the reconciliation of 'soft' and 'hard' rules in WTO practice. One negotiator asked whether an identification of those LDC obligations that had been challenged in WTO dispute settlement proceedings could assist in determining the legitimate scope of S&D provisions. Another WTO negotiator said that a one-size-fits-all approach could not satisfy all LDCs; as the incentive-effects of S&D provisions differed depending on the trading capacities of LDCs, differentiation among LDCs case-by-case, depending on the trade-effects, was therefore inevitable (e.g. differentiation of preferences, textiles-quotas, LDCs depending on food aid, LDCs importing generic or patented pharmaceuticals). While the objective of a *Development Round* might entail that least-developed countries may undertake few market access commitments, advanced developing countries should and could not avoid meaningful market opening commitments in exchange for market access commitments by developed countries. As regards TRTC, several WTO diplomats agreed that current technical and capacity-building assistance remained inadequate and lacked a coherent approach and a convincing evaluation methodology. TRTC was needed not only for building strong

institutions in LDCs and for helping LDCs to implement their WTO obligations, but also for improving the internal supply and export capacities of LDCs. The WTO lacked qualified staff, expertise and adequate financing for various capacity-building tasks (such as improving the supply side in LDCs). Outsourcing and long-term assistance by other international organizations and countries thus remained crucial.

***D. Geographical Indications and Traditional Knowledge:  
Developing Countries' Interests and Negotiation Positions***

The presentation by *Marion Panizzon* and *Thomas Cottier* examined *Developing Countries' Interests and Negotiation Positions on Protection of Geographical Indications and Traditional Knowledge*. Panizzon and Cottier emphasised the interrelationships between geographical indications (GI) that protect specific qualities of a product in a particular region and traditional knowledge (TK) developed therein. Developing countries have manifold interests in GIs and TK, for instance in order to promote their exports of agricultural products and increase their share in the benefits derived from plant genetic resources and related TK. The WTO negotiations on extending the protection of geographical indications beyond wines and spirits (Article 23 of the TRIPS Agreement), and on the protection of traditional knowledge and folklore (cf. Article 27:3(b) TRIPS Agreement) have, however, not led to any agreement so far. Panizzon and Cottier suggest protecting agricultural, ecological and medicinal knowledge through new GIs 'as a form of collective property anchored to specific places', and by recognising TK as individual or collective property created by an individual or a community of rights-holders. They further propose to link the needed reforms of the TRIPS Agreement with the agricultural negotiations on market access for agricultural products from developing countries using TK.

In the discussion, it was said that the proposed extension of GI remained controversial. None of the WTO agreements protected TK as intellectual property. Many developing countries feared that expanded GI protection could entail additional regulatory costs and trade barriers for exports from LDCs. The paper's assertion that GIs could be used as a bargaining chip by LDCs in the Doha Round negotiations was disputed and remained to be proven in terms of a cost-benefit analysis. The pending WTO dispute settlement proceedings on the complaints by Australia and the US against the EU's protection for trademarks and GIs (under EU Regulation 2081/92) was likely to influence the attitude of WTO members vis-à-vis the EU's proposal to extend to other products the strong protection afforded by the TRIPS Agreement to GIs of wines and spirits.

As regards TK, it was said that the definition and ownership of TK and other related issues remained to be clarified. As long as there were no precise national rules on TK (e.g. defining property rights and distribution of rents) and no

adequate economic analysis of the implications of various possible kinds of TK protection, international regulation and harmonization of rules remained difficult. The broader and more fundamental question was that of access to genetic and other biological resources. These issues were often embedded in national customary laws and had to be clarified before any redefinition of intellectual property rights. Several speakers emphasised that the WTO discussions were only a small part of ongoing multilateral discussions on these issues in a variety of international organizations (like WIPO and FAO). The proposal by a group of LDCs to limit 'bio-piracy'<sup>67</sup> by means of new TRIPS obligations to disclose the source and country of origin of the biological resources and/or TK used in a patentable invention, continues to be opposed by a number of developed countries. The WTO General Council Decision of 1 August 2004 requests:

[T]he Director-General to continue with his consultative process on all outstanding implementation issues..., including on issues related to the extension of the protection of geographical indications provided for in Article 23 of the TRIPS Agreement to products other than wines and spirits,

and to report to the Trade Negotiation Committee and General Council no later than May 2005. Views on the desirable scope and legal rules for protecting TK and expanding GIs continue to differ so much among WTO member countries that a Doha Round agreement in the near future on additional TRIPS provisions protecting TK and expanding GIs to other products currently appears unlikely.

## VI. Doha Round Negotiations on Services Trade

Even though the Doha Work Programme—finally adopted by the WTO General Council on 1 August 2004—justifies hopes for a successful conclusion of the Doha Round negotiations, there is widespread concern that the current offers of additional market access and national treatment commitments for trade in services—notably for labour-intensive services exported from LDCs and related temporary movements of natural persons ('mode 4 services' by independent service suppliers or employees of supplying companies)—remain disappointing. The Doha Work Programme of 1 August 2004 sets out agreed guidelines for making progress in the services negotiations, and urges WTO Members who

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67 Cf. e.g. P. Schuler, 'Biopiracy and commercialization of Ethnobotanical Knowledge', in: J. M. Finger and P. Schuler (eds), *Poor Peoples Knowledge. Promoting Intellectual Property in Developing Countries*, 2004, chapter 7.

have not yet submitted their initial offers to do so as soon as possible. By October 2004, only 48 initial offers on behalf of more than 70 WTO Members had been tabled. Many initial offers had been criticised for their lack of ambition. The WTO Working Parties on Domestic Regulation (e.g. administrative measures relating to visas and entry measures) and on GATS rules (e.g. emergency safeguard measures, government procurement, subsidies) also reported only slow progress. Part VI of this book reproduces three conference papers analysing the Doha Round negotiations on services trade.

#### **A. LDC Proposals for Liberalization of Movements of Natural Service Suppliers**

*Prof. Winters's paper on Developing Country Proposals for the Liberalization of Movements of Natural Service Suppliers* criticizes the mercantilist rhetoric of some of these initial proposals because they request other countries to liberalise their imports without offering reciprocal and equivalent market opening commitments. Winters also notes the extreme caution of developed country offers and concludes that, even though 'Mode 4' (i.e. temporary cross-border movements of natural service suppliers) appears to be the principal way in which developing countries might expect to reap market access benefits in services, there may not be much liberalisation of 'Mode 4 services' during the Doha Round in view of, *inter alia*, the xenophobic European fears of permanent migration. Developing countries likewise continue to be restrictive on opening their labour markets for professional services of foreign workers, in contrast to their more liberal attitude *vis-à-vis* 'commercial presence' (Mode 3) of foreign services suppliers. In order to separate temporary service providers under the GATS from permanent labour and immigration flows, India, for example, proposes a special GATS visa for temporary Mode 4 services outside normal immigration procedures. The United Kingdom has already used such 'GATS visas' for liberalising a limited number of services sectors. Overall, however, liberalisation of market access for foreign lower-skilled workers (e.g. by abolishing economic needs tests, professional qualifications, social security requirements) appears to be often resisted by local interest groups and to make little progress in view of the spectre of cultural and social strife (e.g. adverse labour market effects for local less-skilled workers), even though the potential economic gains from increased labour mobility could be huge. Important counteracting forces are firms that wish to use foreign labour and push for increased mobility. But many of the existing temporary labour schemes are administered bilaterally (e.g. access of Indian medical doctors to the UK) rather than multilaterally, for instance in view of the most-favoured nation requirements in Article II GATS and the comparatively lesser flexibility of GATS provisions. Winters warns against dropping demands for the liberalisation of lower-skilled mobility and suggests that GATS should ignore bilateral deals



outside GATS rather than legalize departures from GATS' non-discrimination requirements.

In the discussion on the paper by Prof. Winters, it was said that LDCs were not the only WTO members requesting 'mode 4' liberalization (temporary movements of personal service suppliers). Some developing countries (like India) had also *offered* mode 4 commitments. Most requests by developed countries related to 'mode 3' liberalization (commercial presence). The 44 initial offers to date (July 2004) were widely seen as unsatisfactory and needed to be followed by several rounds of exchanges of offers and requests. Many international labour movements took place outside the GATS framework (e.g. on the basis of bilateral agreements). One reason for this was the close relationship between temporary labour migration and domestic immigration, labour and administrative laws (e.g. on visas and work permits) and the fact that trade negotiators usually do not talk to immigration officials. One negotiator suggested that the often informal practices of admitting temporary labour migration should be formalized and legalized through the GATS negotiations (e.g. ca. 20% of workers in the Swiss labour market came from abroad). In domestic parliamentary discussions on labour mobility, opposition focused on permanent immigration of foreign labour. GATS was rarely mentioned in domestic debates on temporary labour migration. Also services industries appeared to be interested more in regional than in worldwide liberalization and regulation of services. It was generally recognized that humane, orderly labour migration was beneficial not only for the migrants themselves, but also for both sending and receiving countries (annual remittances transferred by migrants to their home countries had been estimated in 2002 to have been more than \$130 billion per year). This mutually beneficial character explained why much liberalization and regulation of trade in services continued to be unilateral.

### **B. Liberalization and Regulation of Health and Education Services**

*Prof. VanDuzer*, in his paper on *Navigating between the Poles: Unpacking the Debate on the Implications for Development of GATS Obligations Relating to Health and Education Services*, recalls the different opinions regarding the implications of GATS for public services like health and education in developing countries. While some believe that GATS may enhance the effective delivery and regulation of essential services, others view GATS liberalisation commitments as a significant threat to the effectiveness and viability of national health and education systems. Before deciding on what GATS commitments to undertake in health and education, developing countries should make prior policy choices regarding how much private sector participation to permit in the delivery of these services which are often extensively regulated, funded or even delivered by governments. Apart from determining the net benefits from permitting foreign

supplies of health and education services, developing countries also have to examine whether they might prefer to liberalise their health and educational services regimes without making GATS commitments limiting their future policy options.

VanDuzer provides an overview of the so far limited GATS commitments in these sectors and suggests possible strategies for making the GATS more relevant for improving the regulation and delivery of health and education services in developing countries. As equitable access to a basic level of health and education is widely considered to be a human right and fundamental responsibility of the state with far-reaching macroeconomic effects, GATS commitments and GATS obligations for health and education policies raise numerous legal and political questions. Both health and education services are characterised by market failures; large segments of health and education services are therefore delivered or funded by the state in all countries. In most developing countries, private and public health and education systems are closely intertwined and are increasingly traded—mainly through consumption abroad (GATS mode 2), but also through commercial presence (GATS mode 3), health and educational professionals from developing countries providing their services abroad (GATS mode 4) as well as cross-border supply (GATS mode 1). VanDuzer analyses the specific GATS commitments undertaken by WTO Members for health and education services, identifies obstacles to—and benefits from—liberalisation of trade in this area, and explains why most developing countries continue to be reluctant to make commitments that restrict their policy options.

The discussion on the paper by Prof. VanDuzer confirmed that GATS commitments for the liberalization and privatization of health and education services remained controversial in many LDCs. Regarding the fear that GATS commitments could threaten the viability of domestic health and education systems, it was said that LDCs remained free to impose services obligations on foreign services suppliers. The number of requests (e.g. by Australia for medical and nursery services) and offers (e.g. by India) in the government-dominated health sector remained very limited. There was also legal uncertainty as to whether public health and education services fell outside the scope of the GATS because, according to GATS Article I:3(a), ‘services’ includes ‘any service in any sector except services supplied in the exercise of government authority.’ Many health and education services were internationally traded without GATS commitments (e.g. ‘mode 2’ consumption of health and education services abroad) and subject to rules elaborated by other international organizations (like the World Health Organization and UNESCO). Several speakers commented on the advantages of negotiating a ‘reference paper’ so as to facilitate GATS negotiations on health and education services (e.g. by agreed definitions and classification of categories of services), respond to domestic regulatory concerns, and coordinate the relevant GATS negotiations with the international standards

of other relevant international organizations (like WHO and UNESCO). Mode 1 (cross-border supply) and mode 3 (commercial presence abroad) were becoming ever more important forms of trading and liberalizing education and health services and were usually subject to stringent domestic regulations (such as health, labour and tax laws). Domestic controversies were often less related to the presence of foreigners than to the commercial provision of health and education services. GATS included no obligation to privatize health and education services, nor a model for such privatization.

### **C. Domestic Regulation of Traded Services**

The paper by Prof. Trachtman on *Negotiations on Domestic Regulation and Trade in Services (GATS Art. VI): A Legal Analysis of Selected Current Issues* argues that it may be difficult for developing countries to insist on policy flexibility for their own domestic prudential regulation of services and request greater, asymmetric disciplines on regulatory barriers in developed countries (e.g. immigration controls) if such barriers impede services exports from developing countries. Trachtman distinguishes horizontal disciplines (e.g. under GATS Article II), sectoral disciplines (e.g. under GATS Article VI:4) and specifically negotiated disciplines (e.g. under GATS Article XVIII). He examines related legal problems such as discrimination against foreign 'like services' and 'like service providers' inconsistent with Articles II, XVII GATS, 'nullification or impairment' of specific commitments inconsistent with Article VI:5, and measures 'not more burdensome than necessary to ensure the quality of the service' in the sense of Article VI:4 of GATS. The *Disciplines on Domestic Regulation in the Accountancy Sector*, adopted by the WTO Council on Trade in Services in 1998, and the Article VI:4 Work Program are discussed.

In the discussion on the paper by Prof. Trachtman, it was said that—compared with GATT—the GATS included a great deal less legal discipline on domestic regulation. This raised difficult questions about the relationship among market access commitments (Article XVI), national treatment commitments (Article XVII), additional commitments (Article XVIII) and domestic regulation (Article VI GATS), especially in the case of prudential domestic regulation for non-economic reasons (rather than industrial policy regulations protecting competing domestic suppliers). Reference was made to the pending WTO dispute settlement proceedings against *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, in which US restrictions on several means of supplying gambling services were found to violate a US market access commitment to allow the cross-border supply of such services, notwithstanding the US invocation of its right to restrict gambling as being 'necessary to protect public morals or to maintain public order' (GATS

Article XIV[a]) and the Panel's acknowledgment of the right of WTO members 'to regulate, including a right to prohibit, gambling and betting activities.'<sup>68</sup>

One WTO negotiator referred to the concern that many LDCs lack sufficient expertise and staff for adequately participating in the regulatory and standard-setting work of the various international organizations dealing with international services, including the WTO Working Parties on Domestic Regulation and on the elaboration of additional GATS Rules. In developed countries, the transparency and quality of domestic regulation were often promoted by participation of private stakeholders in domestic rule-making and 'prior comment procedures'; similar transparency and stakeholder participation in domestic regulation was lacking in some developing countries. Another speaker referred to the 'examples paper' prepared by the WTO Secretariat for illustrating the obligations under GATS Article VI:4 to ensure 'that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services', and that 'such requirements are ... not more burdensome than necessary to ensure the quality of the service.' It was noted that, in the WTO dispute settlement report on *Mexico – Measures Affecting Telecommunications Services*, the Panel had given 'substantial interpretative weight' to 'draft module schedules', 'chairman's notes', 'scheduling guidelines' and other supplementary documents prepared by the Secretariat in connection with GATS negotiations, even if such documents had not been formally adopted by WTO members.<sup>69</sup>

The slow progress in the GATS negotiations, as well as in the GATS Working Parties on GATS Rules and Domestic Regulation, was also due to the often close interrelationships between international and domestic regulatory processes and to the fact that, for many LDCs, other areas of the Doha Round negotiations (such as agriculture) had a higher priority.

## **VII. Concluding Remarks: Lessons from Cordell Hull for the Needed WTO Reforms**

In concluding the conference, *Prof. Petersmann* said that a stronger legal and economic integration of LDCs into the world trading system was crucial not only

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68 Cf. para. 7.4 of the Panel Report on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DSD285/R), whose legal findings were largely upheld by the Appellate Body.

69 Cf. paras. 7.67-68 of the Panel Report on *Mexico – Measures Affecting Telecommunications Services* (WT/DS204/R) of 2 April 2004, adopted in June 2004.

for the conclusion of the Doha Round and for economic welfare in LDCs, but also for the legitimacy of the WTO and for the promotion of ‘democratic peace.’ The opening of national economies to international trade, competition and judicial protection of the rule of WTO law was bound to enhance democratic competition and rule of law also in the polity. Petersmann recalled that the year 2004 was the 70<sup>th</sup> anniversary of the US Reciprocal Trade Agreements Act of 1934, which had fundamentally changed trade policy-making—not only inside the US, but also through promotion and conclusion of a large number of reciprocal, international trade liberalization agreements based on unconditional most-favoured-nation treatment, including the GATT 1947. US Secretary of State Cordell Hull—who had been the architect of these modern trade policy principles of US trade legislation and of GATT 1947, as well as of the basic principles of the 1944 US draft for a United Nations Charter—had received the Nobel Peace Prize in 1945 for his ‘constitutional insight’ that a liberal, rules-based international order cannot be durable unless it is ‘anchored’ in parliamentary domestic legislation and democratic support.<sup>70</sup> Hull had initiated the 1934 Reciprocal Trade Agreements Act as a means of breaking ‘the logrolling dynamics’ of the protectionist Smoot-Hawley tariff legislation of 1930 by giving export industries an equal voice with import-competing industries in trade policy-making.<sup>71</sup> The expiry of the current trade negotiating authority of the United States Trade Representative on 1 June 2005, and the legislative conditions for its extension (such as no ‘resolution of disapproval’ by either the House of Representatives or the Senate), constitute a challenge for academics, business and WTO negotiators to contribute not only to a better understanding of the Doha Round negotiations by civil society, NGOs and national parliaments, but also to a socially more balanced focus of the WTO so that it can deliver its ambitious goal of a Development Round.

Unlike the US leadership after World War II for a UN system based on human rights, the now prevailing ‘realist’ approach in North America—which explains international cooperation as the mere pursuit of self-interest and power and disavows any normative value to international law—runs counter to civil society calls for considering claims of justice, human rights and poverty reduction also in WTO negotiations. Since Robert Hudec’s already ‘classical’

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70 On the Cordell Hull strategy of embedded international liberalism (a term coined only much later in the 1980s by the American political scientist John Ruggie), which Hull saw as the prerequisite for international peace, see: C. Hull, *The Memoirs of Cordell Hull*, 1948.

71 Cf. Kenneth W. Dam, ‘Cordell Hull, The Reciprocal Trade Agreements Act and the WTO’, in: Petersmann (note 26), chapter 4.

legal analysis of the role of LDCs in the GATT legal system,<sup>72</sup> most reports on developing countries in the WTO have been written by economists, with no or very limited discussion of legal concerns for social justice<sup>73</sup> and constitutional reforms of the WTO.<sup>74</sup> In contrast to narrow ‘realist’ and economic perceptions of the WTO as a framework for power- and business-oriented negotiations in the pursuit of national interests, the WTO Appellate Body’s recent endorsement of making trade preferences for LDCs conditional on compliance with UN and ILO conventions<sup>75</sup> offers hope for a broader conception of WTO law promoting coherence of WTO rules with citizen-oriented human rights obligations of WTO governments. The effectiveness of national and international bi-level negotiations on WTO rules—and the ‘constitutional functions’ of WTO rules for international rule-making, adjudication, rule of law and worldwide division of labour—ultimately depend on whether parliaments, governments, courts and private actors in domestic economies will accept and implement WTO rules as being mutually beneficial and socially just.<sup>76</sup> For the successful conclusion of the consensus-based Doha Round negotiations, it is important that WTO Members and their rule-making, executive and quasi-judicial WTO bodies are more clearly seen to respond to the basic needs and human rights of all citizens, including the more than one billion poor people in less-developed WTO member countries. Just as rights of governments derive from the rights of their citizens, the legitimacy and effectiveness of the WTO derive from benefiting, serving and protecting not only governments but, more importantly, all citizens living in WTO member countries as the ultimate democratic owners of the rules-based trading system.

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72 Cf. note 40 above.

73 Cf. e.g. the *World Bank Handbook on Development, Trade and the WTO* (note 16 above) and B. Hoekman and W. Martin (eds), *Developing Countries and the WTO*, 2001.

74 The new report by the Consultative Board to the WTO Director-General on *The Future of the WTO*, WTO 2004, rightly proposes various institutional reforms of the WTO so as to strengthen the powers of WTO bodies to defend ‘collective interests’ and supply ‘international public goods’ vis-à-vis the often narrow pursuit of national interests in the ‘member-driven WTO’.

75 Cf. note 44 above, notably the *obiter dicta* in para. 182 of the Appellate Body report.

76 On the constitutive roles of constitutional rights and social justice for an international social market economy and a cosmopolitan integration law, see E. U. Petersmann, ‘Theories of Justice, Human Rights, and the Constitution of International Markets’, in: *Symposium on the Emerging Transnational Constitution*, special issue, *Loyola Law Review* 2003, at 407-460.



**Part I**

**Transatlantic Programme  
Annual Lecture**





# *The Future of the World Trade Organization*

*Peter D. Sutherland*

Chairman, BP, and  
former Director-General of  
GATT and the WTO

In titling this address, ‘The Future of the World Trade Organization’,<sup>1</sup> I may, on reflection, have committed something of a fraud. You are all crowded in here assuming I am about to divulge the detailed conclusions of the Director-General’s Consultative Board—that I happen to chair—which is looking into the future of the World Trade Organization. No such luck! About the only thing I intend to divulge is that we do not really have any conclusions as yet. But we shall, in not too many months.

That said, the debates we have had in the group have been fascinating and probably complement or parallel some of those you have had in earlier sessions here. But the Board is working in a medium to long-term timeframe. The practical reality is that the future of the WTO may be determined in the next four weeks. And that gives me cause for concern. Let me spend the first part of my comments in discussing why, and then I will move on to some longer term perceptions.

My own view is that the Doha Round was initially something of a political misjudgement. It came too soon after the Uruguay Round and before the many of the commitments made in Marrakesh were even close to full implementation. It superseded a built-in agenda, agreed in the Uruguay Round, that was already demanding and potentially very ambitious. Further, the new Agenda was pushed through at a time when globalisation was being seriously questioned—and

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1 Transatlantic Programme Annual Lecture held on 2 July 2004, previously published in the RSCAS Distinguished Lectures Series, November 2004.

systematically misunderstood—in constituencies unfamiliar with the meaning and value of the multilateral trading system.

It was also a time when many developing countries were questioning their own role and purpose as members of the WTO. The only saving grace in Doha was that the ministerial declaration was agreed on the back of huge and justified political concern, in the wake of the events of 11 September 2001, that, somewhere, multilateralism—solidarity among nations—had to be seen to deliver.

This may all seem unduly negative, even a little pointless given where we are now. However, I think it is necessary to understand the roots of the crisis—and I use that word advisedly—facing the WTO at this moment. I see the next few weeks as a watershed. With luck and some wisdom on the part of participants we may see the over-ambition and exaggerated rhetoric of Doha corrected. And with that we should see the WTO—or, rather, its membership—giving itself an opportunity to again make a real and lasting contribution to global growth and development.

Clearly, we are moving back to a more manageable agenda and more realistic timeline. I suspect none of us here in this room believe that the round can now be concluded before 2006/7 and that is to assume something more than a reassertion of the Doha declaration can be agreed by the end of this month. We should accept the delay with reasonable equanimity. If it provides a timeframe to capture a deal with significant economic impact for all the players, then the wait will be worth it.

Of course, it will be tempting to say that what we are now looking at is a rather modest negotiation. It is certainly not a negotiation on the scale of the Uruguay Round. But that is to miss the point. What is being sought is of enormous potential significance. If we can walk away from the Doha Round with export subsidies in agriculture on track for elimination, along with other trade-distorting forms of export support, then it will be a huge achievement that will impact on poverty and hardship throughout the global farming community. So too, if we can secure some meaningful new limits on domestic support and open a few markets. The problems of agricultural trade cannot be resolved in a single trade round. Perhaps it will take another two sets of negotiations before we can say that international exchanges in farm commodities are being conducted on a basis that is comparable with that for industrial goods.

Naturally, the business community is looking for results on more than just agriculture. The WTO needs to secure a good package of non-agricultural market access commitments in the Doha Round and it needs to go much further than what is now on the table on services. The only other big-ticket item is trade facilitation. I believe that a deal that provides new disciplines on the activities of customs services and other practical aspects of moving goods across frontiers

will be of benefit to developing countries that wish to be truly part of the global trading community. That said, the costs are going to be considerable and they must be accounted for up-front. For least-developed countries—which have most to gain, but most to pay, for trade facilitation—a best endeavours undertaking by other WTO members to provide assistance for implementation will be insufficient. We, in the rich countries, stand to gain from reform in the poorest. These are very practical and measurable reforms, the financing for which cannot be met from the internal resources of poor nations alone.

The other element of the Doha package that seems still likely to bear some fruit is that on rule making. I have some doubts that we will get very far on trade defence instruments—though there ought to be some refinements in the disciplines that would be acceptable. That is especially so for measures already condemned through the dispute settlement cases in these areas.

One aspect of rulemaking that I think is a prerequisite for a respectable Doha Round outcome is in the area of rules on regional trade agreements. Sadly, we now have a multilateral system in which virtually everyone has an interest in a preferential trade deal. That does not make it easy to bring some rigour to the WTO's oversight responsibilities. To date, these have been notable for their inadequacy and ineffectiveness. There needs to be a serious attempt to provide workable review conditions that will encourage the eventual consolidation of regional agreements into the multilateral system. The jigsaw puzzle of administrative complications and unpredictability—and their attendant business costs—that these proliferating deals represent is not sustainable.

So, there is plenty to fight for still in the Doha Round. But the game for July 2004 is less about immediate, solid, commercial benefit than about the WTO's credibility, and that of its members. It may even be about the ultimate survival of the institution as an effective instrument of multilateralism.

The WTO has to show again that it can deliver: to deliver something better than a lowest-common-denominator text of politically safe, but commercially meaningless diplomatic verbiage. I guess the test will be that the frameworks—notably those on agriculture and non-agricultural market access—demonstrate unambiguously that something of real value is achievable in the Doha Round. My impression is that this absolute necessity is increasingly understood and that most parties are working with an appropriate sense of urgency. Nevertheless, we are still far from an agreement. So I feel justified in rehearsing here why the current efforts are so vital to the system and to the interests of all the WTO's members.

First, there is the issue of credibility. The WTO must be seen again as capable of delivering. Leaving aside the remarkable work on dispute settlement and the major accession negotiations—especially that of China—little of economic

significance has been delivered for well over five years. That does not give business people much reason to support the system.

And when I talk about business support I am not referring simply to the interests of global companies. These large firms have a perception of the global market that leads them to support multilateralism as a principle—and they will go on doing so. I am thinking more of tens of thousands of enterprises in developed, developing and least-developed countries alike for which the trading conditions created by the WTO can mean the difference between success and failure—between opportunity and simple survival.

Wherever they are, companies want the same things. For a start they need transparency and predictability in business and trading regulation. Rather few, I suggest, would opt for corruption as the ideal environment. They want efficient services—especially financial services. They want fair competition at home and equitable treatment with competitors in export markets. They need recourse to open, efficient and honest legal systems. Many need better market access overseas, or the chance to invest. Some need protection from time to time.

All this is very simple stuff. It also happens to be the stuff of the WTO. This is core business. Unfortunately, it is core business that has been neglected in favour of some relatively unproductive diversions in recent years. I have to say that the endless debates about internal transparency—while probably valid—have not helped one single company anywhere earn one dollar in export markets. And if the WTO is worth having, it is to give opportunities to companies and entrepreneurs. One cannot say too many times that it is not governments, international agencies or, indeed, NGOs that create wealth for the world's poor. Governments can distribute. Business people, farmers, traders, services suppliers, researchers and educators create. One sometimes has the impression that this simple truth is ignored or hidden in Geneva.

The WTO has two roles. First it is a system of rules and disciplines—enforceable rules and disciplines. Second it is a negotiating vehicle. The first role is not currently in doubt—although we should not be complacent, as I will discuss later. The second surely is. The vehicle is seriously in need of gasoline, or some fundamental maintenance. The chassis is solid—the engine has seen better days. I will be divulging no confidence if I tell you that this is a preoccupation of the Consultative Board.

Broadly the concern is that far from being an instrument of negotiation the WTO is settling for being an instrument of litigation. My fear is that if the two roles cannot be fulfilled convincingly and consistently then ultimately both will fall into disrepute. Yes, we can settle for a certain amount of gap filling through the Dispute Settlement Understanding (DSU). But there are political limits to wholesale reliance on dispute settlement. True, it may be an easy way out when negotiators can find no basis for compromise. Yet that is to excuse the process of

negotiation and the negotiators themselves, be they Geneva-based diplomats, senior officials or ministers. The nexus and interplay between these three sets of participants is crucial—but currently seriously dysfunctional.

The Consultative Board will offer some proposals in this area. I trust they will be considered objectively—and in the light of the recent failure to secure meaningful results through multilateral negotiations. Certainly, no one set of participants has a monopoly of ability or experience. There will be times when diplomats must make the running—perhaps most of the time. But there will be times when only senior officials or ministers can move the process. That is hardly news. The issue is the extent to which the three groups of players interact and secure the best, not the worst, from the system. We need to find dealmakers—and we need to create deal-making situations.

Clearly, I am straying a little from the immediate situation. However, this is all about delivery. What must also be delivered is something solid that will respond to the ambitions of developing countries. I happen to believe that the best the WTO can offer is, as I have already outlined, a big package in the core business of the Doha Round. With that—and especially for the least-developed countries—there will be need for some special and differential treatment and a large amount of non-discretionary technical assistance to aid implementation.

I fear the focus on making Part IV of the GATT significantly more operational is neither likely to be fruitful nor, even if it were, especially valuable. Denuding the WTO of all disciplines affecting least-developed countries harms—above all—the least-developed countries. If poor countries do not use the WTO for what it was intended—as a prop and encouragement for economic and regulatory reform—then the institution is never likely to deliver benefits to the poor.

I hope these realities will be kept in mind in the coming weeks. We must restore some credibility to multilateralism as a primary means of securing global economic progress. We need to demonstrate to many constituencies that the WTO is worthwhile.

Like it or not, one constituency that we are going to have to convince is the US Congress. As a European I am perfectly comfortable to say that without the US very little of value gets done in the WTO—and it was no less the case in the GATT. This may not be a popular message. But it is a necessary one if there is any danger of the US giving up on the WTO. I do not believe any such intention exists at present. There may be political irritation at the impact of dispute cases—and there may be business frustration at the sluggishness of the Doha Round in opening up markets. However, the US was instrumental in creating the WTO. The institution sits well with the generous and outward looking foreign policy principles that have traditionally been pursued and supported in Washington.

If the WTO can reach a respectable set of decisions on the Doha negotiating frameworks this July then I have little doubt that Congress will acquiesce in the rolling over of 'fast track' negotiating authority for a further two years—the two years in which the Doha negotiations will have to conclude. But without the clear prospect of a worthwhile Doha outcome it would be complacent of us to assume Congressional goodwill towards an institution that is manifestly failing to deliver.

The implications of the US stepping back from the WTO would be dangerous for all of us. For a start we would lose the Doha Round. Three years' work would have been for nothing. The prospect of eliminating export subsidies in agriculture would once again be a pipedream. Valuable practical advances—like that on trade facilitation—would be for the distant future. All the market access opportunities that could be opened up multilaterally will end up on the plates of the chosen few benefiting from bilateral or regional deals.

Furthermore, we should not be too confident about re-launching a trade round in the foreseeable future. Without US leadership the EU would be unlikely or unable to go it alone. And we are not yet at the stage where trade rounds without these two great markets could have any but the most marginal impact on the prospects for poor nations.

Two more potential costs stand out in this depressing scenario. The first is our ability to cope with the dramatically burgeoning presence of China in the global marketplace. That presence should be welcome and beneficial for us all ultimately. But only China's commitment to the WTO provides the basis for coping intelligently with the impact of such broad-based and dynamic competition.

The case of Russia—even now in the process of negotiating accession—is almost as serious. We need Russia fully integrated into the global economy. The WTO is presently driving the process of domestic regulatory reform. There is no other system out there that can pull Russia in the right direction. If, in the absence of such pressure, Moscow changes direction, we shall all be the losers—not just economically but perhaps in the context of our own security. Russia is prepared to pay a price for its WTO membership—but the price will only be justifiable domestically if the WTO holds on to its own credibility.

So, for China and Russia the WTO must deliver this month.

Finally in this gloomy litany, I think we must consider the impact of a failure this July on the crown jewels of the WTO—the dispute settlement system. I believe the DSU has been a truly remarkable success. It has taken on far more cases than we ever thought likely, or possible. With few exceptions the work of the panels, the Appellate Body and the secretariat's legal division has, rightly, been applauded. The body of jurisprudence—if I may call it that—is now hugely impressive. And the results are there for all to see. Disputes are being settled—often without recourse to the full procedure and usually without recourse to the

blunt weapon of retaliation. Without knowing it thousands—perhaps tens of thousands—of companies around the world have benefited from the work of dispute settlement in the WTO.

In short, this is not an instrument to put at risk. Yet the system has credibility only for as long as it is respected—with or without good grace—by the WTO's membership. Respect means accepting the findings of panels and the Appellate Body (AB) and implementing the recommendations—or, sometimes, taking the consequences of not doing so. As we have seen, where Dispute Settlement Body (DSB) recommendations require legislative action they can be a hard sell. In the final analysis however, legislators have continued to accept that the system can only work for their national interests if it also works for the national interests of others. In short, credibility and utility is only maintained by respect for DSU judgements.

It is profoundly to be hoped that this political perception of self-interest will persist. But we must ask the following question. If the institution within which the DSU operates becomes so tarnished by failure will dispute settlement continue to be revered as a process apart? Again, I do not want to be accused of scaremongering, but we would be complacent to ignore the dangers in a failure of the Doha Round this summer. The potential impact on dispute settlement in the WTO strikes me as one of the more insidious among them.

If we can successfully negotiate the watershed of July 2004, then the WTO has a chance to demonstrate that it can achieve the goals set for it ten years ago. It will not be easy. For the Doha Round, the most difficult will still be in front of us. After all, even assuming the best possible outcome in the coming weeks, we will be a long way from agreeing the detailed basis on which most of the negotiations will take place. Fixing precise targets for agricultural and non-agricultural market access bargaining will be hard. Settling clear timelines for implementation—especially with respect to developing countries—will be no less challenging. Yet it can be done. Indeed, it must be done.

However, looking ahead further, I have little doubt that some complex institutional issues must be tackled. The Doha Round has struggled for many reasons. Some are probably transitory. The political impact of the anti-globalisation movement and the rebalancing of the procedures of the WTO towards a broader involvement of developing countries will, I trust, be behind us. Making the institution and its rules valid for the coming decades will, however, require further reflection in the not too distant future.

There are probably four key issues—each of which the Consultative Board is considering—which are going to be fundamental to making the WTO deliver in the long term. As I have already mentioned we need a clearer demarcation of the nexus between the involvement of ministers, senior officials and Geneva-based diplomats. Second, we have to look at the decision-making process itself.



Third we need to consider the validity of broad trade rounds with large agendas. Finally, we must understand and make provision for the relationship between the multilateral system and a parallel system of bilateral and regional trade agreements.

I will not delve too far into these arguments. Let me merely give you a taste of the debate, much of which, in any event, I am sure you have all reflected on at one time or another.

The hierarchy of trade negotiations has always been problematic. Ministers and senior officials tend to blame Geneva for immobility—at the same time failing to send the kind of instructions that would provide negotiating manoeuvrability. Ambassadors in Geneva prefer to keep their turf clear and resent grand, high-flown political ‘agreements’ that seldom provide the substance for consensus at the technical level. At the same time the Geneva process is somewhat blinkered and, except at points of extreme crisis, not over-effective.

At root, it seems to me that the key is for ministers to understand better the realities and practical requirements of the Geneva process. At the same time, Geneva must build in to its consultative procedures the domestic political and economic environments within which governments must take their decisions on trade policies and formulate positions in trade negotiations. This is a two-way relationship and we need to ensure the institutional framework reflects it.

The process of decision-making is something different. It is long and frustrating. At the centre of the frustration is the consensus rule. Can or should we deviate from it? My personal view is that the rule is the fundamental safeguard in the WTO that stops the rich and powerful overwhelming the poor and weak. It is also the rule that gives WTO decisions absolute credibility in legislatures everywhere. This is not to say that there may not be occasions when we could reasonably deviate from consensus—as the Marrakesh Agreement allows—but I suspect they will be few and far between.

Should we stick with large trade rounds? While they are in process, the tendency is always to say ‘never again!’ We have limited experience of successful sectoral negotiations—though these have tended to be in areas where the door was open to reform and market opening. The key question is whether we would ever get multilateral commitments to reform agriculture outside a broad-based negotiating agenda in which the political pain can be diluted. The answer may be that we simply have to be much more modest and withstand the temptation to throw everything bar the kitchen sink into trade rounds. Maybe we should keep rulemaking separate from market access bargaining.

I have already referred to the challenge of proliferating regional agreements. I believe the challenge is very serious. It is partly caused by the limited results of the WTO at the multilateral level while, in diverting attention from Geneva, it is

itself partly responsible for those limited results. The Balkanisation of the global trading system is entirely illogical and dangerous while we are seeking to maximise the potential—especially in the interests of development—of an increasingly global view of trade and investment taken by the private sector. It is also very expensive. I hardly need to rehearse here the many studies showing the extra business costs associated with the chaotic multiplication of preferential duties and import regimes.

We need to find a way for the WTO to make the disciplines of GATT Article XXIV fully operational. Further, we need soon to consider how we can rationalize the situation. Establishing a date for free trade under the WTO would clearly be one way out. Are we ready for that yet? Probably not, but we need to have the debate before too many years have passed.

To conclude, therefore; we have some big issues to face for the future. Right now, we have a very concerning situation that faces us in the next four weeks. The stakes are very high. Failure is difficult to contemplate if the potential costs are kept in mind. I hope the negotiators in this room will ensure their national positions are elevated above the small and inconsequential. If anyone believes—as apparently some did in Cancun last year—that a breakdown of the Doha Round is some kind of victory, then they should think again. We will all lose from a failure this time. Agreement means we live to negotiate another day—and the institution of the WTO will be safeguarded until it can take the time to reflect on its own future.



## **Part II**

# **WTO Decision-making Procedures, 'Member-driven' Rule-making and WTO Consensus-practices: Are They Adequate?**



## *Chairing a WTO Negotiation*

*John S. Odell*

University of Southern California

Efforts by member states of the World Trade Organization to negotiate multilateral decisions have been less efficient and less legitimate since 1997 than many would prefer.<sup>1</sup> The most powerful and the least powerful members alike have complained about the WTO process of negotiating. The last effort to decide upon a new Director General in 1999 produced a remarkably nasty and prolonged fight that damaged the organization's credibility and the members' ability to reach consensus on substantive issues. Two of the three most recent ministerial conferences have ended in frustrating impasse. Although these were not the first deadlocks in history, conditions today are likely to make impasse more frequent and more difficult to break than before. And when WTO members fail to agree on improvements to their rules, conflicts tend to be driven into the legal dispute settlement process. Thus there has been some concern, as well, that potentially explosive conflicts that ought to have been settled by political negotiation will damage the dispute settlement institution.

Multilateral deadlocks are a problem for developing countries at least as much as for industrial countries. Stalemate may seem like a good thing, at first glance, to business leaders or politicians in a poor country who fear external pressure to open the home market to greater competition or absorb new regulatory burdens. But multilateral stalemate equally means no improvements to WTO rules that many of these citizens feel are imbalanced or inadequate and

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1 This paper draws from John S. Odell, 2004. *Mediating Multilateral Trade Negotiations*, Paper presented at the 2004 annual meeting of the International Studies Association. I am grateful for comments by Oran Young on that paper, to Stuart Harbinson and Sheila Page for comments on an earlier draft of this paper, and for the support of the University of Southern California College of Letters, Arts, and Sciences and its School of International Relations while conducting this research. Neither these friends nor any official who spoke to me confidentially is responsible for my claims or conclusions.

yet may well be enforced. When deadlocks drive problems into the realm of adjudication, the developing countries' larger numbers make no difference to the outcome.

Members and their Director General have made modest changes to their negotiation processes since 1999, and these changes helped them fashion an agreement to launch the Doha round in 2001. But in 2003 they ran aground again in Geneva and Cancún. In 2004 they hammered out some partial deals that they hoped would move the talks ahead once again. Farther-reaching institutional changes have been proposed. Some would strengthen the centre while others would limit leaders' discretion.<sup>2</sup> But stalemate reigns regarding these more ambitious ideas as well.

It is a truism that ultimate responsibility for future WTO outcomes will rest with the member states. If trade ministers want future conferences to be more productive under present rules, for instance, they could instruct their ambassadors to close more gaps in Geneva prior to the conference, giving authority to make concessions earlier rather than holding back as many concessions until the last moment. This truism is only part of the story, however. Each minister and diplomat is surrounded by an international reality, and his or her future decisions will also depend on the collective reality in view. This chapter addresses one means by which this collective reality can be managed or mismanaged. I assume for the moment that there will be no formal changes to WTO institutions for negotiation and decision-making.

GATT and WTO member states have given their Director General the role of overall chair of the Uruguay and Doha round negotiations. Members also give special influence to ministers and ambassadors who temporarily chair ministerial conferences and subsidiary negotiating bodies. Casual observation suggests that these chairpersons' decisions can make a difference to the collective outcomes. Yet little has been published analyzing or even describing how they play this role

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2 Blackhurst, Richard, 'Reforming WTO Decision-Making: Lessons From Singapore and Seattle' in Klaus Gunter Deutsch and Bernhard Speyer (eds.) *Freer Trade in the Next Decade: Issues in the Millennium Round in the World Trade Organization* (2000) 295-310. Schott, Jeffrey J., and Watal, Jayashree, 'Decision Making in the WTO' in Jeffrey J. Schott ed., *The WTO After Seattle* (2000) 283-92; Oxfam GB, *Institutional Reform of the WTO* (2000) [http://www.oxfam.org.uk/what\\_we\\_do/issues/trade/wto\\_reform.htm](http://www.oxfam.org.uk/what_we_do/issues/trade/wto_reform.htm); Sampson, Gary P., ed. *The Role of the World Trade Organization in Global Governance* (2001); Cottier, Thomas, and Satoko Takenoshita, 'The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response', *Swiss Review of International Economic Relations* (2003) 58: 171-214; Kenya and 10 other African states, 14 August 2003 (WT/GC/W/510); Commission of the European Communities, *Reviving the DDA Negotiations: the EU Perspective* (2003).

or what determines the results.<sup>3</sup> Part of what chairs do is a type of mediation, but most research on international mediation has concentrated on wars and military-political disputes. I have found nothing that a future WTO chair or others could read to learn about the informal essence of the process of mediating multilateral trade impasses. It is more like a folk art at this stage. I have interviewed a number of individuals who have played the role and others who have observed them closely. This chapter reports provisional findings from research still in progress.

The main emerging points are that WTO chairs have limited but significant capacity to influence the efficiency of consensus building and the resulting distribution of gains and losses and its legitimacy. Chairs can consider three types of mediation tactics for helping members overcome deadlocks. But chairs face challenges and dilemmas in deciding how to use this influence, which sometimes open them to controversy. Experience suggests positive and negative lessons for future practice.

## I. Incentives to Delegate Influence to a Mediator

Three types of obstacle stand in the way of negotiated agreements that would advance the common interest, in any international negotiation involving dozens of states. Still other impediments arise from the special features of the WTO. These recurring problems give governments that seek agreements incentives to delegate influence to a mediator and consensus builder on behalf of the whole.<sup>4</sup>

First, the information obstacle to achieving complex multilateral agreements is huge. To discover whether any package deal would satisfy more than 100 governments from extremely heterogeneous countries on highly technical issues poses a mind-boggling challenge. The needed information in the WTO includes not only economic forecasts but also political information such as

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3 The pioneering article by Winham (Winham, Gilbert R. 1979, 'The Mediation of Multilateral Negotiations' *Journal of World Trade Law* (1979) 13: 193-208) has not been followed up, to my knowledge. The present piece takes a step toward describing recent practice. More rigorous analysis will have to await the accumulation of more thorough description.

4 Tallberg, Jonas, *The Power of the Chair in International Bargaining*. Paper presented at the annual meetings of the International Studies Association (2002) provides valuable insights on this subject. See Odell, John S., *Negotiating the World Economy* (2000) 400-429 for a survey of negotiation analysis and new contributions regarding trade and monetary negotiations. Also see the Economic Negotiation Network at [www.usc.edu/enn](http://www.usc.edu/enn), for information about more research on the process of negotiating over international trade and finance.



member governments' true minima, and whether a coalition defending a common position is likely to hold together or fragment.

Furthermore, each player has a tactical incentive to conceal or exaggerate its true reservation value, worsening the information problem for a consensus builder. When all do so, they can shrink or eliminate the perceived zone of agreement. If no one can identify a deal that would satisfy all the exaggerated minima, they walk away even when some deals would have satisfied their genuine but unknown minima.

Exacerbating the effects of deliberate tactics is less conscious partisan bias in interpreting information. Experimental subjects playing partisan roles genuinely tend to overvalue their own alternatives to agreement, compared with judgments by non-partisan observers given exactly the same information.<sup>5</sup> Partisans tend to recall more information favourable to their own position<sup>6</sup> and to use a self-serving conception of fairness.<sup>7</sup> These biases encourage firm refusals to concede, which intensify impasses.

A second obstacle in any large group is the familiar free rider problem. In the WTO, the Organization's credibility as an enforcer of rights and a forum for negotiating future agreements is a public good for the members. One cost of supplying this good is taking the initiative to propose a compromise that would strengthen the Organization. Taking the initiative is costly in negotiation terms since a proposal for a compromise undermines the credibility of the speaker's commitment to his or her preferred position and hence the ability to claim the largest possible share of the gain. Only the very largest traders conceivably stand to gain enough to pay, individually, this cost of taking the initiative toward compromise in the WTO.

Third, vast inequalities in power and wealth across member states can be a source of suspicion and resistance to multilateral agreement. Naturally weaker members worry about exploitation and try to use the organization to compensate for their weakness, and naturally stronger members resist agreements that would cost them. In all realms of world politics negotiating is partly a struggle over the distribution of gains and losses. Today poor small traders such as those in the African Group are better organized and prepared than earlier, and many are drawing support from non-governmental

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5 Lax, David A., and James K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (1986) 58.

6 Thompson, Leigh, and G. Loewenstein, 1992. 'Egocentric interpretations of fairness and negotiation' *Organizational Behavior and Human Decision Processes* (1992) 51: 176-97.

7 Babcock, Linda, and George Loewenstein, 'Explaining Bargaining Impasse: The Role of Self-Serving Biases', *The Journal of Economic Perspectives* (1997) 11: 109-26, 111-13.

organizations. Developing countries are showing greater willingness to stand firm and block the whole in order to defend against losses and claim greater gains.

On top of these general obstacles to agreement, the WTO in particular makes decisions not by majority vote but by consensus, theoretically giving the smallest member the authority to block the whole. One reason is that the stakes are often higher than in many organizations, since negotiated WTO rules become binding legal obligations that can be enforced through dispute settlement. At the same time, the WTO lacks formal devices for promoting consensus that are available in other organizations. The Director General lacks explicit authority to advance original proposals. This Organization has no small representative executive body that could function as a site for more private efforts to change negotiating positions and build consensus. All formal meetings are open to the whole membership.

These structural obstacles give rational members who seek agreements an incentive to delegate to a mediator the function of helping them break impasse in the common interest. Formally the WTO gives its chair only limited authority. The shared understanding is that the WTO is to be a member-led organization. The only rules pertaining to this post are general and sketchy. Chairs are selected by the member states by consensus. ‘Chairpersons should continue the tradition of being impartial and objective; ensuring transparency and inclusiveness in decision-making and consultative processes; and aiming to facilitate consensus.’<sup>8</sup> Chairs are not permanent civil servants; they are national delegates except for the Director General as chair of the Trade Negotiations Committee. The term of office is short—one or two years for subsidiary bodies and only a week for the ministerial chair. They have no authority to make policy decisions for any other member or to originate substantive proposals. They have no budget or staff independent of their own governments and the Secretariat. Thus chairs from most states, which have small or tiny missions in Geneva, rely heavily on the Secretariat. Secretariat officials typically collect evidence for and suggest ideas to chairs and facilitators including ministers, and sometimes draft the chair’s report describing a meeting’s outcome before the meeting has taken place.<sup>9</sup> Individual chairs vary in the degree to which they follow or reject Secretariat advice.<sup>10</sup>

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8 Paragraph 2.2, WT/L/510, rules for selecting officers to standing WTO bodies, December 2002. Also see minutes of the WTO Trade Negotiations Committee, 28 January 2002, TN/C/M/1, 3-4.

9 Telephone interview with a veteran chair, 13 July 2004. Interviewees spoke on condition of anonymity.

10 Interviews with Secretariat leaders, Geneva, 2002 and 2003.

Informal convention gives the chair's office greater influence than the sketchy rules provide. Chairs have the capacities to consult privately with members, convey information and ideas to them, schedule formal and informal meetings, set meetings' agendas, preside over sessions, assemble texts based on delegations' proposals as possible vehicles for consensus, decide when to adjourn meetings, and make statements to the mass media as chair of the conference or council.

Mediation has been defined as a form of assisted negotiation.<sup>11</sup> The mediator is a helper who intervenes with the consent of the parties and with the mission of attempting to help them find an agreement. A mediator does not have authority to make a decision for the parties.<sup>12</sup> The function has been partly institutionalized in many international organizations.

Mediation becomes relevant when there is a deadlock, and deadlocks often form early in multilateral trade negotiations. As a rough generalization, WTO diplomats typically open with what are called distributive tactics—high demands, resistance to discussing the demands of others, and interpreting and manipulating information to their advantage and the disadvantage of adversaries. Governments link their concessions on some issues to gains on other issues. If there is an announced deadline, they tend to delay integrative proposals and concessions until weeks and hours prior to that deadline. Delegates meet in small groups without necessarily reporting to the chair all they are doing.

Another basic property of these situations opens space for chairs' influence. Governments' reservation values, as theorists call them, or bottom lines as negotiators call them, are not always as clear and firm as theorists assume. The reality, one veteran GATT and WTO negotiator declares flatly, is that: 'Most delegations don't know their own bottom lines.'<sup>13</sup> One reason is that some WTO delegates and most trade ministers know little of many technical legal and economic WTO issues they must manage, until they have to begin negotiating over them. In addition, while a vocal constituency might pose a clear limit on some issues, many WTO delegations hear little or nothing from constituents

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11 Bennett, Mark D., and Michele S. G. Hermann, *The Art of Mediation* (1996).

12 Some understandings of mediation are narrower than what I have in mind. Here mediation is not restricted to bilateral conflicts or ad hoc interventions. Mediation is not restricted to the activities of outsiders or strictly neutral helpers. The partiality or impartiality of the mediator is a variable to be observed rather than a matter of definition. Specialists have engaged in lengthy debates over the distinctions between negotiation, mediation, facilitation, and arbitration. See for reviews Bercovitch, Jacob, (ed.) *Studies in International Mediation* (2002) 4-8 and Raiffa, Howard, John Richardson, and David Metcalfe, *Negotiation Analysis: The Science and Art of Collaborative Decision Making* (2002) 311-12.

13 Interview, Florence, Italy, 3 July 2004.

back home about many issues under negotiation. (The shortage of expertise and attention in many capitals also means that the Geneva process among professional negotiators and mediators has scope to operate with greater autonomy from political leaders than a simple model of state-to-state international relations would suggest.) Even experienced trade policy makers from the richest countries have at most an approximate feel for what might be negotiable abroad, before talks begin. The difficulties in identifying a clear reservation value at the outset multiply in a complex round of talks encompassing a dozen or more technical issue areas simultaneously. There, a final deal will link special deals on most of these areas, and trade-offs between areas probably will pose choices later that can be foreseen only dimly. Another experienced chair adds that even when they begin with clear instructions and limits, negotiators often find with experience that their instructions need adjusting.<sup>14</sup> Instructions from capitals as a set are mutually inconsistent at the outset, and some diplomats begin exploring for ways to make a gain on one issue by trading a concession on another, and sometimes for ways to reframe the issue space itself. Thus in practice rationality is bounded and reservation values, if they exist, are unavoidably partly subjective and partly endogenous to the international process.<sup>15</sup> As a result, the chair has a capacity to facilitate or impede this informal exploration and adjustment.

The WTO chair, facing these general and special obstacles to agreement, has a menu of three types of mediation tactics from which to choose. The types increase in strength from the more passive to the more interventionist or manipulative.<sup>16</sup> Available space permits only selected illustrations.

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14 Telephone interview, 13 July 2004.

15 Odell, John S., 'Bounded Rationality and the World Political Economy' in David Andrews, Randall Henning, and Louis Pauly (eds.) *Governing the World's Money* (2002) 168-193 develops this theoretical point and its long-term implications for political economy and constructivist scholarship.

16 Scholarship on mediation of other international conflicts suggests a typology for organizing our thinking about this role, adapted from Bercovitch, Jacob, 'Mediation in International Conflict: An Overview of Theory, a Review of Practice' in I. William Zartman and J. Lewis Rasmussen (eds.) *Peacemaking in International Conflict: Methods & Techniques* (1997) 125-153 which built on Touval, Saadia, and I. William Zartman *International Mediation in Theory and Practice*, SAIS Papers in International Affairs, 6 (1985).

## II. Mediation Tactics

### A. *Type 1: Observation, Diagnosis, and Communication Tactics*

The most passive WTO mediation tactics consist of observation, diagnosis, and communication. The chair is given a privileged central position for collecting information about the sources of impasse and is expected to use this capacity to help governments find a balanced consensus. Thus as a deadline approaches, the effective mediator speaks privately with delegations, trying to separate bluffs from true reservation values and to form a diagnosis of specific blockages. One negotiator described such tactics used during the drafting of the Uruguay round dispute settlement understanding:

Ambassador [Julio] Lacarte [of Uruguay] was a great chair. He listened very carefully. He went to great lengths to give everyone a sense of being included. Then he also called in each delegation, or spokesman for several delegations, for what he called 'confessionals'. He also traveled to some capitals. Essentially he said, 'Trust me. Show me your cards.' I'm not sure how many really did. But he tried to test, to feel, to probe for where you had flexibility and where you really had none. And once he found something where you really had no flexibility, he took that on board as something you were going to have to have. On other issues, he expected you to sit silently and cooperate when it was something the other guy had to have.<sup>17</sup>

The effective chair also communicates information back to delegates and groups to attempt to offset partisan biases, for instance reporting confidential evidence from other 'confessionals' indicating that the delegation's position is not winning support. In addition, sometimes when a chair has felt the debate is not well enough informed technically, the chair has recommended to delegates that they ask the secretariat to prepare a technical background paper for the negotiating group. During the Uruguay round talks on dispute settlement rules, for instance, such neutral papers, stimulated indirectly by the chair's initiative, may have helped move discussions beyond the reiteration of initial partially-informed positions.<sup>18</sup>

Even this passive level of activity raises some dilemmas and pitfalls:

- The most obvious pitfall would be failing to ask and listen carefully. Critics of the chair of the 1999 ministerial, US Trade Representative Charlene Barshefsky, complain that she devoted too little effort to consensus building. She spent little time coordinating with the Director General or the other ministers who were to act as facilitators, she arrived in Seattle at the

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<sup>17</sup> Interview, Washington, 19 June 2000.

<sup>18</sup> Interview with a participant in those talks, Florence, Italy, 3 July 2004.

last moment, and in Seattle she seemed to spend less effort consulting privately with ministers than veterans expected.<sup>19</sup>

- Giving an impression of bias would undermine confidence that the chair can be trusted not to exploit confidential information, and low trust would choke off the flow of information. This constraint is likely to bind any prospective chair from a country that has significant trade stakes in the issue to be negotiated. Participants report that Barshefsky deepened this predictable scepticism about the United States as chair with her actions in Seattle. In one session she even acted personally as the chief US negotiator, claiming value from others while also occupying the post of the conference's top mediator.<sup>20</sup> A European GATT veteran summed up the conclusion of many by saying, 'The American in the chair was one of the reasons for failure. She gave the impression she would not do anything that was contrary to US national interests.'<sup>21</sup>
- Operating without thorough personal knowledge of the issues would be another pitfall. The currency of these negotiations consists of highly technical commercial and legal language and facts. One experienced mediator, thinking of Directors General, could have been referring to any chairperson:

The DG has to know the inner detail of the subject, the small print. The delegations are well aware of the small print and will use it for their own purposes whenever possible. The DG must know more than they do, or at least as much.<sup>22</sup>

- A related pitfall would be to accept a fake bottom line as genuine. Doing so would narrow possibilities for agreement unnecessarily and perhaps fatally. During the Uruguay round, one chair spotted what he, given his knowledge of the issues and the interests, regarded as an obviously fake minimum:

In a consultation with the European Community, I remember the delegate told me he had to have something. I said, 'Forget it. We are not even going to discuss that.' He protested and I said, 'Tell your ambassador that the chair would not even talk about that.' And sure enough, when they heard this, they dropped it.<sup>23</sup>

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19 Interviews, Geneva, June 2000. See Odell John S., 'The Seattle Impasse and its Implications for the World Trade Organization', in Daniel L. M. Kennedy and James D. Southwick (eds.) *The Political Economy of International Trade Law* (2002).

20 Interviews, Geneva, June 2000 and July 2004.

21 Interview, Geneva, 19 November 2002.

22 Interview, 5 December 2002.

23 Interview, 5 December 2002.

### **B. Type 2: Formulation Tactics**

WTO chairs regularly go beyond minimal tactics and reach for moderately interventionist ones. First, at the earliest stages the DG, other chairs and members create an organization for the talks. Multilateral trade negotiations are far too complex for any single individual to perform the mediation function effectively alone. Thus if this form of leadership is to be provided, an organization of individual mediators must be constructed and managed to oversee the process and unify it at the end. Thus they establish specialized negotiating groups by issue area, select chairs for these groups, set interim deadlines, coordinate the agendas, schedule meetings, and preside over them. The Secretariat provides organizational support.

Supplementing the formal organization, the informal gathering is a standard conflict resolution technique in nearly every realm of social life. In the GATT, the informal 'green room' meeting became a regular feature. During the Uruguay round Director General and Chairman Arthur Dunkel invited chief negotiators from the states representing three-quarters of world trade to meet off the record, first in a small conference room in the DG's office suite. Other members were not notified that a meeting would occur, no written summary of remarks was prepared, and each participant was free to speak personally. After complaints from the excluded, Dunkel shifted to hosting private dinners in his home. The table accommodated up to 24 chairs and no deputies—only chief negotiators as he called them—were welcome. The country list was the same each time except for perhaps 20 percent. It regularly included developing countries such as Brazil, Argentina, Chile, Mexico, Egypt, Morocco, India, and others. The ASEAN countries and the Nordics each chose to send one member to attend for their group. Dunkel might add an ambassador from a small country who could be counted on to inject the right joke when arguments became heated. Sometimes Dunkel tested an idea for a settlement and heard franker statements about what capitals could and would not accept. The EC ambassador sometimes explained which EC member states were the main opponents or *demandeurs* of a particular idea, cuing others to talk to them. Some participants also served as chairs of negotiating groups and thus potential mediators. Dunkel hoped these dinners would help create a core of individuals who would identify personally, in their hearts, with the success of the Uruguay round as a common enterprise, while also defending their national positions. Assembling them regularly as a team contributed to *esprit de corps*.<sup>24</sup>

WTO Directors General continued this tradition of off-the-record meetings of leading states occasionally in Geneva and during ministerial conferences as a

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24 Interview with a regular participant in these meetings, Geneva, 19 November 2002.

device for breaking deadlocks. But 1999 and especially the chaotic Seattle ministerial brought an explosion of angry complaints. Some smaller members and nongovernmental organizations publicly denounced the WTO for being non-transparent, undemocratic, and unfair to the weak. Immediately after Seattle, the organization was chaotic, clearly lacking consensus on how they could organize their work. US and EU leaders acknowledged that the traditional negotiation process had to change. Yet through what process were the members to negotiate such a change if the inherited GATT process was no longer legitimate?

This situation generated an example of how chairs handle dilemmas at this level. In 2000 Director General Mike Moore proposed some confidence building measures, including special meetings to give attention to the developing countries' demands concerning implementation of the last round. Moore also met with coalitions in Geneva and travelled to capitals to meet ministers of countries that felt excluded. The first DG to visit Africa, Moore made seven trips there. Between visits he telephoned two or three ministers a week to keep them informed and strengthen relationships for the next ministerial conference.<sup>25</sup>

Meanwhile Kåre Bryn, Norway's Ambassador and chair of the WTO General Council, held more frequent Council meetings, held private consultations, and attempted to propose a set of procedures that would permit some work to be done privately in small groups while still respecting the authority of the plenary meeting. This issue (labelled 'internal transparency') remained sensitive and some refused to agree. Then he attempted to propose some principles to guide such procedures; again no agreement. Yet Bryn realized eventually that no one had been complaining about the way members had actually been operating that year so far. In mid-year he wondered, 'What about just writing down a description of what we have been doing?' Bryn published his understanding of a possible consensus, in his own name, making two main points: it is important, first, that members are advised of the chair's intention to hold a small meeting and 'members with an interest in the specific issue under consideration are given the opportunity to make their views known.'<sup>26</sup> Second, small groups never make decisions for the whole; all their results must be reported back to the full membership for their consideration. He was not certain even this statement would survive, but although the statement was not agreed, members continued to cooperate on this basis. The next year his successor as chair, Stuart Harbinson,

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25 Interview, Geneva, 9 November 2002.

26 'General Council, Monday 17 July 2000, Internal Transparency and the Effective Participation of Members, Chairman's Statement,' provided by Ambassador Kåre Bryn, Norway's Mission to the WTO, Geneva.



followed this understanding during preparations for the Doha ministerial. That year there were no official complaints about exclusion from Geneva consultations and the WTO reached agreement on an agenda for a new round. In 2002 the Trade Negotiations Committee agreed to work on the basis of its best practices of the past and cited the 2000 Bryn statement.<sup>27</sup>

During the period through 2004, chairs also relied increasingly on selected members to represent coalitions of states during private consultations. One state would represent the African Union, another the Caribbean Community, and so on. Some coalitions, like the Least Developed Countries, were defined functionally rather than geographically. In agriculture talks in 2004 the chair invited Indonesia to represent the Group of 33, formed to protect special products of developing countries. Initially chairs decided which state to invite, but practice tended toward inviting whichever state had been selected by the group's members.<sup>28</sup> Delegates were becoming accustomed to operating as members of coalitions, and it was expected that the delegated representative would confer with fellow coalition members before and after the restricted meeting. It was also understood that a delegation that disagreed with its coalition partners would still have a chance to speak on its own behalf in plenary sessions. Complaints from delegations about inadequate representation in informal consultations declined sharply, in marked contrast to 1999 and before (and NGOs continued to voice complaints.) Although proposals to formally establish a representative executive body failed to achieve consensus, an approximation reportedly became normal informally.

Recent Directors General have also organized informal meetings of selected ministers prior to full ministerial conferences. In 2001 Moore invited 22 ministers to meet in Mexico City in August and in Singapore in October, prior to the November Doha meeting. Moore added selected African ministers to the inner circle for the first time. An ambassador from a developed country described what occurred in these 'mini-ministerials':

These were not decision-making sessions and were not meant to be. They were important, first, for building relationships between people. This way you didn't show up in Doha and shake hands for the very first time. There were lunches where no one was present except ministers. So they could relax and begin to get to know each other. And second, they were important for putting things in a political context. Pascal Lamy would say things like, 'You've got to understand that I have *got* to have something on environment.' These were all

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27 Interview, Geneva, 28 November 2002.

28 Interviews with a senior Secretariat leader and a delegate to several ministerial conferences including Seattle and Cancún, August 2004.

politicians and they all understand political demands. And so I heard some say, 'Well, I don't like what you are doing and don't agree, but I hadn't quite thought of it that way.' These meetings were very, very useful. I don't think Doha would have been a success without them.<sup>29</sup>

Going beyond organization, another consequential formulation tactic is to introduce an informal single negotiating text (SNT) in the chair's name. This familiar move normally occurs after delegates have made conflicting substantive proposals and attempted to generate support yet no consensus has been reached. The chair normally decides what to include in the text after considering Secretariat proposals and conducting extensive 'confessionals' with delegations. The SNT is meant as a vehicle for moving the large group toward agreement. It is informal in the sense that no delegation has approved it; it is an intermediate starting point for more talks if the parties accept it as such. A cautious variant presents two or three alternative positions on each issue in square brackets. This move can help reduce a plethora of options to a few, excluding proposals that are not generating support, without taking a position between the few, but is not a true 'single' text. A moderately risky variant suggests a particular resolution for each issue and introduces a package of multiple issues meant as a single balanced compromise. The bolder variant can be conceived as attempting to inject a focal point<sup>30</sup> into the process or pull the parties toward one.

This bolder procedure subtly changes the negotiators' incentives in talks among themselves. Before there is any mediator's text, as each delegation attempts to conceal the space it may have for falling back, they all make it difficult to coordinate their expectations about how each would behave regarding a potential compromise settlement. But once they expect that a chair is going to introduce a package deal, parties have a greater incentive to initiate compromises among themselves since otherwise the chair will take the matter out of their hands.<sup>31</sup> Furthermore, if the chair presents a revised SNT and reports that it represents the closest these parties can come to consensus, judging from his or her private soundings, the chair uses that information advantage to persuade the parties that the cost of rejecting it will be high. His or her text will be the most prominent focal point. The chair with Secretariat advice frames their alternatives in a new way that is more favourable to agreement than if there were no focal point.<sup>32</sup> Intervening more boldly always runs a risk of

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29 Interview, Geneva, 1 November 2002.

30 Schelling, Thomas C., *The Strategy of Conflict* (1960) chap. 3.

31 Buzan, Barry 'Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea', *American Journal of International Law* (1981) 75: 324-48.

32 See Bazerman, Max H., and Margaret A. Neale., *Negotiating Rationally* (1992) chapter 5, for general insights about framing in negotiations.

rejection, but 'your need to take risks increases the closer you get to the deadline,' as one veteran puts it.<sup>33</sup> Even the fairest and most public-spirited chair can expect criticisms of a compromise text from delegates seeking to defend their preferred positions strongly. One sign of an effective mediation will be that few delegations reject the SNT as a basis for further talks.

Some of the best-known examples of chairs formulating texts appeared in the so-called Dunkel draft of 1991. The 1990 Brussels ministerial conference, the scheduled end point of the round, ended in disarray. The next year Dunkel managed to get the talks restarted with the hope that a comprehensive deal could be hammered out by November 1991. In some negotiating groups, delegates and chairs worked out agreements, but by mid December, after an intense period of essentially non-stop negotiations, divisions still remained on other key issues:

On 18 and 19 December, each of the chairmen ... made their own decisions on all the questions still unsettled. The GATT Secretariat gave advice, but these final decisions were those of the individual chairmen... Dunkel pointed out that [this Draft Final Act] was the outcome of both 'negotiation among you, the participants, and arbitration and conciliation by the chairmen when it became clear that, on some outstanding points, this was the only way to put before you the global package of results of this Round.'<sup>34</sup>

He told the members they could either accept this draft in its entirety or reject it, and to add to the pressure to settle, he announced that he would be leaving as Director General.<sup>35</sup> Dunkel personally took responsibility for proposing a settlement for the most explosive issue, agriculture. To help refine the terms of that deal he staged a private simulated negotiation. The European Community soon rejected that section as too demanding. But this GATT text, along with credible bilateral threats from the USA, may have helped EC commissioners build support for an internal reform of the Common Agricultural Policy in 1992, which paved the way for a GATT agreement late in 1993.

The tactics used in Geneva to prepare for ministerial conferences in 1999 and 2001 offer contrasts between the two variants.<sup>36</sup> In both years many

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33 Interview, Geneva, 23 September 2002.

34 Croome, John, *Reshaping the World Trading System: A History of the Uruguay Round*, 2nd and revised edition (1999) 254-55.

35 Interview with a participating GATT Secretariat leader, 19 November 2002.

36 Developed further in Odell, John S., *Making and Breaking Impasses in International Regimes: The WTO, Seattle, and Doha*. Paper presented at the 2002 meeting of the British International

governments sought a declaration launching a new round while others sought to prevent or delay negotiations on many issues. In 1999 the members were divided on many issues and many circulated proposals. General Council chair Ali Mchumo of Tanzania then issued a draft ministerial declaration in October. Rather than an integrated compromise text, this thirty-four-page document presented rival texts advanced by contending groups in square brackets. Under the implementation issue, he listed three alternative paragraphs and under agriculture, four. The chair even accepted provocative language that criticized members whose ministers would have to sign it. No mediator can make governments resolve their differences. But once delegations saw their positions in this official WTO document, the process amounted to convincing them to lose things they seemed to have won, making it more difficult to move them toward consensus.<sup>37</sup> The cautious variant (resulting from a process which had been favoured by many besides Mchumo) runs an unintended risk of making the deadlock more difficult to dissolve.

In 2001, after this experience and Bryn's consultations, General Council chair Harbinson eventually followed the bolder variant. In April after consultations he proposed a bare checklist of topics that would need to be included in a declaration, without any text. Members accepted this list, formed coalitions, wrote proposals, and negotiated among themselves over these issues. Harbinson held informal meetings open to any interested delegation to try to explore solutions for particular issues. By July most gaps remained substantial and firm. He announced that in September he would issue an informal compromise draft declaration and he did so, a package deal with few square brackets, meant to be seen as balanced. Many delegations predictably criticized it for the ways in which it diverged from their positions. But many said it could serve as a basis for further talks. Some in fact said off the record that it was probably as close to a consensus as could be achieved before ministers gathered.<sup>38</sup> In addition Harbinson issued two special draft declarations, concerned with implementation and health and property rights. After a revision to the main text in October, Harbinson sent his SNT to the minister who was to chair the conference. He did not characterize the text as agreed, though this procedure naturally made it more difficult for dissenters to prevail. Pakistan and India denounced Harbinson for excluding some of their positions and for exceeding his authority. But much of the

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Studies Association and the University of Southern California Center for International Studies (2003).

37 Interviews, Geneva, June 2000. This insight is consistent with psychology's prospect theory, the laboratory finding that people hate losses more than they value gains of the same magnitude, and hence will take greater risks (e.g., of no agreement) to avoid losses.

38 *World Trade Agenda*, 15 October 2001, 1.

negotiating work of 2001 had been completed. By the time the ministers left Doha, they had adopted a main declaration whose language was the same in many respects, and whose structure was identical to Harbinson's October draft. It had functioned as a focal point.

Attempts in 2003 to use the same formulation tactic fell short and illustrate the hazards of boldness when parties are far apart. On 24 August General Council chair Carlos Perez del Castillo, in close cooperation with Director General Supachai Panitchpakdi, proposed a largely integrated draft declaration for ministers in Cancún.<sup>39</sup> Their agriculture text was based mostly on a joint proposal from the EU and the US with some nods to the new G20 group of developing countries. Regarding the proposed 'Singapore' issues—which the EU and its allies Japan and Korea wanted added to the agenda and which 90 developing countries repeatedly opposed—this text cautiously presented two alternative texts in square brackets. Perez del Castillo and Panitchpakdi did, however, append annexes specifying modalities for negotiations on the two most controversial Singapore issues, as drafted by the EU coalition but not approved by others. This text as a whole was disappointing to those developing countries that had been demanding improvements in special and differential treatment and implementation and an end to cotton subsidies, citing promises in 2001 that this would be the 'development' round.

In Cancún the conference chair, Mexico's Minister Luis Ernesto Derbez, introduced a bolder revised draft declaration on Saturday 13 September. Derbez had selected several other ministers to join his team of mediators, including Singapore's George Yeo to specialize in agriculture and Canada's Pierre Pettigrew for the Singapore issues. Derbez largely delegated mediation of each issue to the respective 'facilitator' aided by Secretariat leaders.<sup>40</sup> The Pettigrew-Derbez draft had ministers commencing negotiations on two Singapore issues and setting a future date for talks on investment, the most controversial issue—that is, moving beyond the Geneva draft in the EU direction despite public warnings from 90 other members. At the same time the larger declaration continued to reject Africa's proposal on cotton subsidies<sup>41</sup> and other developing country demands on SDT and implementation. On cotton the mediators

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39 WTO document JOB(03)/150/rev.1. This was a revision of an earlier first draft. Other accounts of the Cancún process include Bernal, Luisa E., Rashid S. Kaukab, Sisule F. Musungu, and Vicente Paolo B. Yu III, *South-South Cooperation in the Multilateral Trading System: Cancún and Beyond*, T.R.A.D.E. Working Paper 21 (2004) and Narlikar, Amrita, and Rorden Wilkinson, 'Collapse at the WTO: A Cancún Post-Mortem', *Third World Quarterly* (2004) 25:447-60.

40 Interview with a member of the Mexican team, 3 July 2004.

41 WT/GC/W511, a proposal from Benin, Burkina Faso, Chad and Mali, 22 August 2003.

inserted diversionary language from the United States, the leading subsidizer. This formulation did include some new nods to developing countries on agriculture<sup>42</sup> and one option to continue protection of industrial sectors.<sup>43</sup>

Many developing countries denounced the Derbez text angrily and bitterly, especially its tilt in favour of EU demands they had repeatedly rejected, during a Saturday evening Heads of Delegations meeting. Africans expressed outrage at finding US language on cotton subsidies in place of their own.<sup>44</sup> Some suspected the giants had again cooked up a deal in private and were planning to twist arms to ram it through.<sup>45</sup> WTO spokesman Keith Rockwell said the only consensus seemed to be that all disliked this chair's formulation.<sup>46</sup> After the session, India's minister met privately with the Director General to make his anger about the Singapore issues even more credible.<sup>47</sup> Many participants report that the mood among negotiators that night was unusually ugly. Delegations did not converge around this single text as a focal point. Indeed judging from the reaction, the decision to introduce this particular formulation might have unintentionally made the task of settling in Cancún more difficult.

This intermediate level of mediation, then, raises its own dilemmas and risks.

- **The dilemma of timing**

Two veteran chairs warn newcomers not to offer their own formulations too early.<sup>48</sup> It is important to keep the heat on delegates to suggest their own integrative formulations and convince their capitals of the need for compromise. Otherwise they might not be ready to accept the mediator's suggestion. After Cancún in spring 2004, WTO mediators made a point of trying to stay out of the action until parties had begun to move off their positions. But waiting too long can also make a chair ineffectual.

- **The dilemma of the square brackets**

The cautious approach of listing major alternatives in square brackets is safer but runs the risk of reinforcing an impasse. One veteran chair believes that

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42 *Inside US Trade (IUST)*, 15 September 2003, 9.

43 *IUST*, 15 September 2003, 1-2.

44 *Bridges Daily Update*, 15 September 2003. Kenya expressed its deep disappointment in WT/MIN(03)/W/21, 13 September 2003. Brazil detailed its objections to the agriculture annex (talking points used by Minister Amorim, 13 September, at [www.ictsd.org/ministerial/cancun/documents\\_and\\_links.htm](http://www.ictsd.org/ministerial/cancun/documents_and_links.htm)).

45 Interview with a participating developing country ambassador, Geneva, 5 November 2003.

46 *IUST*, 15 September 2003, 8.

47 Interview with a Secretariat official, 13 August 2004.

48 Interviews, Geneva, 19 November and 28 November 2002.

presenting no chair's text at all will be better for the organization than one with many square brackets.<sup>49</sup> The bolder approach has a better chance of spurring movement toward consensus but runs a greater risk of rejection by the dissatisfied.

- **The related dilemma of determining whether stated reservation values are bluffs or genuine**

Confessionals may help resolve this dilemma, if they allow confident identification of true bottom lines different from stated ones. But when the chair hears the same firm positions in private as in public, he or she, always lacking complete information, may on the one hand bet that a stated position is a bluff and issue a compromise formulation. The danger on this side is illustrated by the 2003 case, when Pettigrew and Derbez may have bet that African and least developed ministers would accept some Singapore issues despite their public rejections. The opposite risk is to bet that inconsistent stated positions are final when in fact players still can be convinced they have room for flexibility, offer no compromise formulations, and fail to realize an available opportunity for agreement.

- **The dilemma of the weights**

If members work out their own provisional compromises, the chair can incorporate those. Otherwise how much weight should the chair assign to the positions of the respective members and coalitions? The chair is in the midst of a struggle among members with vastly unequal power despite their legal equality. A chair's compromise deal will be the most prominent focal point and thus may well influence the distribution of gains in the final deal. One scholar maintains that actually the WTO decides with invisible weighted voting; no small trader has anything approaching the effective clout of the US or the EU.<sup>50</sup> A vocal minority of WTO governments complains that informal practice is systematically biased against their preferences.<sup>51</sup> Proposals that are

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49 Interview, Geneva, 19 November 2002. This resistance to compromise positions laid on the table might have increased in recent years as more governments began to publicize their WTO negotiating positions at home during the process for the first time.

50 Steinberg, Richard H., 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', *International Organization* (2002) 56: 339-74.

51 The Like Minded Group of 15 developing countries, led by India, has proposed rules that would curtail chairs' informal discretion to take initiatives and make decisions without approval by the full membership (WTO document WT/GC/W/471, 24 April 2001). Jawara, Fatoumata, and Aileen Kwa, *Behind the Scenes at the WTO: the Real World of International Trade Negotiations* (2003) reports evidence of tactics used by the strong to coerce the weak into acquiescence. Also see Narlikar, Amrita, and John S. Odell, 'The Strict Distributive Strategy for a Bargaining Coalition: The Like Minded Group in the World Trade

not generating support tend to be dropped unless they are from the EU or the US. One past chair acknowledges that shares of world trade are taken into account when deciding what elements to add to or exclude from a package.<sup>52</sup> But today the small countries are better organized in groups and more willing to use their authority to block the whole as a means of shifting the distribution of gain in their direction. The chair's obvious dilemma is that leaning too far in any direction may lead other members to reject the formulation.

### C. Type 3: Manipulation Tactics

Occasionally GATT and WTO chairs, like mediators in other conflicts, go still further, resorting to more decisive or manipulative tactics that attempt to give the process or individuals a push in a particular direction.<sup>53</sup> In the WTO evidently most of these pushes come just prior to a deadline and after parts of a consensus have already been accepted informally. A GATT veteran recalls a time when the first DG, Eric Windham-White, intervened after a long and fractious discussion that had failed to generate consensus:

Windham-White came into a meeting and said, 'I've got the answer in my pocket.' Everyone said, 'Great!' Then he said, 'But I won't reveal it unless you agree to accept it first.' Eventually they said okay, they would. And that was the end of it.

A participant in the 1986 conference that launched the Uruguay round reports how the chair, Minister Enrique Iglesias of Uruguay, orchestrated that process in the face of strong opposition from a minority, especially the ministers of Brazil, Argentina, and India:

On Wednesday we were still stuck on which of three texts to work on. He took 30 ministers off to the nearby town hall, and basically wouldn't let them go until we settled at least which text to work from. This was not the final outcome but at least a way forward.

He was a master in knowing when to push and when not to push. I'll never forget we were working on investment. The US had come down a great deal from what they wanted, yet Argentina would not give. Finally he looked over at the Argentine, just like this, and said, 'Please minister, surely this is something you can give.' If the minister

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Organization', in Odell, John S. (ed.), *Developing Countries and the Trade Negotiation Process*, forthcoming.

52 Interview, Geneva, 28 November 2002.

53 Mediators in this institutionalized setting of course lack the wherewithal to manipulate parties as strongly as mediators who have attempted to end wars—for example, Lord Carrington at Lancaster House 1978, or President Carter at Camp David 1979.



had replied, 'absolutely not,' it would have been a mistake. But he said, 'Oh, well, if you insist...'<sup>54</sup>

Later during the Uruguay round, Ambassador Julio Lacarte chaired the negotiating group working on a dispute settlement understanding. According to a participant in that group, Lacarte:

[...] would come to us and say, 'You can get what you want on A and on B but you are not going to get C also. You need to decide what you want most.' He went to all the important parties this way.

He tried to get groups [of delegates] to meet; he worked deals. I remember that the US, India and Brazil worked out one secret agreement with only Lacarte, outside room F [the official meeting room], then carefully scripted how we would act in the meeting. 'You say you can compromise on X, then I'll say I can compromise on Y.' This was all Julio's work.

By 1993 the Uruguay round had dragged on for seven years, much had been agreed provisionally, yet a few major issues still blocked a package deal. With half a year remaining before the extended deadline, the members turned to Peter Sutherland as a new Director General and chair of the TNC. They may have picked Sutherland because of a capacity for manipulative tactics when needed. Sutherland banged heads together, according to many accounts. He threatened Geneva ambassadors that he would telephone their capitals if they did not make greater concessions. He did call ministers and even heads of state—US President Bill Clinton personally took one of his calls—to make the case for flexibility to save the round. Sutherland also used the public platform and the media to generate maximum pressure on governments. These tactics might not have been insignificant in the outcome. In January 2004 as the Doha round was frozen and only a year remained before its deadline, Director General Supachai Panitchpakdi also began making public threats to go over the heads of ambassadors.<sup>55</sup>

Among the strongest moves available to a WTO chair is the threat to abandon mediation, as a means of stimulating concessions. With a Uruguay round deadline extremely close, major gaps still divided the group on dispute settlement and future institutions. Lacarte decided that all participants had had ample opportunity to make all possible arguments. He personally drafted four short paragraphs that settled the outstanding issues and that he regarded as a fair resolution (a formulation tactic). During a lunch recess he invited four delegates—from the EC, the US, India and Brazil—to his office. He selected

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54 Interview, Geneva, 7 June 2000.

55 *Bridges*, January 2004.

these because they represented the extremes that had to be convinced. He presented his proposal to them, and although they had been at loggerheads, they told him after some discussion that they would support the compromise. After lunch, back in the plenary meeting Lacarte, saying nothing about the private meeting, announced that he had a proposal to make. He left a strong implication that if this proposal were not accepted, there would be no more efforts from this chair toward compromise (a manipulation tactic). The document was distributed and a long silence ensued. Lacarte said nothing to relieve the pressure. Eventually Canada gently said it could endorse the proposal. After another silence Japan followed, and eventually so did the rest.<sup>56</sup> The risk paid off in this case.

An even stronger move, though in the opposite direction, would be to end a negotiation when members prefer to keep talking. Chairman Derbez's decision to pull the plug in Cancún proved to be one of the most controversial acts by a WTO chair to date. After the crisis Saturday evening, Derbez met with five key ministers to decide what to do, then called the first green room meeting for Sunday morning. He decided the most urgent priority was to try to resolve the crisis over the Singapore issues. On Sunday morning, the last scheduled day, the EU's Pascal Lamy fell back from his demand to add four, eventually offering to settle for two, the least controversial two. After a break for representatives to consult their coalitions, the African Union held firm on its position refusing to add even one. Other developing countries concurred at that time, saying, 'There was not enough on the table.'<sup>57</sup> Arrangements had been made to stay another night, since these meetings are normally extended beyond the official closing date.

But Derbez, hearing this African position, announced he was closing the conference, before a plenary had been able to discuss agriculture or any other issue.<sup>58</sup> Saying it was pointless to continue, he perceived that harsh rhetoric by critics had fatally poisoned the atmosphere.<sup>59</sup> The Director General agreed with the decision to end the conference at that time.<sup>60</sup> On the other hand Patricia Hewitt, the UK Trade Minister, complained that this decision was 'premature' and 'utterly unexpected'.<sup>61</sup> The EU delegation had expected the talks to shift to

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56 Interview with a participant in these meetings, 5 December 2002.

57 *IUST*, 15 September 2003, 6.

58 *Ibid.*, 1. Reportedly Derbez had told the facilitators or others in advance that he would end the conference if the parties remained divided (two interviews, July 2004).

59 Interview with a Mexican participant, 24 September 2003.

60 Interview with a Secretariat participant, 13 August 2004.

61 *Bridges Daily Update*, 15 September 2003.

agriculture and allow a 'cooling off period'. Some US team members also appeared surprised and frustrated.<sup>62</sup> All year many delegations had said they were holding back concessions on several issues until they saw more on the table for agriculture. Mediator George Yeo had offered a compromise text and felt there was a 2/3 chance of consensus around it.<sup>63</sup> The EU, the US, and other delegations later said they were working on a deal on farm trade and had not used all their flexibility.<sup>64</sup> The G20 had spent seven hours working on a new joint position moving somewhat from their previous position.<sup>65</sup> Brazil, leader of the G20, said it was equally surprised and did not prefer to stop talking.<sup>66</sup> Some African delegates, told that Derbez had decided to close the conference, were described as first doubting it could be true and were not happy.<sup>67</sup> Bangladesh's Minister and chair of the Least Developed Countries later said they could have shown more flexibility on the Singapore issues if they had been offered more on cotton.<sup>68</sup>

For some future chairs, then, an additional challenge in a stalemated negotiation will be to judge how long to wait before pulling the plug. A possible pitfall would be to intervene in this manner too early. But again to be fair, no chair will have complete information for forecasting delegations' true scope for concessions. More generally, if members delay many difficult problems until one short conference, as in 2003, they will increase the odds of breakdown there. For instance, had the EU fallen back on the Singapore issues two weeks or even two days earlier, it would have made a major difference to this process. And politicians who fail to win their stated objectives will also have an incentive in domestic politics to find someone else to blame.

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62 Interview with a participating US official, Mexico City, 4 May 2004.

63 *Straits Times*, 15 September 2003.

64 Interviews, Geneva 2003 and August 2004.

65 *IUST*, 15 September 2003, 11.

66 Interview, Geneva, November 2003.

67 Correspondence with a delegate who was inside the delegates' area of the building, 26 June 2004.

68 *Bridges Daily Update*, 15 September 2003. My research casts doubt on the press report (*New York Times*, 16 September 2003), quoted many times thereafter, that this conference ended because developing countries 'walked out'. Also note that the following summer, developing countries agreed to add one Singapore issue (trade facilitation) to the round's agenda, when there was more on the table in the agriculture area.

### III. Conclusion

Deadlocks in multilateral WTO negotiations are more likely and more difficult to resolve today than prior to 1994. Numerous obstacles to agreement that are common in all multilateral negotiations are compounded by special features of this organization. Its members depend in part on the efforts of chairpersons of its negotiating bodies, including the Director General, to help them overcome these impasses, given its present institutions.

WTO chairs seem to have limited but significant influence on the efficiency and legitimacy of negotiations and the resulting distribution of gains and losses. Mediators in the WTO, like those working elsewhere in international relations, can choose from a menu of tactics. The options range from the more passive—observation, diagnosis and communication—to formulation tactics, to the most decisive manipulation tactics.

Carrying out the function of chair-mediator raises several tricky challenges and dilemmas. They include diagnosing impasse, separating bluffs from true reservation values, imagining integrative multi-issue deals, deciding when to offer a single negotiating text, how cautious or bold to make it, how to weight the demands of diverse members to satisfy the expectation of perceived balance, when if ever to push particular members in certain directions, and how long to wait before ending a stalemated negotiation. It is easy to go wrong or become sidelined. Experience nevertheless suggests positive lessons as well as pitfalls to avoid.

While this preliminary effort has scratched the surface, deeper research would improve our understanding of this phenomenon. Fuller and more case studies of mediation attempts might tease out better generalizations about the conditions and tactics that favour success. Scholars could consider the analytical value of the concept of the ‘batma,’ the mediator’s best alternative to a mediated agreement,<sup>69</sup> for understanding and influencing mediator behaviour. Comparisons of attempts at different stages of the process and in organizations with different rules and cultures might be instructive.

What a future chair-mediator will be able to do will also depend on the state of the institution. The WTO during its formative first decade experienced an unanticipated clash of two diplomatic cultures. Trade diplomats with experience in the GATT naturally expected to continue the special informal decision-making

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69 Steenhausen, Paul., *Negotiating Among Mediators: Multiparty Mediation in International Politics*, Dissertation, University of Southern California (2003). Other research suggestions are found in Odell, John S., *Mediating Multilateral Trade Negotiations*. Paper presented at the 2004 annual meeting of the International Studies Association (2004).

practices of their experience. But the membership expanded dramatically, by the formal accession of non-members and also effectively, as developing and transition GATT members that had been largely passive became much more active in negotiations. Many WTO diplomats from newly-active members had never worked in the GATT but did bring experience in the United Nations and other multilateral organizations. These delegates too naturally expected the new WTO to operate according to their experience. For UN veterans, the normal way to produce a written agreement was to appoint a formal drafting committee of national delegates, which decided which text to include and exclude. These delegates from small states felt disenfranchised by the less transparent GATT practice, whereby a small group of the most powerful traders and the Secretariat met privately without notice to the majority, rejected many proposals without notice, hammered out important deals, and reported them to the many. Chairs during that time found themselves with the task of helping to discover what modes would be acceptable in this old-new organization.

At the time this is written, the GATT mode seems to have largely prevailed over any alternative. Most fundamentally, new members joined the old in deciding after Seattle to reaffirm the GATT norm that WTO decisions should normally be made by consensus rather than majority voting, especially regarding obligations that will be legally binding on each member state.<sup>70</sup> Nor are facilitators for ministerial conferences elected by the majority. Virtually all governments acknowledged that informal consultations in smaller groups are essential steps in building multilateral consensus. No major formal changes in decision-making institutions were adopted. But leaders have made the process more inclusive and somewhat more transparent than before 1994, through an informal representative system based on coalitions and by adding African ministers to mini-ministerials. The legitimacy of this adjusted GATT mode in 2003 and 2004 among governments seemed higher than in 1999, at least judging from a decline in official complaints about internal transparency.

To make this mode as efficient and legitimate as possible, the organization could consider widening and institutionalizing the process of drawing lessons for chairs and passing them along. Members could ask the Director General to host a private one-day retreat each year to help prepare chairs of Geneva bodies due to take office the next year. Veterans could be invited to join the new team, and all could share ideas and ask questions about the recurring functions and

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70 'The View of the African Group on Enhancing the Internal Transparency and the Effective Participation of all Members of the World Trade Organization', March 2000, provided by the Geneva office of the Organization of African Unity; and 'General Council, Monday 17 July 2000, Internal Transparency and the Effective Participation of Members, Chairman's Statement,' provided by Ambassador Kåre Bryn, Norway's Mission to the WTO, Geneva.

dilemmas of the chair that are not spelled out in rules but on which experience can be brought to bear. Such a meeting would no doubt also discuss the issues of the day and how the work of the several bodies might be coordinated. The Director General and the chair of each ministerial conference could consider hosting an analogous private session a month prior to the conference, bringing together ministers who have been asked to function as a team of facilitators. They could receive briefings on the state of play on the outstanding issues, receive training, establish working relationships among themselves, and plan how they will coordinate during the conference. Regular retreats at both levels might help increase *esprit de corps* and personal identification with the Organization and the common interest as well as efficiency.

In even the best case, no team of mediators will have the power to solve all the WTO's problems of efficiency and legitimacy. To that end the future could bring more attempts to change this institution formally. But in that case too, members seeking and resisting such changes will depend in part on their chairpersons to mediate and seek a consensus result.

### **Partial List of Persons Interviewed**

***Abbott, Roderick***

Ambassador of the European Union to the WTO, 1996-2000, and Deputy Director-General, WTO, 2002 to present

***Amorim, Celso***

Ambassador of Brazil to the WTO, 1998-2000, Foreign Minister 2003-present

***Bradley, A. Jane***

US Trade Representative's office, 1982-2003

***Bryn, Kåre***

Ambassador of Norway to the WTO, 1999-present; chair of Dispute Settlement Body and of General Council, 2000

***Castillo, Dacio***

Ambassador of Honduras to the WTO, 1998-present

***Chandrasekhar, K. M.***

Ambassador of India to the WTO, 2001-present

***Chidyausiku, Boniface G.***

Ambassador of Zimbabwe to the WTO, 2000-2002; chair of Council on TRIPS special session, 2001; chair of Committee on Regional Trade Agreements, 2002

***Deily, Linnet***

Ambassador of the United States to the WTO, 2001-present

***Dunkel, Arthur***

Director General, GATT, 1980-1993

***Girard, Pierre-Louis***

Ambassador of Switzerland to the GATT 1984-1988 and to WTO 2000-present; chair of Working Group on China's Accession; chair of negotiating group on Non-agricultural Market Access, 2001-2003

***Harbinson, Stuart***

Ambassador of Hong Kong to the WTO, 1998-2001, chair of the General Council, 2001, chef de cabinet to Supachai Panitchpakdi, 2002-present

***Hartridge, David***

Chef de cabinet to Arthur Dunkel, 1980-1985; Director, Office of Multilateral Trade Negotiations, GATT Secretariat, 1986-1993; Director, Trade and Services Division, WTO Secretariat, 1993-2001

***Hayes, Rita***

Ambassador of the United States to the WTO, 1997-2001

***Lacarte Muró, Julio***

Ambassador of Uruguay to the GATT, 1961-1966 and 1982-1992, chair of GATT Council, the Contracting Parties, and the negotiating group on dispute settlement and institutional questions; member of the WTO Appellate Body, 1995-2000

***Low, Patrick***

Counsellor, GATT Secretariat 1980-1988; Director, Office of the WTO Director General, 1999-2002, Director, Economic and Development Research, WTO Secretariat, 1997-1999 and 2002-present

***Moore, Mike***

Former Prime Minister, New Zealand; Director-General, WTO, 1999-2002

***Otten, Adrian***

Director, Intellectual Property Division, WTO Secretariat, 1995-present

***Ouedraogo, Ablassé***

Foreign Minister, Burkina Faso, 1994-1999; Deputy Director-General, WTO, 1999-2002

***Perez del Castillo, Carlos***

Ambassador of Uruguay to the WTO, 1998-present; chair of several WTO bodies including the General Council in 2003

***Rana, Kipkorir Aly***

Ambassador of Kenya to the WTO, 1998-2001, Deputy Director General, 2002-present

***Ricupero, Rubens***

Ambassador of Brazil to the GATT, Chair of the GATT Council and Contracting Parties, 1987-1991; Secretary General of UNCTAD 1995-2004

***Rodriguez Mendoza Miguel***

Minister of Trade, Venezuela, 1991-1994; Deputy Director-General, WTO, 1999-2002

***Seixas Corrêa, Luiz Felipe***

Ambassador of Brazil to the WTO, 2002-present

***Smith, Ransford***

Ambassador of Jamaica to WTO, 1999-present; Chair of the Negotiating Group on Trade and Development, 2001-2003

***Stoler, Andrew***

US Trade Representative's Office 1982-1999, and Deputy Director-General, WTO, 1999-2002

***Weekes, John M.***

Ambassador of Canada to the GATT, Chair of the GATT Council and Contracting Parties, 1989-90; Ambassador of Canada to WTO 1995-1999, Chair of the General Council 1998

***Zain, Dom Mohammed***

Malaysia's Mission to the GATT during the Uruguay Round, and Deputy Permanent Representative to the WTO, 1999-present





# *Are WTO Decision-making Procedures Adequate for Making, Revising and Implementing Worldwide and ‘Plurilateral’ Rules?*

***Claus-Dieter Ehlermann***

Senior Counsel with Wilmer, Cutler & Pickering;  
former Member and Chairman  
of the Appellate Body of the WTO

***Lothar Ehring***\*

European Commission, DG Trade

## **I. Introduction**

The World Trade Organization (WTO) currently has a membership of 148 sovereign States and independent customs territories. Its agreements cover some 95% of international trade and regulate the trade of goods and services as well as the protection of intellectual property rights. Its membership comes close to that of a universal organisation, even more so if one considers that a significant proportion of the remaining non-Members are currently negotiating their accession to the WTO. The reason why the WTO is important and unique,

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however, is also that it has been and continues to be *the* forum in which trade negotiations take place at the worldwide level in subsequent rounds. These negotiations result in binding international agreements that can be enforced by a highly effective, compulsory and exclusive quasi-judiciary.

Together with other factors, the strong increase of international trade (significantly faster than the growth of world GDP) and of other aspects of economic interaction (e.g. investment) have resulted in an increased international economic interdependence. In view of this interdependence, nation-state governments cannot regulate effectively any more in many areas,<sup>1</sup> which is why effective international governance is needed in order to manage globalisation. At a time when global governance is more necessary than ever before,<sup>2</sup> the WTO is a forum in which the international community can achieve many important things, given its rule-making vocation, its broad membership and its effective enforcement mechanism.

Yet, the WTO has not always presented itself as an organisation that pursues its agenda effectively and easily. Sometimes, or even regularly, it goes through periods of crisis and perceived or threatening paralysis. The ministerial conferences of Seattle and Cancún are two recent examples. Signs of inefficiency regularly also appear in Geneva, be it in the context of negotiating new agreements or in the context of the revision or even just application of the existing trade rules. A recent high profile example is the TRIPS and public health issue.<sup>3</sup> Arguably, the pressure imposed by the upcoming Cancún ministerial was essential in achieving a provisional solution in late August 2003, whereas the post-Cancún talks on a long-term solution have again been deadlocked. The big failures of course attract even more attention and also generate more reflection and criticism regarding the WTO's effectiveness. The recent Cancún collapse certainly has aroused doubts about the *organisation's* effectiveness<sup>4</sup> and has

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1 John H. Jackson, 'The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited', (2001) *Journal of International Economic Law*, 67, at 69.

2 One may even say that there is not enough international governance. See, e.g. Pascal Lamy, 'Mondialisation: Pascal Lamy dénonce un déficit de gouvernance internationale', Interview in *Les Echos*, 22 May 2000, [http://europa.eu.int/comm/commissioners/lamy/speeches\\_articles/intla01\\_fr.htm](http://europa.eu.int/comm/commissioners/lamy/speeches_articles/intla01_fr.htm).

3 Where the WTO was not able to meet the December 2002 deadline imposed in Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, and where one single Member prevented consensus for a protracted period of time.

4 Sungjoon Cho, 'A Bridge too Far: The Fall of the Fifth WTO Ministerial Conference in Cancun and the Future of Trade Constitution', 7 *Journal of Int. Eco. L.* (2004) 219 at 220.

prompted people to see the WTO at a 'cross roads'<sup>5</sup> or even in a 'constitutional moment which parallels the creation of the GATT 1947 and the WTO'.<sup>6</sup>

Of course, the failure of Cancún, and previously that of Seattle, was rooted in the divide that exists between Members of the WTO on many issues of substance (agriculture, trade and investment, trade and competition, market access etc.).<sup>7</sup> In that sense, it has been said that the failures were programmed. It is obvious that if all Members were in agreement over the substance, the world trading system would work smoothly and there would be no crises. However, substantive divergences are to some extent a normal phenomenon (even though it is at times difficult to understand the existing divergence on particular topics). The fact that conflicting interests are a frequent reality in just about every polity or other organisation is precisely the reason why it is so important to have in place institutions that can balance these diverging interests. The situation of conflict is thus the situation in which an effective decision-making mechanism is most needed to resolve contentious issues. This is what has not worked well enough in the recent past.

In this sense, the European Commissioner for Trade, Pascal Lamy, has ascribed the collapse of Cancún to the WTO's 'medieval' decision-making process. After Cancún, discussions have taken place on the need and possibility for reforming the WTO. Given the prominence of the outstanding substantive issues, the post-Cancún discussions, however, soon returned to the specifics of the Doha mandate. Therefore, it seems worthwhile and important to continue to devote attention to the question of whether the WTO shows institutional deficiencies and how they could be addressed with a view to improvement. In terms of how to measure improvement, effectiveness and efficiency are of course not the sole considerations. The importance of transparency, participation and accountability, as well as other aspects of democratic legitimacy should in no way be discounted. Yet, it is submitted that promoting these higher values will be difficult or at least insufficient if the decision-making system is not effective.

A reform of the current system can mean two basically different things: on the one hand, one can think of changing the rules on decision-making in the WTO Agreement (along with changing the practice). On the other hand, reform can mean exploring the scope for improvement within the framework of the

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5 Simon J. Evenett, *Systemic Research Questions Raised by the Failure of the WTO Ministerial Meeting in Cancún*, 2004 LIEI 1 at 2. The 2004 Symposium of the WTO, held in Geneva to foster dialogue with civil society, has also been named 'Multilateralism at a Crossroads'.

6 Sungjoon Cho, *supra* note 4, at 221 and 244.

7 For a perspective on the chronology of events, see Sungjoon Cho, *supra* note 4, at 221-235.

existing rules, i.e. changing the practice, but not the rules. We believe that, for both dogmatic and pragmatic reasons, the latter exercise should receive priority over the former. First, it would be extremely difficult to achieve a modification of the rules on decision making in the present context where the adoption of new multilateral trade rules is in general rather difficult.<sup>8</sup> Second, before resorting to proposing legislative change, one should explore the existing rules and the extent to which improvements are possible within their limits without formal change, as only such an exercise can reveal the need, if any, for legislative change.

With this in mind, we propose to take a closer look at the rules on decision- and rule-making in the WTO Agreement. Of course, there are other levels on which, more in the sense of fine-tuning, improvements can and should be explored, e.g. how ministerial conferences are organised, the role of the chairs, etc. This paper, however, undertakes a more fundamental critique, also with the intention of keeping the debate on the WTO's institutional reform alive, even when negotiations are gaining momentum again. There is also hope that the institutional debate will be revitalised when the Consultative Board set up by Director-General Supachai Panitchpakdi in June 2003 and chaired by former Director-General Peter Sutherland publishes its report.

## **II. Procedures for Making, Revising and Implementing Trade Rules in the WTO**

One needs to distinguish between rule-making and decision-making, as these exercises are different in nature from a constitutional point of view. The formal rules of the WTO reflect this distinction, even though it largely disappears in the organisation's practice.

### **A. *The Rules as They Currently Exist***

#### **1. Procedures for implementing trade rules**

As is well known, the process of decision-making in the WTO is dominated by the practice of consensus. As is also well known, consensus means that 'no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.'<sup>9</sup> Often, at least one Member objects to a proposal, and

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8 One might prefer not to imagine the kind of institutional crisis that would probably be necessary for convincing the WTO Members of the necessity to modify the rules on decision-making.

9 Footnote 1 to the WTO Agreement.

in those circumstances, the next step is typically a protracted effort to reach consensus by overcoming the existing resistance, e.g. by finding a compromise. If this does not work, no decision is taken.

This contrasts with Article IX:1 of the WTO Agreement, which does not mandate consensus for all cases. While the first sentence states that '[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947', the second sentence allows votes: 'except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting.' Those decisions are reached with a (simple) majority of the votes cast. An exception is Article 2.4 of the Dispute Settlement Understanding (DSU), according to which the Dispute Settlement Body (DSB) decides by consensus, with the notable exception of the reverse consensus mechanism for the key steps of a dispute settlement procedure.<sup>10</sup> Hence, except for the DSB, the bodies of the WTO would normally decide according to a two-step approach: consensus if possible, otherwise vote.

The Rules of Procedure contain quite detailed rules on how votes would take place. Rule 16 of the Rules of Procedure for Sessions of the Ministerial Conference and of the Rules of Procedure for Meetings of the General Council provides that a majority of Members must be present for votes to take place (quorum). Rules 29/34 specify that when decisions are required to be taken by vote, such votes be taken by ballot but that the representative of any Member may request, or the Chairperson suggest, that a vote be taken by raising cards or roll call. Where the WTO Agreement requires a vote by a qualified majority of all Members, the Ministerial Conference/General Council may decide that the vote be taken by airmail ballots or ballots transmitted by telegraph or telefacsimile. The respective Annex 1 of these Rules of Procedure contains further details for such airmail/telex/telex ballots, *inter alia* a notice to be sent to each Member and a time-limit of a maximum of 30 days.<sup>11</sup> The Councils, Committees and other subordinate bodies of the WTO, however, are mandated by Rule 33 of their respective Rules of Procedure to refer a matter to the General Council whenever they are unable to reach a decision by consensus.<sup>12</sup>

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10 Articles 6.1 (panel establishment), 16.4 (panel report adoption), 17.14 (Appellate Body report adoption), 22.6/22.7 of the DSU (authorisation of the suspension of obligations).

11 WTO, Rules of Procedure for Sessions of the Ministerial Conference and for Meetings of the General Council, WT/L/161, 25 July 1996.

12 See e.g. WTO, Rules of Procedure for Meetings of the Council for Trade in Goods, WT/L/79, 7 August 1995.

## 2. Procedures for making trade rules

When rules are made from scratch, i.e. new international agreements adopted, it is no wonder that consensus generally governs the procedure. After all, the signatories of the agreement are to ratify the text ('express their consent to be bound'), which is even more than consensus because a subject of international law becomes party to the agreement only by express (and typically written) consent.

Nevertheless, it is worth pointing out that Article 9(2) of the Vienna Convention on the Law of Treaties foresees that the 'adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.' Yet, this only goes for the adoption of the text, which does not yet result in the States being bound. A majority vote in which up to a third of the negotiation participants are outvoted, therefore risks reducing the number of States that will later sign up (and ratify). Even if there are in many cases other reasons for non-signing or non-ratification, it is interesting to point out that the number of signatories of many UN-sponsored conventions is far below the number of conference participants, in fact this is the fate of the Vienna Convention itself.

In international trade, it is desirable that the number of countries that sign up to the agreements be as large as possible for economic<sup>13</sup> and legal reasons.<sup>14</sup> It is therefore productive if trade agreements are shaped in such a manner that, if possible, all become a party. This involves a search for compromises, persuasion and sometimes a certain degree of pressure on other States. Sometimes, an agreement with partial reach is better than no agreement, and in those cases plurilateral agreements are the best choice. However, Article X:9 of the WTO Agreement requires consensus of the Ministerial Conference for adding a plurilateral agreement to Annex 4.<sup>15</sup>

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13 Raising prosperity of all, protecting comparative advantage rather than creating distortions in the form of trade diversion.

14 Homogenous rights and obligations, most-favoured-nation clause.

15 Which may seem somewhat counterintuitive because the parties to the plurilateral agreement could also enter into this agreement outside of the WTO. Such an approach would, however, subject the advantages granted under the agreement to the obligation of most-favoured-nation treatment under Article I:1 of GATT 1994. For plurilateral agreements, Article II:3, second sentence, of the WTO Agreement precludes obligations or rights for non-parties. Article II:3 supersedes the GATT according to Article XVI:3 of the WTO Agreement.

The required consent of every single State for that State to be bound by an international agreement constitutes an in-built preference for the status quo in international law (by default, this status quo amounts to a lack of legal disciplines, otherwise the status quo comprises those legal disciplines that have emerged so far). This contrasts with domestic democracies (representative or direct) where simple majority votes are formally neutral on making or not making, unmaking or changing rules. Obviously, in comparison, international rule-making is highly cumbersome and less effective, possibly more cumbersome and less efficient than it should be in the light of today's demand for international governance in a world of increased international interdependence and eroding independence of single States as regulators.

### **3. Procedures for revising/modifying trade rules**

#### **a) Amendment**

The default rule on amendments in public international law is Article 40 of the Vienna Convention, according to which an amendment does not require the consent of all parties, but obviously no party is bound by the amendment unless it gives its consent. With one exception, Article X of the WTO Agreement is stricter. It first provides that the Ministerial Conference must approve an amendment proposal with a two-thirds majority of the Members, if it cannot reach consensus. Then, two thirds of the Members must accept the amendment for it to become effective: for all Members, where the amendment does not alter substantive rights and obligations; for those who accept the amendment, where it does alter substantive rights and obligations.<sup>16</sup> The former procedure, however, requires a three-quarters majority decision by the Ministerial Conference. Amendments to the DSU are possible only through consensus. Modifications of Articles IX and X of the WTO Agreement, of the most-favoured-nation treatment rules and of Article II of GATT 1994 (on bindings) require every Member's consent.

#### **b) Accession**

A special form of amendment is the accession of a new Member to the WTO. Such accession is an amendment of the WTO Agreement because this Agreement is modified so as to cover an additional subject of international law. Legally, the standard WTO Accession Protocol amends the WTO Agreement by

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16 In the latter case, the Ministerial Conference can decide with a three-quarters majority of the Members that Members who do not accept the amendment must withdraw from the WTO or can remain a Member with the consent of the Ministerial Conference.



becoming an integral part of the WTO Agreement.<sup>17</sup> Nevertheless, the Accession Protocol is an agreement between the new Member and the WTO (Article XII:1 of the WTO Agreement), not an (amendment) agreement between the new and the old Members. In terms of decision-making, Article XII:2 stipulates that the Ministerial Conference approves the accession agreement by a two-thirds majority of the Members. Yet, when a new Member accedes, Article XIII permits Members to exclude the application of the WTO Agreement in relation to the new Member by so notifying the Ministerial Conference.

**c) Renegotiation of commitments**

In the WTO Agreement, rights and obligations are also set out in each Member's schedule of commitments. As is known, this part of the Agreement accounts for the majority of the famous 25,000 pages. If a Member intends to modify or withdraw a GATT concession (typically a tariff concession), Article XXVIII of the GATT 1994 provides for the possibility to do so according to a procedure that is considerably lighter than the amendment procedure under Article X of the WTO Agreement. Preferably, that Member should reach agreement with the other Members primarily concerned (principal supplier(s) and Members holding an initial negotiation right) and with those having a substantial interest, i.e. only a subset of WTO Members. If no agreement is reached, the Member in question can nevertheless proceed (unilaterally) with the modification or withdrawal of its concession and the other Members with rights under Article XXVIII may then withdraw substantially equivalent concessions initially negotiated with that Member.

Article XXI of the GATS provides for a similar, but slightly stricter procedure for a Member that wishes to modify a commitment it has made in its services schedule.

**d) Waiver**

In exceptional circumstances, the Ministerial Conference and the General Council may waive the WTO obligations of any given WTO Member by a three-quarters vote.<sup>18</sup> Waivers are exemptions for certain Members from specific WTO obligations. They must be temporary (although they can be extended) and reviewed annually.

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17 E.g. Paragraph 1.2 of China's Accession Protocol states: 'This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.'

18 Article IX:3 of the WTO Agreement. Footnote 4 of the WTO Agreement requires consensus for decisions to grant a waiver with respect to implementation periods.

### e) *Authoritative interpretation*

A special instrument foreseen in the WTO Agreement that can be used to refine or revise multilateral trade rules is the interpretation provided for in Article IX:2. This instrument is an invention of the Uruguay Round; it did not exist under the GATT 1947. In Article 3.9 of the DSU, it is referred to as the ‘authoritative interpretation’, which allows it to be distinguished from the kind of interpretation performed by panels and the Appellate Body in clarifying the provisions of the WTO Agreement.<sup>19</sup> Article IX:2 attributes the responsibility for adopting such interpretations to the Ministerial Conference and the General Council and stipulates a decision by three-quarters majority of the Members and—for interpretations of the GATT, multilateral agreements on trade in goods, the GATS and the TRIPS Agreement—that there has been a recommendation by the respective Council (for Trade in Goods/Services/Intellectual Property). Article IX:2 also states that it must not be used in a manner that would undermine the amendment provisions in Article X.

Although the legal effect of an authoritative interpretation is not spelt out in Article IX:2 of the WTO Agreement, it is relatively clear that such an interpretation would bind all Members.<sup>20</sup> It has also been suggested that, unlike panel and Appellate Body reports and DSB rulings and recommendations,<sup>21</sup> an authoritative interpretation may add to or diminish rights and obligations of Members under the WTO Agreement.<sup>22</sup> This latter aspect is somewhat contested, also on the basis of the last sentence of Article IX:2, which prohibits undermining the amendment provisions. Yet, if an authoritative interpretation were not able to modify the law, it could only clarify existing obligations in accordance with the Vienna Convention interpretation rules. This does not make much sense for a decision emanating from a political organ and it would excessively narrow the purpose for which an authoritative interpretation could be used. Also, it would arguably mean that the Appellate Body could revise any such interpretation as regards whether it constitutes a ‘permissible’ interpretation of the relevant provisions under the customary rules of interpretation (in order to be valid). Otherwise, if an *ultra-vires* interpretation were nevertheless to be binding on (i.e. non-reviewable by) the Appellate Body, the whole question would be academic. Thus, the General Council arguably need

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19 See Articles 3.2, 17.6 of the DSU.

20 See the inferences in Appellate Body Report, *Japan – Alcohol II*, p. 12; and, more explicitly, Appellate Body Report, *US – FSC*, paras. 112-113, including footnote 127.

21 Articles 3.2, 19.2 of the DSU.

22 The Appellate Body has implicitly endorsed this position, see Appellate Body Report, *US – FSC*, para. 112, footnote 127.

not apply the rules of treaty interpretation in formulating an ‘authoritative interpretation’, in other words it may modify WTO law. The attribute ‘authoritative’ would seem to further support this thesis. The prohibition on undermining the amendment provisions in Article IX:2, last sentence, certainly imposes a limit on the extent to which the authoritative interpretation can serve for the purpose of revising trade rules. However, the verb ‘undermine’ is relatively strong, which permits reading that proviso somewhat restrictively, also to avoid making Article IX:2 redundant and void of effect. According to such reading, not every fine-tuning of a provision of the WTO Agreement would immediately ‘undermine’ the amendment provisions.

Theoretically speaking, the authoritative interpretation under Article IX:2 of the WTO Agreement is of high potential relevance. It gives the political bodies of the WTO an opportunity to refine existing trade rules. This can serve to determine the scope of rules in a prospective manner, but also to correct an interpretation given by a panel or the Appellate Body, whose rulings can no longer easily be blocked.<sup>23</sup> The quasi-automaticity of the adoption of dispute settlement reports makes the authoritative interpretation a necessary instrument of checks and balance vis-à-vis the WTO’s quasi-judiciary. If, unlike under the GATT 1947, individual WTO Members can no longer veto the adoption of a report, in fact even an overwhelming majority of WTO Members could not do so as long as one Member (presumably the winner, but in fact any Member) insists on adoption, corrections of jurisprudential developments should be possible to allow for a legislative response. The authoritative interpretation should perhaps not be viewed exclusively through the lens of dispute settlement, but for the reasons mentioned, such a strong correlation exists, as Article 3.9 of the DSU corroborates.

Whether an authoritative interpretation that is adopted during a pending dispute (i.e. after the panel has been established and before the Appellate Body issues its report) has legal effect on the outcome of this dispute depends on the relevant point in time for the legal evaluation of the matter in dispute. Although the WTO jurisprudence is somewhat unclear and arguably also inconsistent on this point, the tendency is to focus on the facts (the challenged measure) as they existed at the time of the establishment of the panel. This would theoretically preclude taking account of subsequent legal modifications, as far as substantive

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23 Arguably, even if Members were exceptionally to succeed in preventing the adoption of a panel (and Appellate Body) report, by building a negative consensus, the relevant piece of jurisprudence would not disappear. A subsequent panel, or the Appellate Body in a subsequent appeal, may well adhere to the interpretation of the earlier panel (or Appellate Body report), if they find it convincing. See Panel Report, *Japan – Alcoholic Beverages II*, para. 10; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14.

obligations are concerned. Nevertheless, at the stage of implementation, a losing Member would arguably have to (and be entitled to) be guided by the authoritative interpretation adopted in the intervening period. It might therefore be worthwhile to clarify this issue so as to prevent interference with pending disputes (and resistance from the party fearing a disadvantage for its litigation) by limiting any effect of an authoritative interpretation to other (future) cases.

## ***B. How the WTO Rules Came About and How They Were Intended to Operate***

If one compares the WTO rules on decision-making, in particular Article IX, with the consensus-dominated practice of the WTO, one may wonder why such rules were incorporated that foresee votes when consensus cannot be achieved. When the WTO Agreement was drafted in the Uruguay Round, was there a belief that this would remain dead letter? In the search for a response, it is worth exploring the historical background. This is, on the one hand, the law and the practice under the GATT 1947. On the other hand, it is worthwhile to explore, to an unavoidably limited extent, the intentions and expectations of the negotiators during the Uruguay Round when they formulated the WTO Agreement, notably Article IX.

### **1. The GATT 1947 and evolving practice**

When one reviews the institutional provisions of the GATT 1947, it becomes clear that Article XXX of the GATT 1947 inspired Article X of the WTO Agreement on amendments, and Article XXXIII of the GATT 1947 inspired Article XII of the WTO Agreement on accessions. Article XXV:4 of the GATT 1947 states that: 'Except as otherwise provided for in this Agreement, decisions of the Contracting Parties shall be taken by a majority of the votes cast.'<sup>24</sup> Article XXV:3 gave each contracting party one vote. Special majorities were called for in Articles XXIV:10, XXV:5 and XXXIII. Article XXIV:10 provided for a two-thirds majority for approving a regional trade agreement that does not fully comply with the requirements of Article XXIV:5-9. Article XXV:5 provided for waivers of obligations but required that 'any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties.'

Voting did take place, but routinely only on decisions for waivers under Article XXV:5 and on accessions under Article XXXIII of the GATT 1947. In

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24 Which included the possibility of postal voting, See GATT, *Analytical Index: Guide to GATT Law and Practice*, 6th ed. (1995), p. 881.

relation to other business, the Contracting Parties did not usually proceed to a formal vote in reaching decisions, but the Chairperson took the sense of the meeting.<sup>25</sup> Even on waivers, a consensus in the GATT Council very often preceded the votes. Notable exceptions prove this rule, and one such situation occurred in 1990 at the annual session of the Contracting Parties when the EEC requested a vote by roll call on a waiver for the German Democratic Republic's trade preferences to former Soviet bloc countries. Despite the surprise and confusion this caused to many delegates who did not even have time to seek instructions, the unperturbed Chairman applied the existing procedures and immediately proceeded to the vote by roll call.

In the early days of the GATT, the Chairman of the Contracting Parties often resolved questions of interpretation through rulings that were tacitly or expressly accepted or put to a roll-call vote.<sup>26</sup> Over the years, decision-making by consensus became increasingly prevalent with the number of developing countries entering the international system in the wave of decolonisation and their accumulation of large voting majorities, although this is not a sufficient explanation if one looks at the early days of the GATT.<sup>27</sup> The GATT Analytical Index stated in 1995 that the most recent recorded decision of the Contracting Parties adopted by vote, other than decisions on waivers or accession, was in 1959.<sup>28</sup> However, the United States called for and obtained a vote in 1985 on whether to hold a special session of the Contracting Parties for the purpose of launching a new round of negotiations (the Uruguay Round).

The GATT 1947 is thus a partial answer to the question of where the rules on voting in the WTO Agreement come from. When the WTO Agreement was drafted, the evolution from votes to consensus (a term that did not even appear in the GATT 1947) was reflected in Article IX:1 of the WTO Agreement by making consensus the first choice. Article XVI:1 reinforced this by stipulating that the WTO be 'guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947.' Yet, it is important to note that voting was not abandoned in the text of the new Agreement and one can also say that the text gives it a more prominent role (vote when no consensus) than the GATT practice had (outside the area of waivers and accessions). This

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25 Analytical Index, *supra* note 24, pp. 1098-1099.

26 See Analytical Index, *supra* note 24, p. 875.

27 Mary E. Footer, 'The Role of Consensus in GATT/WTO Decision-Making', 17 *Northwestern J. Int'l L. and Bus.* (1996-97) 653 at 663-664.

28 Analytical Index, *supra* note 24, p. 1099. The object of the vote was the Recommendation on Freedom of Contract in Transport Insurance of 27 May 1959, BISD 8S/26; adoption by 22-7 vote with 4 abstentions, SR.14/9 p. 115.

justifies posing the question about the intentions and expectations of Uruguay Round negotiators.

## **2. Uruguay Round negotiations on the establishment of a World Trade Organization**

One must recall that the negotiations on the Multilateral Trade Organization (MTO, later in the negotiations to become the WTO) as an institution and international organisation had started between the EEC (later becoming the EC) and Canada who subsequently also involved Mexico. This resulted in the 'Dunkel Draft' version of the Agreement Establishing the MTO. The United States joined in only at a later stage when it became interested in the MTO as a vehicle for the single undertaking. The United States disliked the draft text because it perceived the decision-making rules to be stronger than those in the existing GATT and considered these to be a threat to its sovereignty. It was already clear that there would be a strong majority of developing countries in the MTO/WTO. Some countries therefore intended to avoid the risk of frequent votes which, if taken along developed versus developing lines, could have resulted in majorities adverse to their interests. Thus, in the fall of 1993, some major players worked hard on previous drafts in order to constrain the decision-making process.<sup>29</sup>

One of the main objectives of the United States was to change the MTO text and to make it as difficult as possible to take decisions. The main concerns were (1) that developing countries would try to use the decision-making voting rules to get out of their obligations later on (note that Footnote 4 to Article IX:3 of the WTO Agreement exceptionally requires consensus for waivers of transition periods) and (2) that the United States' sovereignty would be undermined by amendments forced through by quickly formed majorities. The latter was ultimately protected by a return to the GATT approach for amendments with an impact on rights and obligations. Also, the United States successfully fought for the combination of the three-quarters majority rule and the prohibition to undermine the amendment procedure in the context of authoritative interpretations (Article IX:2).

On other types of decisions, the ultimate compromise consisted in laying down a two-step approach: first consensus, and if necessary, as a second step, voting. In a way, this codified 'consensus' which had previously not been part of the GATT text, but had been the practice. At the same time, one must note that the two-step approach does not reflect a practice in which practically no votes took place other than on accessions and waivers (that are regulated elsewhere

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<sup>29</sup> John H. Jackson, *supra* note 1, at 74.

than in Article IX:2). Thus, the fact that voting was not eliminated from the MTO draft and that qualified majorities were introduced (for interpretations) and increased (for waivers) where qualified majorities had existed in the GATT, can be taken as a sign that the Members involved, notably the United States, at the time accepted the idea that votes on such matters would take place.

### ***C. Comparison with Other International Organisations***

It is interesting to compare the situation in the GATT/WTO with that of other international organisations. It would seem that only international organisations operating at the universal level would be relevant for this comparison. The fact that organisations of regional integration sometimes have more advanced decision-making mechanisms is due to their higher level of ambition in terms of integration. Therefore, and also because of the more limited diversity in their membership, these organisations do not lend themselves to a comparison with the WTO.

For reasons of space and brevity, this paper will not set out in detail the decision-making process of multilateral or (nearly) universal organisations other than the WTO. For present purposes, it should merely be pointed out that voting is an in-built mechanism in the United Nations both in the General Assembly and in the Security Council. Every State has one vote. In the General Assembly, however, a trend towards consensus rather than formal votes has emerged over the past decades. In the Security Council, the body that adopts decisions that are binding for all UN members including decisions on war and peace, votes are standard practice. In addition, only a fraction of the UN members, 15 states, are represented in the Security Council. This fact, however, may be precisely the reason why voting does not seem to be an issue. With its 15 members, the Security Council automatically is a representative body acting on behalf of the entire membership. This may make it more acceptable that decisions be taken by a majority, since the authority is a representative one anyway.

The Bretton Woods organisations have voting mechanisms but, unlike in most other organisations, not every member has the same number of votes. Instead, weighted voting applies. The principle is the same in the other development banks for Asia, Africa and America. Nevertheless, also in these financial institutions, many decisions are adopted by consensus, not through formal votes.

### III. Subsequent Practice

#### A. *Decision-making Practice of the WTO (as Compared to the GATT)*

The WTO did not only continue the practice of decision-making by consensus as it had emerged under the GATT 1947. Soon, the WTO even replaced votes with consensus where votes had existed in the GATT, such as in relation to accessions and waivers. Practice differed only in 1995, the first year of the WTO when the General Council submitted the draft decisions on the accession of Ecuador and on certain draft waivers to a vote by postal ballot (after reaching consensus on the contents of these decisions).<sup>30</sup> Thereafter, the General Council agreed on a statement by the Chair that waivers and accessions would be decided by consensus. Nevertheless, the statement makes clear that where consensus is not achieved, the matter shall be decided by voting and that the agreed procedure does not preclude a Member from requesting a vote.<sup>31</sup>

The systemically important tool of authoritative interpretations has remained completely unused. Only once did a Member, the European Communities, attempt to obtain an interpretation in order to resolve the so-called 'sequencing' issue regarding the relationship between Article 21.5 and 22.2 of the DSU. The European Communities specifically suggested that the decision-making procedure foreseen in Article IX:2 of the WTO Agreement could be used without delay if consensus could not be achieved.<sup>32</sup> It might also be noted that there has been only one proposal to use Article X to amend the WTO Agreement, on the same issue.<sup>33</sup>

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30 General Council, Minutes of Meeting held on 31 July 1995, WT/GC/M/6, 20 September 1995, pp. 2-5.

31 General Council, Minutes of Meeting held on 15 November 1995, WT/GC/M/8, 13 December 1994, pp. 6 and 7, subsequently circulated in WTO, Decision-making procedures under Articles IX and XII of the WTO Agreement, Statement by the Chairman as agreed by the General Council on 15 November 1995, WT/L/93, 24 November 1995.

32 See General Council, Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization – Communication from the European Communities, WT/GC/W/133, 25 January 1999; and General Council, Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization – Communication from the European Communities, WT/GC/W/143, 5 February 1999.

33 See the Proposal to Amend Certain Provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) Pursuant to Article X of the Marrakesh Agreement Establishing the World Trade Organization – Submission by Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru,



Thus, no legislative response came from the Membership in the famous *amicus curiae* row, in which an overwhelming majority of the Members fiercely criticized the Appellate Body for transgressing its competences by stating that panels and the Appellate Body itself could accept unsolicited briefs.<sup>34</sup>

In the TRIPS and public health saga, the implementation of paragraph 6 of the Doha Declaration was not achieved within the December 2002 deadline. Up until August 2003,<sup>35</sup> consensus could not be reached because one single Member felt unable to abandon its resistance against the proposed draft waiver. The question at issue was presented by some to be one of life or death for thousands of people in Africa. Yet, no Member considered requesting a vote.

Recently, towards the beginning of the Cotton dispute, Brazil requested the DSB to appoint a facilitator pursuant to Annex V of the Agreement on Subsidies and Countervailing Measures, an appointment which the United States opposed. At some point, the question was put to the Chair whether consensus was truly necessary for that appointment. One would think that Article 2.4 of the DSU, which generally requires consensus (and rules out votes) for DSB decisions *under the DSU* does not apply to a decision under a different agreement, so that Article IX:1 of the WTO Agreement applies. The Secretariat (Legal Affairs Division) nevertheless took and maintained the position that the appointment was only possible through affirmative consensus.<sup>36</sup> In the end, the DSB did not appoint any facilitator and thus failed to fulfil its obligation under the Agreement on Subsidies and Countervailing Measures.

The daily practice of the WTO offers quite a few other examples where the consensus requirement has resulted in a deadlock. As examples one could adduce the rules on derestriction of documents, Iran's observership/accession request and the consistent inability of the Committee on Regional Trade Agreements to reach a conclusion on the free-trade or customs union agreements it reviews. The extent to which that deadlock is protracted and whether a breakthrough is possible at some point obviously depends on such factors as the political context of the question at issue and whether tradeoffs are made.

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Switzerland, Uruguay and Venezuela for Examination and Further Consideration by the General Council, WT/GC/W/410/Rev.1, 26 October 2001.

34 See General Council, Minutes of Meeting, WT/GC/M/60, 22 November 2000.

35 General Council, Decision of 30 August 2003, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540, 2 September 2003.

36 DSB, Minutes of the Meeting of 15 April 2003, WT/DSB/M/147, paras. 68-72.

## **B. Effects**

The result is that it is in theory possible for any Member to block any decision. If consensus cannot be achieved, no vote takes place, contrary to what Article IX:1 of the WTO Agreement suggests. The flipside is that even an overwhelming majority of Members are not able to achieve what they want to decide if at least one Member maintains a veto.

Such a decision-making structure contains an in-built preference for the status quo. It is much easier to maintain the current legal situation than to achieve change.<sup>37</sup>

The practical impossibility of a vote means that the negotiations in search of a consensus do not even take place *in the shadow* of a threatening vote. The only shadow that exists is the shadow of public exposure for the Member(s) opposing the consensus and the shadow of a crisis for the organisation. In purely mathematic terms, one has to recognise that the likelihood of at least one Member opposing a decision increases with the number of Members. This creates a real danger of paralysis.<sup>38</sup>

Whom does this situation favour? Sometimes it is said that the consensus requirement favours the small Members, sometimes it is said that the developed countries benefit most, since they are a minority.<sup>39</sup> Yet, each of these propositions makes the assumption that the respective group would typically find itself in a minority in which it could be outvoted. Formally speaking, consensus protects every single Member, whoever may be in a minority.

Does consensus provide for equality? In theory yes, because any single Member can block any decision. Where all must (at least tacitly) agree, it does not even matter whether or not all Members have the same amount of votes, given that a single opposing Member is sufficient for blocking a decision. Thus, consensus also operates as a way to avoid dealing with the respective weights of different Members' votes.<sup>40</sup> The proposition that consensus provides for equality among Members, however, is flawed in that it wrongly assumes that any

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37 In this context, one should remember that, in many instances, no decision is also a decision.

38 John H. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept', 97 *Am. J. Int'l L.* (2003) 782 at 782.

39 Amrita Narlikar, 'The Politics of Participation: Decision-Making Process and Developing Countries in the WTO', (2002) *The Round Table, The Commonwealth Journal of International Affairs* 171, at 177.

40 John H. Jackson, *supra* note 38, at 782.

Member is equally able to sustain a veto.<sup>41</sup> Where a Member is alone in opposing a decision, it can find itself in quite some isolation and exposed to pressure, which arguably only robust, big Members can sustain for an extended period of time.

Accordingly, it seems unavoidable that the proposed texts that emerge in a negotiation process reflect the views of different Members to very different degrees. These texts arguably give more weight to the positions of Members who are less likely to give up their veto than to the views of Members with weaker consensus resistance capacity. This capacity tends to be linked to their size and importance in international trade.<sup>42</sup> In a way, therefore, consensus is a partial substitute for weighted voting.<sup>43</sup>

It has been said that the negotiation process which is overshadowed by the danger of any Member's veto tends to be less transparent because negotiations take place in informal mode and are often not recorded. Yet, it would seem that this is not inherent in this type of negotiations and can equally be the case where a formal majority vote marks the end of the procedure.

## IV. Potential and Desirability of Improvements

### A. Advantage of the Current System

The advantages of consensus are obvious and should in no way be downplayed. Where a decision is taken on the basis of consensus, it will tend to enjoy broad support, at least with no one expressly opposed it. The decision achieved through negotiations resulting in a mutually satisfactory compromise also means that no one loses face.<sup>44</sup> There is often no open battle, at least no open tensions emerge from the situation, and implementation is secured. One could say that the consensus requirement protects the delicate balance between international regulation and national sovereignty.<sup>45</sup>

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41 See also Thomas Cottier & Satoko Takenoshita, 'The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response', 2003 *Aussenwirtschaft* 171, at 176.

42 *Id.*

43 John H. Jackson, referred to by Mary E. Footer, *supra* note 27, at 668.

44 Christian Tietje, in: Georg M. Berrisch & Hans-Joachim Prieß (eds.), *WTO-Handbuch, Die institutionelle Struktur der WTO*, para. 51.

45 Tomer Brode, *International Governance in the WTO: Judicial Boundaries and Political Capitulation*, forthcoming, at 289.

Consensus is powerful and effective if the majority wishes to secure the cooperation of the minority in the implementation of the decision. In that sense, majority voting can be ineffective and damaging if it risks alienating powerful or disaffected minorities.<sup>46</sup> Consensus is built on a broader and often stronger basis. One must note, however, that this is likely to affect the substance because the search for consensus regularly involves the search for a compromise solution that is somehow acceptable to all. The outcome will in this way also reflect the stake that various Members have in what is at issue, and their influence.<sup>47</sup>

One can thus consider as an advantage the fact that no decisions are likely to be taken against the opposition of the big and mighty, who generally need to implement the decision for it to have practical value. One could perhaps further argue that (due to the need to actively object) the consensus system is sometimes easier for reaching a decision than voting where a certain threshold of affirmative votes must be reached (due to the possibility of passive abstention). In addition, the WTO practice disregards the quorum requirements of the Rules of Procedure when decision-making is by consensus, which is convenient where meetings have a level of attendance below the quorum. Accordingly, the supermajorities required for certain votes are even more difficult to reach in the meeting room, and recourse to postal ballot or telefax does not necessarily yield a high response rate within the deadline. Thus, an important reason for the replacement of votes by consensus on accessions and waivers after Ecuador's accession was the fact that the postal ballot votes regarding that accession arrived in small numbers and late.

It has also been said that consensus is not necessarily popular, but that for both developed and developing WTO Members it is the least bad alternative. Developed countries fear being outvoted, while developing countries fear being presented with *faits accomplis*.<sup>48</sup>

Even if not all Members' interests are protected under the consensus system, because not every Member can oppose any disliked decision, vital interests are. One would have to qualify this, however, by saying that this is true only if these interests are threatened by a *modification* of rules (a decision to be adopted), not if vital interests create the *need for* some decision. In the latter case, the consensus requirement makes it extremely difficult to pursue those vital

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46 Mary E. Footer, *supra* note 27, at 664.

47 Thomas Cottier & Satoko Takenoshita, *supra* note 41, at 178.

48 Amrita Narlikar, *supra* note 39, at 177. See also Richard H Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', 56 International Organization (2002) 339.

interests. Consensus therefore creates a trade-off between the ability of easily objecting and the difficulty of achieving desired decisions.

In its public relations, the WTO also lauds consensus as being more democratic than majority rule.<sup>49</sup> We do not intend to enter into a political theory debate at this point. However, there are some doubts about this beautiful sounding democracy argument, if one thinks of the situation in which a decision supported by an overwhelming majority of Members is blocked by one or several governments, and possibly by governments that lack democratic legitimacy at the domestic level.

### **B. The Problems with the Current System**

The current practice appears to threaten the effectiveness of the political decision-making process of the WTO—not in all cases, but sufficiently often. It seems that the GATT decision-making system worked well because there were far fewer countries and the issues were less complex.<sup>50</sup> Also, the membership was less diverse than it is nowadays.

The problematic flipside of the mentioned advantages of consensus are the known and unknown decisions that are not adopted. Even where the decision-making mechanism works, the outcomes are bound to be the lowest common denominator and the process can take an excessively long time. Although this ineffectiveness has its roots in a voluntary choice by the Members of the WTO, it can become a real problem in certain circumstances. First, the WTO does not deliver where there are real demands for rule-making in the face of today's economic interdependence.<sup>51</sup> The dispute settlement system is neither able nor authorised to meet all these demands by way of dynamic interpretation of the provisions at issue. Second, there is an inherent danger of crisis and paralysis,<sup>52</sup> and of the WTO losing its importance when it does not deliver.

Thus, if Members' efforts to find compromises do not take place in the shadow of a possible vote, the existing shadow of institutional crisis is not an appropriate substitute, as such a crisis is remote from single issues. This is even more the case for the shadow of a WTO that loses its importance,<sup>53</sup> a shadow

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49 WTO, 10 Misunderstandings, p. 11, [http://www.wto.org/english/res\\_e/doload\\_e/10mis\\_e.pdf](http://www.wto.org/english/res_e/doload_e/10mis_e.pdf).

50 Sylvia Ostry, 'WTO: Institutional Design for Better Governance', paper presented in June 2000 at Harvard University, <http://www.ksg.harvard.edu/cbg/trade/ostry.htm>.

51 See also Tomer Broude, *supra* note 45, at 279.

52 John H. Jackson, *supra* note 1, at 74.

53 Because major players could turn to other fora, such as regional or bilateral agreements, or even unilateral measures to solve their problems.

that may have worked in Doha. Also, both these shadows of crisis and reduced relevance are too negative in nature for the day-to-day operation of an organization—perhaps similarly to the shadow of divorce not being a good tool for living a successful marriage day to day.

One can also say that under-use of the political/legislative decision-making systems, albeit voluntary, is not strengthening the legitimacy of the WTO.<sup>54</sup> Thus, the inability of the political organs to reach difficult decisions is important already of itself. This inability is of course due to a lower level of convergence among Members on matters of trade policy than existed at earlier periods of time and also during the Uruguay Round. Nevertheless, it is submitted that these substantive differences could be less visible and less detrimental if the decision-making process were more effective.

In addition, the political paralysis becomes problematic when seen in the context of the active and effective dispute settlement system that has been created in the Uruguay Round. Indeed, the contrast between the very burdensome political decision-making process and the highly effective, (quasi-)automatic dispute settlement system appears like an institutional paradox,<sup>55</sup> when previously, under the GATT, both areas were dominated by the consensus rule. Of course, there are inherent differences between these two kinds of processes, that make it impossible to simply transfer the mechanism used in dispute settlement (where a small and odd number of independent adjudicators *must* decide on the basis of the law) to the political/legislative area (where a large number of government officials bound by instructions are free to adopt decisions of open content or not to adopt them). Nevertheless, the imbalance is problematic and in the long run also dangerous for the WTO.<sup>56</sup>

An independent (quasi-)judicial system, in which norms are clarified and thereby developed, should not be left without a (democratically more directly legitimised) counterweight. If legislative response to judicial developments is not available or not working, the independent (quasi-)judiciary becomes an uncontrolled decision-maker and is weakened in its legitimacy. In domestic systems, such mechanisms of legislative response are usually available and important from a democratic point of view. Although legislative reversals of judgments remain the exception, they do occur once in a while and are

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54 Tomer Broude, *supra* note 45, at 306, 311, 312, 313.

55 Ignacio García Bercero, 'Functioning of the WTO System: Elements for Possible Institutional Reform', 6 *International Trade Law and Regulation* (2000) 103, at 105.

56 Claus-Dieter Ehlermann, 'Tensions Between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO', 1 *World Trade Review* (2002) 301.

important in terms of determining who has the final say on what the law is.<sup>57</sup> In the WTO, legislative response is theoretically available, mainly in the form of amendments and authoritative interpretations. Yet, the mechanism does not actually work.<sup>58</sup> A good example is the *amicus curiae* issue, where one might have expected a legislative response, given the vehemence of the reactions of an overwhelming majority of the Members.<sup>59</sup> This example also demonstrates the detrimental tensions that can arise between the different 'branches' of the WTO, if such disagreements are not resolved, but instead remain a contentious issue.

In a way, it is puzzling that legislative response does not seem to work in the WTO, where the dispute settlement system formally depends on the political institutions. The consensus rule is probably not a sufficient explanation for this phenomenon, especially if one explains the strong adherence to consensus with the concern to protect national sovereignty and to avoid supranational decision-making authority. This does not sufficiently explain the dysfunction of legislative response because the resulting loss of Member-control is even greater when the questions at issue are surrendered to dispute settlement panels and the Appellate Body,<sup>60</sup> which, if asked and unable to avoid the issue, can be forced even to address the most sensitive questions.<sup>61</sup>

In that sense, one can observe that Members voluntarily surrender their decision-making powers in the interest of avoiding divisive votes. It has also been suggested that Members may have a (possibly partly unconscious) preference for deferring decisions to the judiciary because: this allows Members to take less clear positions on issues that are contentious also at the national level; lowest-common-denominator compromises result in ambiguity and give the possibility to later blame the dispute settlement system; linkages can be avoided; Members prefer to focus on specific cases rather than on rule-making for the future; dispute settlement can be used for domestic political ends, both by the

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57 An entertaining recent example from Germany was the very fast modification of the social security legislation after an administrative court had found against the government in a lawsuit brought by a German social security recipient who demanded that the government pay him the rent for an apartment in beach proximity in Florida.

58 Thomas Cottier & Satoko Takenoshita, *supra* note 41, at 171.

59 See General Council, Minutes of Meeting, WT/GC/M/60, 22 November 2000.

60 See Tomer Brode, *supra* note 45, at 287, 289, 290, 291, who also makes the point that if sovereignty were the real issue, one would have seen (more) amendments of the WTO Agreement that do not alter rights or obligations and amendments where the outvoted minority does not become bound by the modification.

61 Lorand Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism', 53 *International and Comparative Law Quarterly* (2004) 861 at 865.

complainant and the respondent.<sup>62</sup> This explanation is of course not complete, but it does contain plausible elements. Also, it does not apply to all potential questions, because not all of them are, for legal reasons, candidates for adjudication in dispute settlement. Conversely, not all questions dealt with in dispute settlement would lend themselves to legislative rule-making instead of the dispute, since Members often bring disputes when there is simply a breach of obligations (e.g. national treatment), which as such are not problematic or contentious, and when a waiver is merely a theoretical option.

As the example of the sequencing issue demonstrates, it also seems that Members are sometimes reluctant to resolve a single issue (by way of amendment or interpretation), but prefer to include this issue within larger negotiations where a concession might be obtained from those who propose the modification.

A further, also incomplete explanation for the strong adherence to consensus can probably be found in the human tendency of inertia. By this we mean the widespread preference for continuing to do things the way they have always been done, rather than trying out something new and foreign, especially when it is unclear what might be the consequences. For this and other reasons, one is likely to encounter this degree of risk-aversion among many of the WTO Members' delegates in Geneva, many of whom have become acquainted with the WTO by observing its practice and have a strong sense of upholding institutional traditions. If one does not read the WTO Agreement, the Rules of Procedure or the few existing official documents on decision-making, one cannot be certain to come across the fact that the WTO Agreement mentions votes.<sup>63</sup>

In reference to a longstanding mantra and the title of the part of the conference for which this paper was initially written,<sup>64</sup> one might provocatively state that the WTO can claim to be a 'member-driven' organisation only if the Members actually sit on the driver's seat and actually drive (forward), not if they merely press down the brake. Otherwise 'member-driven' is reduced to an indirect claim regarding who should *not* be driving the organisation.

Be it as it may, the under use of the political decision-making mechanisms results in a dispute settlement system that is even stronger than according to the WTO's formal design.<sup>65</sup> In the long run, this imbalance is unhealthy for the WTO

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62 Tomer Broude, *supra* note 45, at 293-300.

63 Conversely, one might be surprised about the fact that the text of the GATT 1947 did not mention the term 'consensus'.

64 *WTO Decision-Making Procedures, 'Member-Driven' Rule-Making and WTO Consensus-Practices: Are They Adequate?*

65 Tomer Broude, *supra* note 45, at 309.



as a whole and uncomfortable even for the dispute settlement system. In addition to the lack of legislative response, there is a danger that issues best left to rule-making are handed over to the dispute settlement process,<sup>66</sup> a problem known also from domestic settings. Such deferral involves an inherent legitimacy problem.

### **C. Possible Ways for Improvements**

As already explained in the introduction, it appears that the exploration of possible improvements should first and foremost take place within the framework of existing rules on decision-making. Indeed, it is rather unlikely that WTO Members are willing to revisit the basic rules on decision-making,<sup>67</sup> also against the background of how these rules came about in the Uruguay Round.<sup>68</sup>

If one takes the existing rules as a given framework, improvements are nevertheless possible at various levels. In order to increase the effectiveness of the decision-making system, it is worth exploring possibilities to mitigate the potential pitfalls of the consensus system as we know it. It is submitted that this should include the question of the role that the *availability* of voting, not necessarily holding that many actual votes, could play. Despite all the advantages of the consensus mechanism, it has been seen that it also brings about many downsides and periodically also the danger of paralysis. In some of these circumstances, voting may even appear as the lesser evil,<sup>69</sup> given its ability to resolve a contentious issue.

However, given the one-Member-one-vote principle, decisions on substantive matters that are based on simple majorities would not be representative of the realities of international trade, measured in terms of actual participation and weight of different WTO Members in international trade.<sup>70</sup> Also, the imbalance between the United States (one vote) and the European

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66 John H. Jackson, *supra* note 1, at 73.

67 Ignacio García Bercero, *supra* note 55, at 105, 107.

68 And, of course, the fact that any reform would involve winners and losers, see Sylvia Ostry, *supra* note 50.

69 Claus-Dieter Ehlermann, *supra* note 56, at 304.

70 Ignacio García Bercero, *supra* note 55, at 107. It has even been argued that the one-state-one-vote principle creates inequalities that would be dangerous to apply against the large trading nations and, on that basis, proposed that majority voting with weighted votes similar to the IMF be introduced, see Thomas Cottier & Satoko Takenoshita, *supra* note 41, at 171 and 184-186.

Communities (25 votes)<sup>71</sup> would make it difficult to move to the acceptance of simple majority votes as seemingly foreseen by Article IX:1, second sentence, of the WTO Agreement.<sup>72</sup> This however, essentially argues against narrow simple majorities to serve as the basis for decisions. The arguments are not equally valid if one thinks of qualified majorities as they are foreseen in the WTO Agreement for certain questions, or even overwhelming majorities as they are likely to often exist in practice.

Also, it may not be at all necessary to actually hold votes on important substantive issues in order to achieve an improvement. One would normally consider that the fact that voting is *available* under the existing rules alone should limit the risk of consensus leading to a paralysis of the WTO.<sup>73</sup> This however can only work if the possibility of a vote is a *shadow* under which the quest for consensus takes place. This 'shadow of a vote' must be visible and not absent as it presently is, which leaves only the 'shadow of isolation', if only one or extremely few Members prevent consensus, and the 'shadow of crisis' for the WTO as a whole.

In this sense, a possible proposition would not be that of abolishing the rule of consensus, but of abolishing the taboo of majority decision-making.<sup>74</sup> Also, it should be recalled that voting or consensus is not a binary choice and that there may be many variants between the two that are worth exploring.<sup>75</sup> A possibility could be the distinction between decisions that can only be adopted by consensus from decisions that may be adopted by majority, as a matter of course or under certain qualifying conditions.<sup>76</sup> A plausible suggestion of this kind would be the introduction, in the practice of decision-making, of a distinction between procedural aspects and real substance.<sup>77</sup> This could facilitate overcoming the currently existing problem that even procedural issues of minor importance can get stuck in a deadlock or become the object of protracted consultations until consensus is reached. As a remedy, it has been proposed to

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71 And, in addition, the stronger alliances with other Members which, so far, the European Communities have been able to build, as compared with the United States.

72 Although one can argue that this allocation of votes is clearly set out in the WTO text agreed in the Uruguay Round, which must have given satisfaction to the negotiating parties, at a time when the United States also expected votes to continue on waivers and accessions.

73 Ignacio García Bercero, *supra* note 55, at 107.

74 Tomer Broude, *supra* note 45, at 321.

75 John H. Jackson, *supra* note 1, at 71.

76 Tomer Broude, *supra* note 45, at 321.

77 A similar distinction already exists in Article X of the WTO Agreement on amendments, see also John H. Jackson, *supra* note 1, at 74.

use a written procedure for such decisions or to resort to voting when consensus cannot be reached within a certain deadline.<sup>78</sup> The value of such a modest step in the context of procedural issues should not be underestimated in terms of gradually revitalising the underlying dynamics of decision-making.

In a different way, improvements could be explored by aiming at reducing the likelihood of individual Members interjecting with their veto and thereby blocking consensus. For this, one would have to find tools that would encourage Members not to block consensus or to do so only in defence of vital interests. The possibility of a vote, albeit distant, could be such an instrument. Increasing the implicit costs of the veto would be another, e.g. by resorting to Rule 33 of the Rules of Procedure (see below) or by finding other means of exposing the blocking Member to internal and external criticism etc. The objective could be a system in which individual Members refrain from blocking consensus if an overwhelming majority supports a decision.<sup>79</sup>

As a more radical tool, *actual* votes can of course have the effect of discouraging those in the minority from upholding their resistance. Formalising the decision-making procedure may at times also make it more difficult for individual Members to hide behind a lacking consensus when they would not openly vote against a proposal in the decisive situation of a vote.<sup>80</sup> Indeed, the fact that blocking consensus at times merely results in delay and further consultations/negotiations where a negative vote would result in final failure of the proposal reduces the cost of blocking consensus. If it is felt that individual Members are reluctant to join a majority because they do not want to openly forsake a special national interest, one could think of using secret ballots,<sup>81</sup> although this would obviously involve a problematic tension with the objective of transparency. In any event, a system in which it is more difficult for individual members to block decisions would also make it easier to overcome the resistance of domestic special interest groups.

Anyhow, one should think of more extensive use of Rule 33 of the respective Rules of Procedure of the subordinate Councils, Committees and other bodies of the WTO. This rule mandates them to refer a matter to the General Council whenever they are unable to reach a decision by consensus. At present, this

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78 Ignacio García Bercero, *supra* note 55, at 107.

79 John H. Jackson, *supra* note 1, at 74-75.

80 A difference that reportedly played a role at the vote on the German reunification waiver mentioned above in text following note 25.

81 Tomer Broude, *supra* note 45, at 322.

referral often does not take place when consensus cannot be reached.<sup>82</sup> Such referral could expose the contentious issue to higher visibility and politicise the debate, rather than leaving it at the lower, more technical level where consensus cannot be reached. This would increase the costs of blocking the proposal for the opposing Members and thus in certain cases encourage them to abandon their opposition.

Because of the reasons already mentioned, it would seem particularly valuable if the decision-making mechanism could be reinforced in a way that would reduce the gap in effectiveness between the WTO's political bodies and its dispute settlement system. For this purpose, the so far unused authoritative interpretation pursuant to Article IX:2 of the WTO Agreement would seem to be an ideal tool for giving Members normative guidance in the context of ambiguous rules, instead of resorting to dispute settlement. The three-quarters majority requirement foreseen in Article IX:2 is already quite demanding such that it would be neither helpful nor justified to assume that authoritative interpretations can only be developed on the basis of consensus.<sup>83</sup>

It is anyway likely that the most realistic options for procedural improvement would be those that could be introduced through small, seamless steps that gradually have an impact on the practice of the WTO. If these steps are less noticeable, they are more likely to be accepted by those Members who would otherwise resist formal institutional reforms. For achieving such improvements, courageous and visionary Chairpersons of various WTO bodies could play a pivotal role, and so could the Secretariat, by fulfilling its duty of impartially advising the chairs on procedural matters. In this context, it is worth recalling the cotton incident in the DSB where several Members seemed ready to consider the applicability of voting, but the Secretariat was not.<sup>84</sup>

Further, in terms of the making of new trade rules, where not all Members are ready to sign up for new rules, but a critical mass is, those Members could resort to techniques such as those used for the telecommunications reference

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82 See e.g. the long standoff in the TRIPS Council before it reached consensus on the *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* in the form of a consensus recommendation to the General Council, IP/C/W/405, 28 August 2003. See also *supra* text accompanying note 35.

83 Ignacio García Bercero, *supra* note 55, at 109. See also Thomas Cottier & Satoko Takenoshita, *supra* note 41, at 177, who propose votes on interpretations and amendments in order to strengthen the much needed legislative response.

84 See *supra*, text accompanying note 36.

paper, financial services, the Information Technology Agreement, or plurilateral agreements,<sup>85</sup> and the non-participating Members should allow this to happen.

Although this has not been the focus of this paper, it should finally be pointed out that at a less formal level, the decision-making processes at the WTO could be facilitated through the reintroduction of a high-level steering group of senior capital-based trade officials.<sup>86</sup> Such a group, the Consultative Group of 18 existed in the GATT between 1975 and 1988. It would of course not be easy to make such a body acceptable to all Members by finding a balance between inclusiveness, flexibility and efficiency. Nevertheless, it may well be worth another effort if a system can be found that ensures rough representation of the various regions and interests in a system of rotation that gives even small Members a chance to be part of that group at some point in time.<sup>87</sup>

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85 Ignacio García Bercero, *supra* note 55, at 109; John H. Jackson, *supra* note 1, at 75; John H. Jackson, 'Perceptions about the WTO trade institutions', *World Trade Review* (2002), 101, at 107.

86 Ignacio García Bercero, *supra* note 55, at 108; John H. Jackson, *supra* note 1, at 75.

87 See, further, Richard Blackhurst & David Hartridge, 'Improving the Capacity of WTO Institutions to Fulfil their Mandate', 7 *JIEL* (2004) 705, at 708-710 and 713-716.

## **Part III**

# **Building Blocks for Concluding the Doha Round Negotiations on Agriculture**



# *How to Forge a Compromise in the Agriculture Negotiations*

*Stefan Tangermann*<sup>1</sup>

OECD, Paris

## **I. Introduction**

The Uruguay Round (UR) Agreement on Agriculture (AoA) was the first serious attempt at overcoming the large distortions that have plagued international trade in agricultural products for a long time. It changed the treatment of agriculture in the international trading order fundamentally. For the first time in the history of the GATT it brought agricultural policies and trade under operationally effective disciplines and established quantitative commitments for all WTO Members. This progress was not easily achieved. The negotiations on agriculture were controversial, complex and strenuous. At a number of junctions, the whole UR was on the brink of failure because of agriculture, and it was not before a settlement was found for the agricultural issues that the overall round came to a conclusion.

However, any hopes that the UR might have put agricultural issues in the WTO to rest were soon to prove futile. In the ongoing Doha Development Agenda (DDA) negotiations, agriculture is again at the forefront, and progress or hold-ups in the talks on farm trade once more impact decisively on the fate of the negotiations overall. It was only after agreement on the agricultural elements was reached, after serious tensions and protracted negotiations, repeatedly on the brink of collapse, that the WTO General Council could decide, on 1 August 2004 in Geneva, how to complete the Doha work programme, clearing the way to a continuation of the DDA negotiations. The framework agreed for further talks on agriculture is a significant and welcome step forward and contains a

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1 Helpful comments on an earlier draft from Carmel Cahill and Dimitris Diakosavvas are gratefully acknowledged. The views expressed are those of the author and do not necessarily reflect those of the OECD and its member countries.



number of promising elements, in particular the pledge to eliminate, by a date to be agreed, export subsidies and certain other export competition measures. However, even this hard fought accord obviously is still far away from the full modalities with numerical reduction commitments that WTO Members had originally hoped they could have already agreed by March 2003.

Why is it that agriculture is again so difficult in this round of negotiations? Has the UR, in spite of all its success, left too much unfinished business in agriculture? Have the new rules not worked well? Or were reduction commitments a problem? Where are the priorities for this round of negotiations, and is there a chance that progress will be made? In discussing such questions, this paper will first take a look at what the UR has achieved, in terms of how agricultural policies in the OECD area have developed after the new AoA was agreed. Finding that progress was limited, the paper will then address the question of whether this was due to the rules agreed in the UR, or to the quantitative parameters in the reduction commitments. Focusing on the reduction commitments, the paper will then argue that priority should be on reducing border measures and output payments. Regarding the future of the rules, some observations will also be offered on the economics of the relationship between export competition and domestic support. After commenting, against this background, briefly on the framework for agriculture agreed in August 2004, the paper ends on some concluding remarks.

## **II. Agricultural Policies in the OECD Area after the Uruguay Round**

The preamble of the Uruguay Round Agreement on Agriculture (AoA) identifies the long-term objective of establishing 'a fair and market-oriented agricultural trading system and ... a reform process' providing 'for substantial progressive reductions in agricultural support and protection'. Have agricultural policies of the industrialized countries achieved these objectives? Indicators of farm support as calculated regularly by the OECD should provide some insight.

OECD summarizes the policy-induced transfers directly affecting the revenue of individual farmers in the Producer Support Estimate (PSE), the most prominent indicator in the family of OECD's agricultural support statistics. The PSE can be expressed as an absolute sum of money, showing that in 2003 the 30 member countries of the OECD<sup>2</sup> transferred US 257 billion to their farmers.

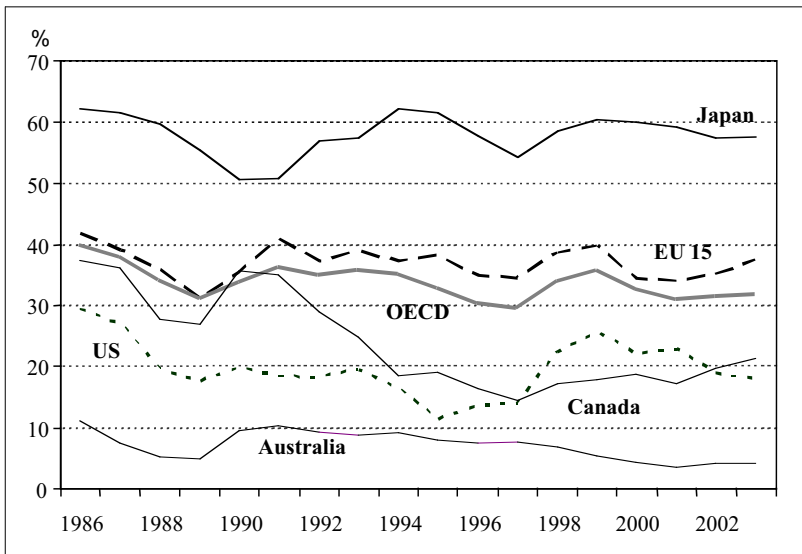
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2 Out of the 30 member countries of the OECD, 15 are member states of the European Union. In measuring agricultural support, the EU is treated as one aggregate, because all EU countries are covered by the Common Agricultural Policy.

More telling than this absolute amount is the share in farmers' revenues that it represents, the %PSE. In 2003, this indicator stood at 32%. In other words, out of each dollar of revenue for the average farmer in the OECD area, 32 cents resulted from government policies, while only the remaining 68 cents came from the market. This is only a marginal decline compared to the situation at the beginning of the UR (1986-88), when the PSE in the OECD area stood at 37%.

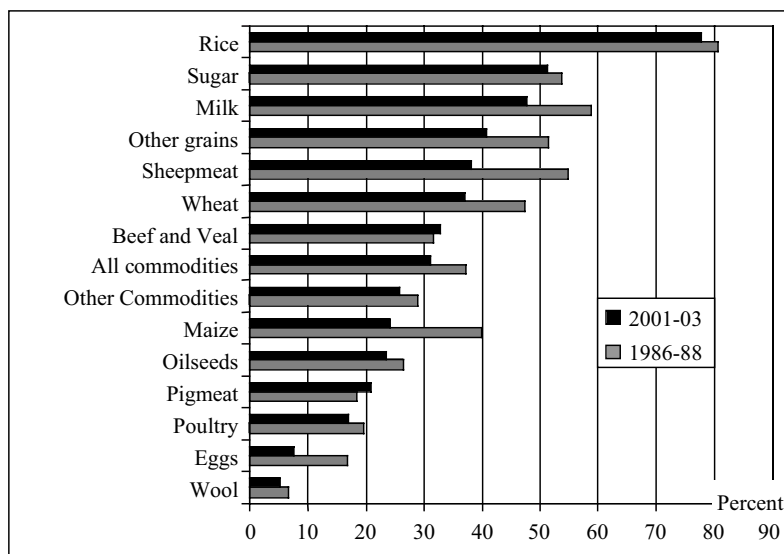
A closer look at support developments over time actually shows that most of this slight decline in the %PSE for the aggregate of OECD countries was achieved during the first half of Uruguay Round negotiations, from 1986 to 1989. Since that time, the support level has fluctuated somewhat, but not shown any obvious downward trend (Graph 1). However, there were significant differences among countries. In some cases, support has declined substantially over the last 15 years. In other countries, though, a declining support level in earlier years was later followed by a rise in support. Overall, after the reduction commitments of the Uruguay Round AoA entered into force, i.e. after 1995, farm support in the OECD area has not decreased. As a matter of fact, it is precisely during this period that support noticeably increased in some OECD countries.

**Graph 1**  
**Farm Support in the OECD Area and**  
**Selected Member Countries, % PSE**



Source: OECD, PSE/CSE database, Paris, 2004

**Graph 2**  
**Producer Support Estimate by Commodity**  
**(OECD average as % of value of gross farm receipts)**

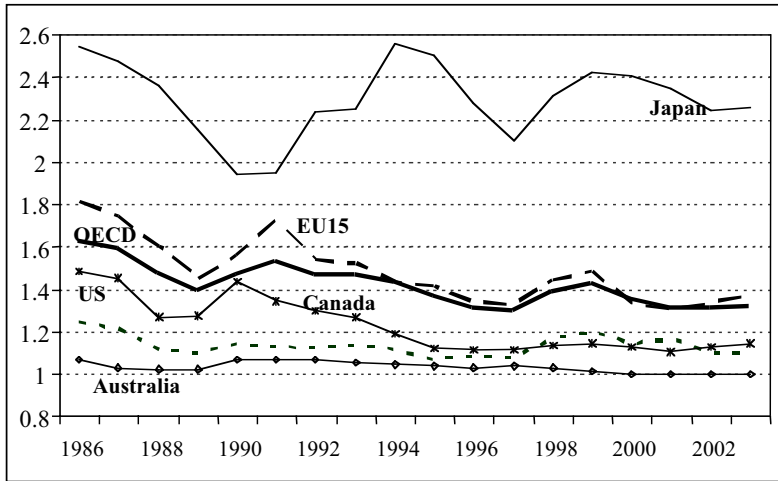


Source: OECD, PSE/CSE database, Paris, 2004

The commodity composition of support has also not changed much after the Uruguay Round (Graph 2). The three products receiving the highest support levels remain rice (around 80% PSE), sugar and milk (the two latter around 50% PSE).

What about the Uruguay Round's objective of a reduction in the level of agricultural protection? The relevant indicator here is the Producer Nominal Protection Coefficient (NPC<sub>p</sub>), measuring the ratio between the average price received by producers (at farm gate), including payments per tonne of current output, and the border price (measured at the farm gate). As portrayed in Graph 3, more progress has been made on this count for the OECD area overall. While in 1986 domestic producer prices in OECD countries were on average 63% above world market prices, by 2003 that gap had halved, to 31%. Again, a good part of this decline occurred while the Uruguay Round negotiations were still going on. But before the implementation period started, in 1994, OECD domestic producer prices were still 43% above the international market level, and thus further progress was indeed made during the implementation period. As in the case of support levels, there are obvious differences in market protection among individual OECD countries, and also the

**Graph 3**  
**Producer Price Protection in Selected OECD Countries**  
**(Producer Nominal Protection Coefficient),**  
**Average Over All Products**



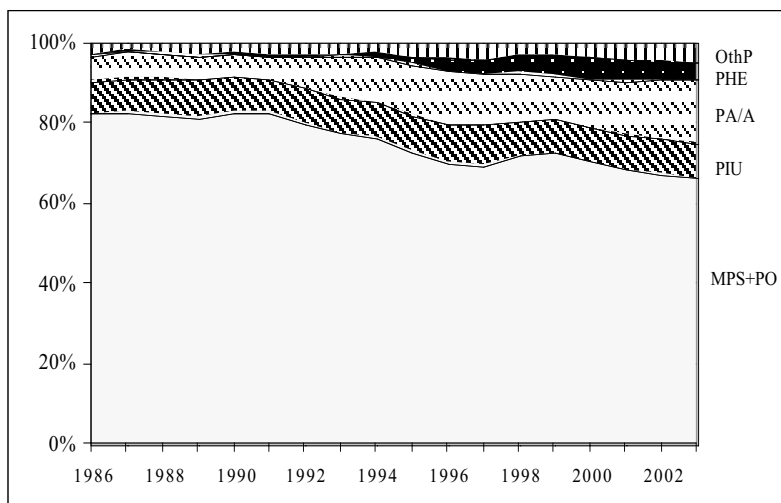
Source: OECD, PSE/CSE database, Paris, 2004

development over time has differed significantly among countries. However, overall, there has been notable progress in the OECD area towards less market protection.

The decline in the level of market protection for OECD agriculture, with significantly less decrease in support levels, indicates that some re-instrumentation of policies must have occurred over time. This change in policy structure is also apparent in the evolution of the composition of the various measures that provide transfers directly to individual farmers, as captured in the Producer Support Estimate (Graph 4). In particular, the share of overall OECD producer support that comes in the form of market price support (MPS) and payments per tonne of output (PO) has declined significantly over time, from 83% in 1986 to 66% in 2003, and mirrors the reduction in market protection. This decline is an important development, as market price support and output payments are among the most production and trade distorting instruments of agricultural policy.<sup>3</sup> However, for the same reason, it is also noteworthy that two thirds of OECD producer support still come in this form.

3 OECD, *The Market Effects of Crop Support Measures* (2001), 19f.

**Graph 4**  
**Composition of Producer Support Estimate,**  
**OECD Aggregate**  
**(Share of individual policy instruments in overall PSE)**



*Note: For an explanation of acronyms, see text*

*Source: OECD, PSE/CSE database, Paris, 2004*

Payments based on input use (PIU), also strongly market distorting,<sup>4</sup> have exhibited a roughly constant share of aggregate producer support, at 9% in 2003. The share of payments based on area planted and animal numbers (PA/AN) in aggregate producer support has expanded, mainly since the early 1990s. In 2003, such area and livestock payments accounted for a share of 16% in aggregate OECD producer support. These types of payment, while somewhat decoupled from production, can still have significant effects on markets and trade, but are less distorting than market price and output support.<sup>5</sup> Still more decoupled and less distorting are payments based on historical entitlements (PHE), another category of measures whose share in producer support expanded at the expense of market and output support and in 2003 stood at 4% of producer support.

Overall, since the early 1990s, a noticeable shift in OECD agricultural policy composition has taken place, with some movement away from strongly

4 OECD, *supra*, n. 3, 19f.

5 OECD, *supra* n. 3, 19f.

distorting price and output support, towards more decoupled, and hence less production and trade distorting, measures. The extent to which this happened has differed markedly among countries. For example, in Japan, 97% of all producer support still comes in the form of price support, output and input payments, unchanged from the mid-1980s. On the other hand, in the United States, the share of these distorting forms of support in the PSE has declined somewhat (from 70% in 1986-88 to 65% in 2001-03), and in the EU it was reduced significantly (from 96% to 68%). Policy changes continue, but not all countries go in the same direction. For example, the US Farm Bill, passed in 2002, locked in the higher levels of support provided in preceding years through *ad hoc* payments, and was a step backwards from the decoupling of support.<sup>6</sup> Conversely, the reform of the EU's Common Agricultural Policy, decided in 2003, while maintaining a higher level of support than in the US, made a further significant step towards decoupling support from production.<sup>7</sup>

In summary, the record is mixed regarding the extent to which the objectives of the Uruguay Round AoA have been achieved among OECD countries, if seen from the perspective of the support indicators as used in OECD's work on monitoring and evaluation of agricultural policies. Overall, the level of agricultural support has declined somewhat since the beginning of the Uruguay Round negotiations. Progress was more pronounced regarding the nature of policy instruments used. The most production and trade distorting policies, i.e. market price support and output payments, have declined noticeably, and have given place to forms of support that are more decoupled from production decisions. On the other hand, price and output support, as well as payments based on input use, still account for by far the largest share of all agricultural support in the OECD area, jointly making up for three quarters of producer support. Within these overall trends in the OECD area, there are obvious differences among individual countries. In particular, producer support has significantly decreased in some countries, while in other countries it has remained at high levels, and progress towards decoupling support from production has been uneven across countries.

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6 OECD, *Agricultural Policies in OECD Countries: Monitoring and Evaluation* (2003).

7 OECD, *Analysis of the 2003 CAP Reform*, (2004).

### III. Rules or Reduction Commitments: Where Is the Problem?

In spite of some progress, and notwithstanding more recent reform decisions such as those taken in the EU, one cannot say that the AoA has resulted in a fundamental liberalization of agriculture in the OECD area. This lack of deep change has caused some disappointment, not least among developing countries, and such frustration has added to the tensions about agriculture that have plagued a good part of the DDA negotiations, most noticeably at Cancún. Why is it that the significant progress made on agriculture in the UR has not yielded more in terms of actual policy change and liberalization? There are several conceivable reasons.

One possibility is that countries have simply disregarded the new disciplines in agriculture established in the UR. However, that does not appear to have been the case, as shown, for example by the fact that discussions in the WTO Committee on Agriculture regarding implementation of the AoA have gone reasonably smoothly. Also, there have been only a limited number of formal disputes regarding central provisions of the AoA. Some of these disputes may have an important bearing on future dealings with agriculture in the WTO, and we shall have to come back to this below. But overall there is no reason to suggest that the AoA did not have much effect because many governments have ignored its provisions.

This leaves us with two alternative potential explanations. First, the new rules on agriculture agreed in the UR might have been deficient and left too many loopholes. Second, the quantitative reduction commitments for tariffs and subsidies established under the AoA may have been too generous and allowed too much scope for continuing to provide high levels of protection and support. Depending on which of these two potential explanations is considered dominant, the priorities of those parties who want to make more progress in the current round of negotiations would have to focus on either refining the rules or agreeing deeper cuts. Let us therefore explore these two potential explanations, in reverse order.

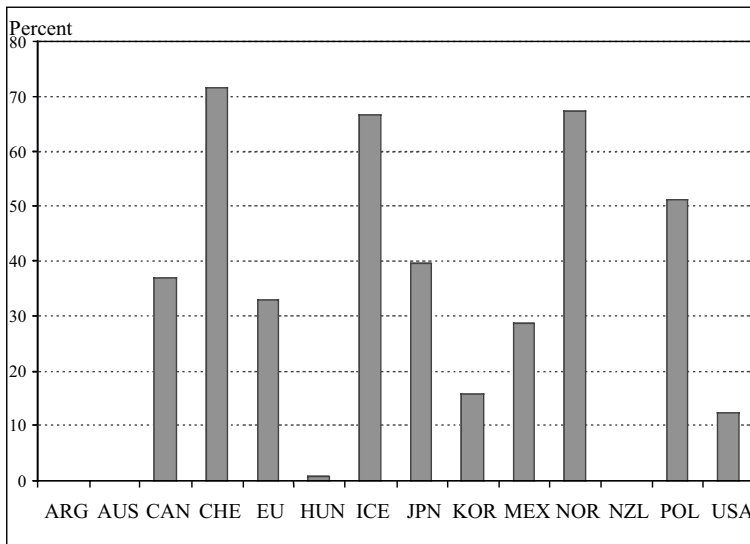
Did the quantitative commitments agreed in the UR contain so much 'water' that even the reductions agreed in the Uruguay Round did not yet effectively constrain policies? This was obviously true in many cases, as shown in a number of analyses.<sup>8</sup> Let us consider just a few indicators.

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8 For example, OECD, *The Uruguay Round Agreement on Agriculture. An Evaluation of its Implementation in OECD Countries* (2001); OECD, *Agriculture and Trade Liberalisation. Extending the Uruguay Round Agreement* (2002); OECD, *Agricultural Policies in OECD Countries. Monitoring and Evaluation* (2002); Diakosavvas, D. 'The Uruguay Round

Regarding market access, many tariffs in agriculture are still very high indeed. In the schedules of several OECD countries, a substantial share of all agricultural tariff lines exhibit mega-tariffs with rates above 100% (Graph 5). Indeed, many of these tariffs are simply prohibitive, and hence reducing them, in a given range, does no more than squeeze some of the economic water out of these tariffs, without affecting domestic price levels and trade flows. This was a major reason why exporting countries were keen to have minimum access commitments agreed in the Uruguay Round. However, it has turned out that many of these newly established tariff rate quotas, even where within-quota tariffs were significantly below 'normal' tariffs, have not so far been fully utilized.<sup>9</sup> There is much speculation and political argument about the reasons for such low fill rates, and a lot of research remains to be done in this regard.

**Graph 5**  
**Mega-Tariffs in Selected Countries,**  
**Percentage of Agricultural Tariff Lines in 2000**



*Megatariff is defined as a tariff equal or greater to 100%*

*Source: OECD calculations based on 3 152 tariff lines from the AMAD database*

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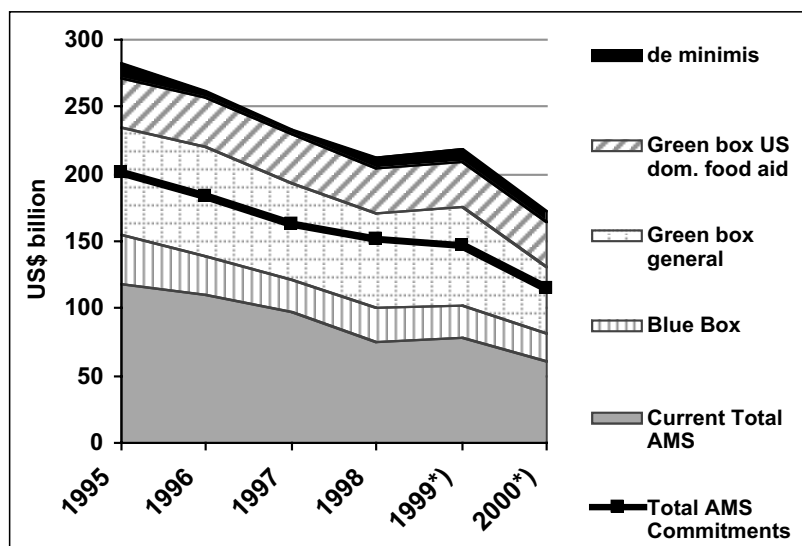
Agreement on Agriculture in Practice: How Open Are OECD Markets?, in: M. Ingco and A. Winters (eds.), *Agriculture and the New Trade Agenda* (2004).

9 OECD, *Agriculture and Trade Liberalisation. Extending the Uruguay Round Agreement* (2002) 20-27.



In the case of domestic support, the situation is simply that commitment levels were set at such high levels that in many cases both their original and the reduced final levels provided more room for manoeuvre than actual policies required. This is shown by the large percentage of all country/year observations in which only rather small shares of the domestic support commitments were actually utilized. On aggregate, in the OECD area, the level of Current Total AMS was no higher than 56% of the AMS commitments on average in the years 1995 to 1999, and only 45% in 2000 (Graph 6). It is, though, interesting to note that, even though the domestic support commitments agreed in the WTO were not binding in many countries, the actual level of accountable domestic support as defined under WTO rules still declined during the implementation period, and substantially more than the level of economic support as measured by OECD. Of course, when interpreting this finding one has to keep in mind that

**Graph 6**  
**Domestic Support and WTO Commitments,**  
**OECD Aggregate**



\*) 1999 and 2000 notifications do not include Mexico and Switzerland,  
2000 notifications do not include Canada

Note: Domestic support levels notified by the individual OECD countries, as well as their AMS commitments have been converted into US\$ using current exchange rates for the years concerned

Source: WTO notifications

market price support, an important element in the Current Total AMS, is, for WTO purposes, measured between administered prices and fixed external reference prices. Another interesting finding is that the total level of green box support in the OECD area has remained roughly constant since the beginning of the AoA implementation period. In other words, for the OECD aggregate, one does not find a significant shift of support into the WTO green box. This holds true even if one disregards for a moment domestic food aid in the US, a significant share of all green box notifications. Usage of the *de minimis* provisions, though, has increased somewhat recently for the OECD aggregate. Of course, these developments of OECD aggregates hide significant differences in the usage of the domestic support commitments across individual countries. For example, in the US, Current Total AMS has risen from 27% of the domestic support commitment to 88% in 2000 and 75% in 2001.

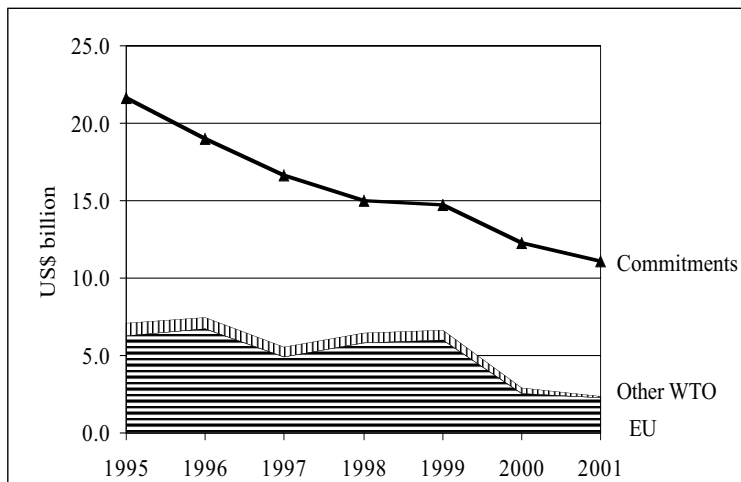
The commitments on export subsidization are generally considered to have been the most binding of all the new quantitative disciplines agreed in the UR. A look at the aggregate usage of export subsidy outlays as notified by all WTO Members, in comparison with aggregate commitments, does not appear to confirm this view (Graph 7). It is evident, though, that the EU had the lion's share in all notified export subsidies. And for the EU, the export subsidy commitments have indeed constrained the room for manoeuvre in several commodity sectors, as shown by the high degree to which quantity commitments were used for a number of products (Graph 8). On the other hand, there are also product sectors in the EU where the export subsidy commitments have been far less than fully utilized in recent years. Generally, use of export subsidies by the EU, and hence in the WTO overall, has declined noticeably in recent years. In addition to international market developments, reforms in the EU's Common Agricultural Policy have contributed to this decline. The WTO was a factor that contributed to these reforms<sup>10</sup> and to policy changes in other countries, and in that sense the UR did have an effect on the actual development of agricultural policies.

Overall, many of the new quantitative commitments on agriculture that were agreed in the UR did not constrain policies, and this appears to be the primary reason why the AoA has not yet resulted in more significant changes in agricultural policies in the OECD area. The non-binding character of the new commitments may have been the price that had to be paid during the Uruguay Round for the acceptance of a wholly new legal framework in the WTO for agricultural trade and policies. But further progress on reduction commitments

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10 Moyer, W., and T. Josling, *Agricultural Policy Reform. Politics and Process in the EU and US in the 1990s* (2002).

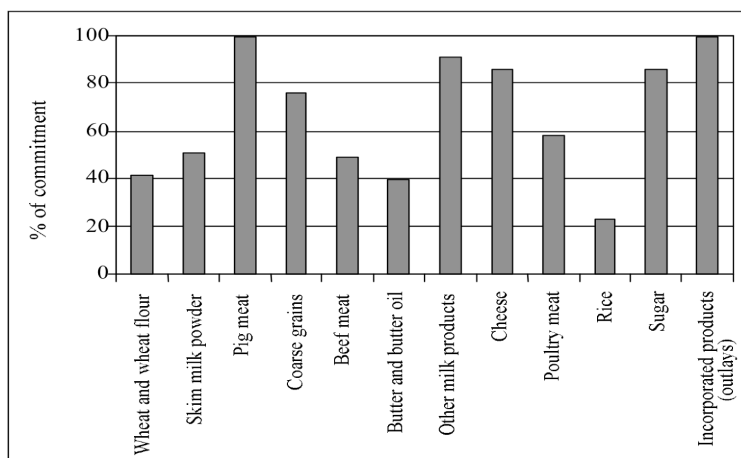
**Graph 7**  
**Outlays on Export Subsidies:**  
**Aggregate Commitments for All WTO Members**



Note: 1999, 2000 and 2001 notifications do not include Cyprus and Venezuela, 2000 and 2001 notifications do not include Australia

Source: WTO notifications

**Graph 8**  
**Export Subsidisation by the EU: Utilization of Quantity**  
**Commitments, Average 2000-02, Selected Products**



Source: WTO notifications of the EU

can be made in the current round of negotiations, and a few comments on that subject will be made in the following section.

While many of the quantitative reduction commitments agreed in the UR obviously contained much water, it cannot be said that the rules embodied in the AoA exhibited many loopholes. It appears that overall they have worked reasonably well, although some issues did indeed become apparent. For example, the rules on domestic support make it possible to reduce notified support by changing commodity programmes such that an administered price is eliminated without much effect on actual producer prices received. This possibility was used in some cases, and contributed to the decline in current total AMS shown in Graph 6. Also, certain issues regarding the interpretation of the rules on export subsidies have become apparent in dispute cases. Moreover, after overt export subsidies were subjected to disciplines in the AoA, an equivalent coverage of other forms of export competition has become an issue in the current round of negotiations. These issues regarding rules on export competition will be discussed in a later section.

#### **IV. Reduction Commitments: Focus on Border Measures and Output Payments**

Given that existing quantitative commitments still contain substantial amounts of water, it is reassuring that there appears to be essentially universal acceptance in the current round of negotiations of the need to agree on further substantial reductions. Indeed, proposals tabled so far appear to suggest that cuts this time may eventually be deeper than in the UR. Moreover, in the framework accord of July 2004, agreement has now been reached that export subsidies and other forms of export competition will finally be eliminated. Though full blown negotiations on numerical reduction parameters still have to start, growing attention has been paid in recent months to market access issues, in particular the formulae for tariff cuts. This is a positive development in the sense that there is a great deal of merit in giving priority to the reduction of border measures in agriculture.

OECD research, and the policy conclusions drawn from it—agreed among all OECD member countries—suggest that price support provided to domestic producers, maintained behind border protection and export subsidies, is ineffective and inefficient in achieving the objectives of agricultural policies. Hence, from a purely domestic perspective, the reduction of border measures is

a priority in agricultural policy reform. The same holds true for government payments per tonne of output or per unit of input. It is easy to see why.<sup>11</sup>

The most important objectives pursued by governments in agriculture fall into either of two categories, support to farm income and correction of market failures. Regarding farm income, price and output support is unnecessary, inefficient and inequitable. It is unnecessary because there is not a general farm income problem in the OECD area. In many OECD countries, incomes of farm households are in line with, or above, incomes in the rest of the economy, and where incomes of farm households lag behind, the margin is not big. Price and output support is an inefficient means of supporting farm incomes because only a small share of the money transferred to agriculture through these policies ends up in the farmer's pocket. In a typical situation, one extra dollar transferred to agriculture through price support adds no more than 25 cents to the income of farm operators. The remaining 75 cents end up in the hands of landlords and in the input industry, or evaporate through extra resource costs.<sup>12</sup> The reason is that price and output support provides an incentive for farmers to expand output, and in order to do so farmers demand more land and intermediary inputs. This also drives up prices of all these inputs. Hence, a significant share of the extra receipts farmers receive when their selling prices are supported ends up as higher expenditure on inputs. The net result is that no more than a quarter of the extra transfer to farmers from consumers and taxpayers through price support actually results in extra income for the farm operator and his or her family. Finally, farm income policy through price and output support is inequitable as this support is distributed across farms in essentially the same way as production volume, rather than in accordance with needs. The largest farms receive the largest sums of support, and those are not typically the farms owned by the poorest farmers most in need of income support. The 25% largest farms in the EU receive 70% of all government support, and in the US the 25% largest farms even get 90% of support.<sup>13</sup> The irony is that a policy arguably pursuing equity objectives has rather inequitable results.

As far as the correction of market failures is concerned, agricultural policies pursue objectives related to positive and negative externalities (e.g. the effects of agricultural production on biodiversity and the environment) and public goods

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11 The following paragraphs provide a brief overview of some of the major points made in the report by OECD, *Agricultural Policies in OECD Countries: A Positive Reform Agenda* (2002). That report also provides quantitative information that underpins the arguments advanced here, and makes reference to other OECD reports dealing with these issues in more detail.

12 OECD, *Farm Household Income: Issues and Policy Responses* (2003) 67.

13 OECD, *supra* n. 12, 22.

(e.g. maintenance of a pleasing landscape or providing food security). However, price and output support is not really doing a good job when dealing with such market failures.<sup>14</sup> Negative externalities, such as those resulting from an expansion and intensification of agricultural production, are often actually made worse through such policies. Positive externalities and any public goods that agriculture can provide usually do not come in anything like a fixed proportion with agricultural output, and hence output raising policies such as price and output support often make little, if any, contribution to attaining such objectives, and are in most cases less efficient than payments made directly dependent on the delivery of such services. In only very specific and probably rare cases may the transaction costs involved in making such targeted payments be so high that output support is the preferable approach. In other words, border policies, implemented to provide price support, and output-related domestic payments rarely do a good job in pursuing objectives related to the multifunctional characteristics of agriculture.

What is the alternative to price and output support, in dealing with agricultural issues that cannot be left to the market? Decoupling support from production is a first, very useful step in improving the domestic functioning of agricultural policy. As far as farm incomes are concerned, decoupled payments have at least the advantage that their transfer efficiency is better. For example, compared with price or output support, payments based on historical entitlements can get double the amount across to farm operators per dollar spent by consumers and taxpayers. Targeting payments directly to the objectives pursued is another very helpful step, because in nearly all cases this is significantly more efficient than supporting farm prices and output.

Hence, for purely domestic reasons, it is promising to move from border measures and output-related payments to payments decoupled from production and targeted to specific objectives. In the context of international trade, a second big advantage of such policy reform is that distortions of production, markets and trade are reduced. This is why the reduction of border measures, i.e. tariffs and export subsidies in all forms, as well as the reduction of payments per unit of output or input, merits priority.

As far as the WTO categories of domestic support are concerned, policy reform in this direction also means moving support out of the amber (and possibly the blue) box and into the green box. In this context, concern is often voiced, in particular from the perspective of developing countries, regarding the

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14 OECD, *Multifunctionality: The Policy Implications* (2003) 76-77.

phenomenon of ‘box shifting’.<sup>15</sup> In its simplest form, this criticism suggests that it doesn’t matter in which form the governments of rich countries subsidise their farmers—all forms of support distort trade. Shifting support from the amber or blue box into the green box, as allowed by the AoA, doesn’t improve the conditions on international markets, the criticism goes, and should therefore not be allowed. There is a grain of truth in this view. It is certainly the case, as confirmed by OECD research, that any payment made to a farmer is likely to have some effect on production. In that sense, a policy change that moves support from the amber to the green box is unlikely to eliminate, in a strict quantitative sense, all production and market effects. But OECD research has also shown that the production impacts of strongly decoupled policies, such as payments based on historical entitlements, and not related to current prices, are orders of magnitude below those of typical amber box measures, such as administered market prices and output payments.<sup>16</sup> From that perspective, any ‘box shifting’ of this nature is beneficial for international markets as well as for the domestic economy. Such policy reform should, therefore, be encouraged. At the same time, along with policy reform in this direction, support can also be reduced because, as argued above, decoupled and targeted payments are more effective regarding both farm incomes and dealing with market failures.

## V. Rules: The Support Jungle

As far as refinement of the rules in the AoA is concerned, it appears that the spotlight is on those regarding export competition. How can rules be formulated that extend beyond overt export subsidies and establish equivalent disciplines for other policies with potentially similar effects, such as export credits, food aid and state trading enterprises? In addition, there is also the more fundamental issue of the definition of export subsidisation, or more specifically of what the relationship is between domestic support and export competition. This issue figured in the disputes on Canada’s dairy policies and US cotton programmes, and from the media news on the as yet unavailable interim report of the panel dealing with the EU sugar regime, it appears that this issue played a role in that case, too.

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15 See, for example, Jank, M. S., and M. de Queiroz Monteiro Jales, *On Product-, Box-, and Blame-Shifting: An Assessment of the Cancun Frameworks for WTO Negotiations on Agriculture*. Paper presented at the Second IDB-CEPII Conference on ‘Economic Implications of the Doha Development Agenda for Latin America and the Caribbean’, Washington DC, October 6-7, 2003.

16 OECD, *supra* n. 3, 19f.

Negotiators in the UR aimed at a comprehensive set of rules and agreed separate disciplines for the three areas of market access, domestic support and export competition. Given the mechanics of economic relationships, it was clear from the beginning that there are overlaps between these three areas. For example, a domestic administered price above the world market level (covered under the AoA rules on domestic support) can be sustained only behind tariff protection (covered under rules on market access). If this price support results in surplus supplies on the domestic market, exports can only take place with export subsidies (covered under the rules on export competition). In such cases, a given economic phenomenon, resulting in a trade distortion, is disciplined, in the AoA, by more than one rule. The advantage may well be that this creates multiple security.

On the other hand, there are alternative policies with rather similar effects that the AoA covers in different parts of its rules, with the result that different reduction rates and degrees of stringency may apply. For example, a government payment per tonne of output has the same effect on domestic supply (though not on domestic demand) as an equivalent level of price support. However, while in an exporting country with domestic price support the exported share of domestic production is subject to the (product-specific) commitments on export subsidies, an output payment, including that on exported output, is submerged into the sector-wide commitment on domestic support. It would be difficult to argue that this is equivalent treatment of alternative forms of policies with essentially the same effects.

In the same context, it is clear that a watertight distinction between domestic support and export support is difficult to strike in exporting countries. Essentially, export support is the tip of the iceberg of domestic support. What makes a policy have an effect on exports is the incentive it provides, at the margin, to domestic producers (and/or any disincentive to domestic consumers). The implication for rule design is obvious: the tighter the disciplines are on domestic support, and in particular on domestic support for exported output, the less there is a need to rely on rules regarding export competition. In principle, appropriate disciplines on domestic support could substitute for export competition disciplines.

The same logic can also be extended to the relative effects of alternative forms of export competition. What counts here is the extra amount of output that is shipped abroad, over and above of what would be the case in the absence of the policy measure concerned.<sup>17</sup> In the final analysis, this depends on any extra incentives to produce that domestic farmers receive as a result of the policy

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17 In addition, there are also issues such as market displacement, which are not discussed here.



measure concerned. Even though the measure is implemented at the point of export (as opposed to a payment to domestic farmers), any incentive to domestic producers, and hence any additional exports, can only originate from an increase in the price these producers receive. In other words, a policy that does no more than make it easier for the importing country to buy the produce concerned, without raising the producer price in the exporting country, will not result in an expansion of exports from the country pursuing that policy.<sup>18</sup> From this perspective, too, it can be said that a tight discipline on domestic support (the 'iceberg') might well capture the export competition phenomenon (the 'tip of the iceberg'). Hence, sufficiently stringent and demanding rules on domestic support could well bring about equivalent discipline for all forms of export competition, without the need for specific provision regarding the individual export competition measures. Moreover, the link with tariffs, emphasized above, is relevant here too. In the absence of tariffs, domestic market prices cannot be lifted up by any policies. This adds further weight to the priority focus on market access.

## **VI. The Framework Agreement of 1 August 2004**

Against this background, the Decision Adopted by the WTO General Council on 1 August 2004,<sup>19</sup> and the Framework for Establishing Modalities in Agriculture annexed to it, constitute an important step forward, though many questions are still left wide open. The agreement reached in Geneva is a significant achievement far beyond signalling progress in the agricultural talks. It has also saved the WTO, and the multilateral regime of economic relations among nations overall, from the depression that could have resulted from a failure to agree on at least a rough outline for further negotiations in the DDA round. WTO Members have, through this agreement, shown their political determination to make progress in these talks and, quite irrespective of the concrete content of the Decision, the symbolic value of the fact that countries could agree on some form of accord was very important at this moment. The Framework for agriculture has a number of elements that provide more precision, at this stage, than some observers might have considered achievable, but in other parts it remains rather vague.

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18 As a matter of fact, this policy may allow the importing country to import more than it might otherwise have done, thereby raising global import demand. This would allow all exporters to ship more, including the exporting country pursuing the policy concerned.

19 WTO, Doha Work Programme - Decision Adopted by the General Council on 1 August 2004. Document WT/L/579.

The most significant achievement of the Framework is the accord 'to establish detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date.' What that end date will be is still to be negotiated. Some participants have already indicated that they think more in terms of ten to fifteen years, rather than in orders of magnitude similar to the duration of the implementation period for the UR AoA (six years for developed countries). In any case, the eventual elimination of export subsidies and equivalent measures, generally seen as the most unacceptable forms of agricultural support, will be a major accomplishment, removing what so far remains the biggest difference in the treatment of agriculture compared with the rules for manufactured trade where export subsidies were prohibited a long time ago. It is also in line with the priority focus on border measures advocated above. Negotiators will, though, still have to work hard in search of appropriate approaches to establish 'parallelism' across the various forms of export competition measures. One pragmatic step in this direction has already been taken through the agreement to eliminate, by the end date to be agreed, export credits, export credit guarantees or insurance programmes with repayment periods beyond 180 days. However, what 'parallelism' with the treatment of overt export subsidies will mean when it comes to shorter-term export credit measures, exporting state trading enterprises and food aid will still have to be determined. It will be interesting to see whether equivalence between all these measures will be defined based on an economic analysis of their respective effects on markets and trade, as briefly discussed in the preceding section of this paper, or whether more mechanical approaches will be adopted.

Regarding domestic support, the Framework has opened the door somewhat towards more specific disciplines that could in future potentially cover the economic relationships between domestic subsidies and export competition, as also briefly discussed in the preceding section. It has done so, in particular, through providing that product-specific domestic support will be capped, according to a methodology still to be agreed. The agreement to harmonize levels of domestic support across countries will eliminate (some of) the base-period effects that allowed countries with high levels of support before the UR to continue providing larger rates of support than countries whose support levels were already lower during the UR base period. The agreement to establish a new overall limit on all trade-distorting domestic support (sum of aggregate measurement of support, re-defined blue box and *de minimis*) guards against some forms of 'box shifting', as does the understanding to establish a new ceiling on the blue box, and to negotiate reductions in *de minimis* support. The resolve to make a down payment in the form of a 20 percent reduction in all trade-distorting domestic support in the first year of the implementation period will take some of the water out of current domestic support commitments. At the same time, the blue box has been opened up more widely so as to provide a

home also for payments that do not, as required in the UR AoA, come under production-limiting programmes, though only as long as such payments do not require production. The new requirement for blue box payments, that their base must not be changed, should guard against updating of the production base for these payments, and hence against the production-stimulating effects that can result if farmers are given reasons to expect that they can inflate their base for future payments by expanding production. Regarding the green box, it is not fully clear how the agreement to review its criteria will be put into practice in further negotiations. It is reassuring that in the text on the three pillars of the AoA (market access, domestic support and export competition) non-trade concerns are mentioned only in relation to the green box.

The area where the Framework is least precise is market access. In addition, while the texts on both domestic support and export competition contain at least some quantitative parameters, the section on market access does not. Agreement was reached to make deeper cuts in higher tariffs, through a tiered approach. However, what that will mean remains unclear as the number and definition of bands remained open, as did the nature of the reduction formulae to be applied in each band. This may uphold the option of not only making deeper cuts in the bands with higher tariffs, but also to apply a progressive reduction formula within each band. However, whether any of these options will become embodied in the final agreement remains to be seen. The biggest open question is what precisely the scope will be for countries to treat 'sensitive' products more leniently. The Framework does not provide guidance regarding the number of products that can be assigned to that category, nor does it indicate the degree to which markets for these products will be opened up. There is the expectation that 'substantial improvement' of market access for such products will be achieved as well, essentially through expansion of tariff rate quotas. However, in the absence of more concrete parameters in the Framework, much remains to be negotiated in this most important area. It remains to be seen whether these still open-ended Framework provisions for market access will be followed by negotiations and final results that reflect a priority for the reduction of border measures as advocated above.

The Framework aims at responding to the concerns of developing countries by providing for several elements of special and differential treatment. These provisions will not be discussed here as the focus of this paper is on OECD country policies.

## **VII. Conclusions**

The AoA concluded in the UR was a big step forward. Almost half a century after the formation of the GATT, it brought to an end the era in which

agriculture had escaped most international disciplines. The price paid for this leap forward was a relatively generous set of quantitative reduction commitments that have often not yet constrained actual policies. In spite of this generosity, the existence of the new rules and commitments has already triggered some important policy reforms. And more reforms will follow if further reductions are agreed in the current round of negotiations.

In this round, agriculture is again one of the most difficult items on the negotiating agenda. Does that say the Uruguay Round has failed on agriculture? Quite the contrary. The AoA has laid the foundations that allow negotiators in this round to focus on the rates of reduction to be agreed. In the UR, agriculture was difficult because it was not clear how the rules should be formulated. In the DDA round, agriculture is difficult because the serious reduction business is about to begin. In that sense it can also be read as a reassuring sign that agriculture is generally considered to be one of the most challenging elements of the DDA negotiations: governments are aware of the fact that only a big step forward towards reducing protection and trade distorting support will be considered sufficient progress, and they are concerned about the political implications. This may help to understand why it was so difficult to find agreement on the way forward for the agriculture negotiations in the DDA round, and why negotiators had a hard time to reach consensus, at the last minute, on the Framework for further agricultural talks that was eventually agreed on 1 August 2004 in Geneva. This Framework features a number of promising elements, in particular the envisaged elimination of export subsidies and equivalent disciplines on other forms of export competition. However, it still leaves much to be achieved in the coming negotiations. In particular, most of the approach to be adopted to improve market access—a priority for this round of negotiations—needs still to be agreed.

At the same time, the current difficulties should not cloud the historical perspective: the process of reform has much advanced. Anyone who in the mid-1980s, in the run-up to the UR, would have predicted that 20 years into the future the issue would not be whether there should be any effective disciplines on agriculture, but whether tariffs on farm products, all meanwhile bound, should be reduced according to the Swiss formula or by a flat rate of possibly 36%, or by some combination of these and other elements, would most certainly have been considered a naïve optimist.

It is appropriate that focus in the negotiations should turn to market access. Price support behind border protection and export subsidies, as well as other forms of directly output-related support, are neither effective nor efficient in reaching the objectives of agricultural policies. It is in the domestic interest of countries in the OECD area to reform these policies, and to move in the direction of decoupled and targeted payments, while at the same time achieving their policy objectives in agriculture with lower levels of support. It is good to

know that such policy reforms, in the best domestic interest, also have the extra benefit of greatly reducing distortions of production, markets and trade. Agricultural policy reform, therefore, has the potential of generating a win-win situation in the DDA negotiations: national policies become more effective, and in the WTO they allow progress to be made, both in agriculture and in other sectors.

As far as WTO rules on agriculture are concerned, the situation is not static, either. An extension of rules on export competition is envisaged, to create equivalence between disciplines for export subsidies and those for export credits, food aid and exporting state trading enterprises, including the pledge to finally eliminate all such forms of government influence on export competition. At the same time, some findings in recent dispute cases have thrown new light on the relationships between domestic support and export competition. Conceptual thinking may be required on how the various support policies affect markets, and how these market effects can be disciplined in an equivalent way.

*Strategic Use of WTO  
Dispute Settlement Proceedings  
for Advancing WTO  
Negotiations on Agriculture*

*Ernst-Ulrich Petersmann\**

European University Institute, Florence

**I. Introduction: The GATT 1947 Bicycle, the WTO Tricycle,  
and the Need for a Four-wheel Drive for the WTO**

According to the ‘bicycle theory’, the multilateral trading system risks toppling down unless periodic ‘rounds’ of intergovernmental negotiations lead to progressive, *reciprocal* liberalization of national and foreign trade barriers. Trade negotiators often warn that such ‘bi-level negotiations’ at home (over national trade barriers) and abroad (over foreign trade barriers) risk being damaged by WTO dispute settlement proceedings aimed at *unilateral* liberalization of trade barriers or trade-distorting subsidies. This paper shows how much GATT and WTO dispute settlement proceedings have already become part of GATT and WTO negotiation strategies and have transformed the ‘GATT bicycle’ into a ‘WTO tricycle’. Several recent WTO disputes (e.g. on US cotton and EC sugar subsidies, EC approval procedures for genetically modified organisms, EC application of geographical indications) pursue not only the settlement of bilateral disputes, but also the clarification of existing WTO obligations in order to improve bargaining positions (e.g. of Brazil, the US) in the Doha Round of multilateral trade negotiations. Well designed litigation strategies and judicial clarification of the often contested meaning of WTO rules can enhance the bargaining power of WTO Members and facilitate welfare-increasing trade liberalization, especially at times and in areas where WTO Members are not

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(yet) ready for consensus-based rule-making. In view of the slow and unbalanced momentum of the member-driven 'WTO tricycle', the WTO needs a more powerful four-wheel drive based on empowering the WTO Director-General to defend collective WTO interests more strongly vis-à-vis bi-level bargaining, quasi-judicial dispute settlement proceedings, and one-sided interest group pressures. Modern negotiation theories confirm that granting the WTO Director-General the right to act as 'guardian of the collective interest', by initiating independent reform proposals, could improve the quality and 'deliberative culture' of 'principled bargaining' in the WTO.

## **II. All International Agreements Are Incomplete: The Judicial Function to Clarify the Meaning of WTO Rules**

The 1994 Agreement establishing the World Trade Organization (WTO) serves 'constitutional functions' in the sense of constituting worldwide rules and institutions that legally limit national and intergovernmental trade policy discretion and lay down procedures for international rule-making, decision-making and peaceful settlement of disputes. The WTO Agreement explicitly recognizes that, in many regards, WTO rules remain incomplete for achieving the agreed objectives of e.g. 'substantial reduction of tariffs and other barriers to trade and elimination of discriminatory treatment in international trade relations' (WTO Preamble). Hence, the 'WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations' and a 'framework for the implementation of the results of such negotiations' as well as for the peaceful settlement of disputes (Article III:2,3). The WTO Dispute Settlement Understanding (DSU) explicitly:

[S]erves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of international law (Article 3:2 DSU).

Modern negotiation theories demonstrate that multilateral trade negotiations in the WTO are shaped mainly by national and international legal, political and economic constraints, intergovernmental bargaining, and by the beliefs and skills of negotiators in 'two-level bargaining' at home and abroad.<sup>1</sup> GATT and WTO negotiators often resorted, and still resort, to 'constructive ambiguity' as a consensus-building technique so as to enable agreement on international trade

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1 Cf. J. S. Odell, *Negotiating the World Economy* (2000).

rules even if there is no agreement on the precise meaning of the agreed rules.<sup>2</sup> As the ‘WTO shall continue the practice of decision-making by consensus followed under GATT 1947’,<sup>3</sup> the consensus practice prevailing in WTO decision-making has so far prevented the adoption of authoritative interpretations by a three-fourths majority of WTO Members pursuant to Article IX:2 of the WTO Agreement. The main thesis of this paper is that many of the more than 45 WTO dispute settlement panels involving agricultural, fishery or forestry products have been established over the preceding years not only in order to settle bilateral trade disputes, but also for clarifying the contested meaning of WTO obligations with the view to improving one’s bargaining power in WTO negotiations and progressively developing WTO rules through agreed WTO dispute settlement rulings (e.g. regarding the legal relevance of the use of domestic subsidies for cross-subsidizing exports for the interpretation of the subsidy disciplines in Articles 9 and 10 of the WTO Agreement on Agriculture).

The same political reasons—such as the prisoner’s dilemma in the collective supply of international public goods (including liberal trade and rule of law)—which induce rational governments to limit their policy discretion by reciprocal international legal obligations, also justify international rules on the peaceful settlement of disputes and on the delegation of the ‘clarification’ of international rules to independent judges as a means of protecting, and progressively developing, the rule of law. The DSU emphasizes the legal limits of legitimate adjudication. For instance, the mandate of WTO dispute settlement bodies is limited (e.g. by Articles 2, 3, 7, 11, 17, 19), and ‘[r]ecommendations and rulings of the DSB [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements’ (Articles 3:2, 19:2). The 1994 Ministerial Decision inviting the WTO ‘to complete a full review of dispute settlement rules and procedures under the WTO within four years after the entry into force’ of the WTO Agreement<sup>4</sup> illustrates another problem of international rule-making: governments learn from experience and recognize the need for periodic review and improvements of newly agreed rules that, in practice, may turn out to be sub-optimal, incomplete and needing adjustments to additional exigencies.

The increasing imbalance between, on the one side, the large number of so far (October 2004) 317 formal consultations under the DSU since 1995 (leading

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2 Cf. M. Moore, *A World Without Walls – Freedom, Development, Free Trade and Global Governance* (2003) at 111.

3 Article IX:1 of the WTO Agreement.

4 See: The WTO Dispute Settlement Procedures, WTO 1995, at 42.



to more than 90 panel reports, 26 compliance panel reports, almost 60 appellate reports and more than 30 arbitration awards) and, on the other side, the continuing inability of WTO Members to meet their self-imposed deadlines for new rule-making (e.g. on DSU reforms) is widely criticized.<sup>5</sup> The obvious lack of adequate political rule-making mechanisms for clarifying and complementing WTO rules has also contributed to the large number of more than 105 pending consultations under the DSU, as well as to the frequent resolution of WTO disputes outside the quasi-judicial panel and appellate procedures, i.e. by means of mutually agreed solutions (in 45 cases by October 2004) and other dispute settlements (in 26 cases up to October 2004).<sup>6</sup> These statistics confirm the insight, increasingly emphasized also by WTO negotiators, that 'dispute resolution, the management of trade relations, and trade negotiations need to be clearly seen as part of a coherent integrated process.'<sup>7</sup> As can be seen from the evidence described below, governments have often resorted to GATT and WTO dispute settlement proceedings as a means of improving their negotiating position 'in the shadow of the law'<sup>8</sup> even if, for political reasons, the government may prefer, in the end, to negotiate a bilaterally agreed settlement of a dispute rather than to litigate its contested legal claims through (quasi)judicial panel and appellate proceedings. Modern dispute settlement theories explain why, and on the basis of which criteria, international trade disputes can be sub-divided, according to their underlying intergovernmental or domestic conflicts of interests, into various categories that lend themselves to different kinds of optimal dispute prevention and dispute settlement methods at national and international levels.<sup>9</sup>

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5 See the chapter by Ehlermann and Ehring in this book and C. Trojan, Foreword to: E.-U. Petersmann (ed), *Preparing the Doha Development Round: Challenges to the Legitimacy and Efficiency of the World Trading System*, EUI 2004, at x-xi. On the WTO jurisprudence and the WTO negotiations on reforms of the DSU see: F. Ortino and E.-U. Petersmann (eds), *The WTO Dispute Settlement System 1995-2003*, (2004).

6 These figures are taken from: Update of WTO Dispute Settlement Cases, WT/DS/OV/22 of 14 October 2004, at page ii.

7 J. M. Weekes, former WTO Ambassador of Canada, in his contribution to the book by: J. Lacarte and J. Granados (eds), *Intergovernmental Trade Dispute Settlement: Multilateral and Regional Approaches*, 2004.

8 On the influence of legal rules on political negotiations, mediation and conciliation see e.g.: Y. Dezalay and B. G. Garth, *Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996).

9 Cf. E.-U. Petersmann, 'Prevention and Settlement of Transatlantic Economic Disputes' in: E.-U. Petersmann and M. Pollack (eds), *Transatlantic Economic Disputes: The EU, the US and the WTO* (2003) chapter 1.

### III. Agricultural Disputes during the Tokyo Round and the Uruguay Round: Lessons from GATT Disputes Involving the EC and the US

Since the entry into force of the GATT in 1948, the GATT provisions on market access and subsidies for agricultural goods have been progressively clarified and strengthened by treaty amendments (e.g. of GATT Article XVI), supplementary agreements (e.g. the 1979 and 1994 Agreements on Subsidies and Countervailing Measures), additional market access commitments, domestic support commitments as well as export subsidy commitments (e.g. pursuant to the 1994 Agreement on Agriculture).<sup>10</sup> Even though trade in agriculture accounts today for less than 10% of world merchandise trade, almost half of the 115 dispute settlement reports issued up to 1995 under Article XXIII of GATT 1947 and under the 1979 Tokyo Round Agreements related to agricultural goods.<sup>11</sup> This dispute settlement practice contributed to the progressive clarification of GATT rules (e.g. as regards minimum import prices, variable import levies, domestic support prices, export subsidies) and to the negotiation of ever more specific, additional legal disciplines (e.g. in the context of the 1994 Uruguay Round Agreements on Agriculture and Subsidies). This *section (III)* illustrates how some of the GATT disputes relating to production and export subsidies for agricultural products in the European Community (EC) and the United States (US)—i.e. the two most important producers, traders and ‘subsidizers’ of agricultural goods—have influenced the Tokyo Round and Uruguay Round negotiations in the GATT. The following *section (IV)* discusses some of the recent WTO disputes whose legal findings are likely to influence the ongoing WTO negotiations on trade in agriculture.

Up to the end of GATT’s Kennedy Round (1964-1967), the large number of GATT disputes over agricultural restrictions and subsidies seemed to have influenced GATT negotiations on agriculture only marginally. The ‘GATT 1947 bicycle’ rolled and, through six major GATT Rounds of reciprocal trade liberalization commitments, created the necessary political momentum for liberalizing domestic market access barriers. During the Tokyo Round (1973-1979), the US successfully challenged various EC import restrictions for

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10 Cf. M. D. Ingo and J. D. Nash (eds), *Agriculture and the WTO* (2004) e.g. chapters 2 and 11.

11 See the lists of dispute settlement reports in Annexes A and B to: E.-U. Petersmann, *The GATT/WTO Dispute Settlement System* (1997). For a list of 196 disputes under GATT Article XXIII up to 1995 (including disputes that did not lead to a dispute settlement report) see: Guide to GATT Law and Practice, Vol.2, WTO 1995, at 771-787.

agricultural products through GATT dispute settlement proceedings.<sup>12</sup> The GATT panel reports on the 1978 complaints by Australia and Brazil against EC-refunds on exports of sugar led to findings that the EC system of export refunds for sugar constituted a threat of prejudice in terms of GATT Article XVI:1.<sup>13</sup> Yet, no violation of the vaguely drafted GATT prohibitions of export subsidies (Article XVI:3) was established. The discussions—in two subsequently established GATT Working Parties—of the possibility of limiting EC subsidies of sugar exports ended without formal agreement on the settlement of the dispute.<sup>14</sup> The large number of agricultural disputes influenced the final Tokyo Round Agreements in several ways:

- The evidence that import restrictions could be successfully challenged through GATT dispute settlement proceedings offered support for additional market access commitments.
- The threat of GATT disputes (e.g. against EC import restrictions and export support for beef) facilitated political dispute settlement arrangements (e.g. the setting-up of the International Meat Consultative Group, the conclusion of the ‘International Bovine Meat Arrangement’ as part of the Tokyo Round Agreements).
- The ineffective GATT disciplines on agricultural export subsidies, and the disappointing outcomes of GATT dispute settlement challenges of the GATT consistency of such export subsidies (e.g. US tax refunds on the exportation of agricultural products, EC refunds on exports of sugar), contributed to the conclusion of the 1979 Tokyo Round Agreement on Subsidies.
- The threat of ‘too much GATT litigation’ prompted the EC to oppose the establishment of a GATT Legal Office until 1983, notwithstanding the previous codification of GATT dispute settlement practices in the Tokyo Round ‘Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance’.

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12 The 1978 Panel Report on *EEC-Measures on Animal Feed Proteins* found various measures in violation of GATT Article III, cf. GATT Basic Instruments and Selected Documents (BISD) 25S/49. Another 1978 Panel Report on *EEC-Programme of Minimum Import Prices, Licenses and Surety Deposits for Processed Fruits and Vegetables* established various violations of GATT Article XI (BISD 25S/68).

13 BISD 26S/290 (1979); 27S/69 (1980).

14 BISD 28S/80; 29S/82.

Following the Tokyo Round up to the beginning of the Uruguay Round (1986-1994), a similar pattern of clear GATT dispute settlement findings on import restrictions—yet only vague dispute settlement findings regarding subsidies for agricultural goods—prevailed: GATT dispute settlement proceedings challenging EC market access restrictions led to Panel findings that, for instance, EC restrictions on imports of apples from Chile were inconsistent with GATT Article XIII,<sup>15</sup> and EC restrictions on imports of beef from Canada violated Articles I and II of GATT.<sup>16</sup> Yet, the 1981 US complaint—under the 1979 Tokyo Round Agreement on Subsidies—against EC subsidies on exports of wheat flour led only to a vague Panel finding that the export refunds had caused undue disturbance of the normal commercial interests of the US in the sense of GATT Article XVI:2; the Panel was unable to find that the EC export refunds on wheat flour had resulted in the EC having more than an ‘equitable share of world export trade’, or had caused ‘market displacement’, in the sense of Article 10 of the Subsidies Agreement.<sup>17</sup> The 1982 US complaint against EC subsidies on exports of pasta products led to a legal finding by the majority of the Panel that the EC subsidies violated Article 9 of the Subsidies Agreement. Yet, also this panel report was not adopted due to opposition by the US.<sup>18</sup> There were, however, two new developments in agricultural disputes during this period. *First*, the 1982 US complaint against EC production aids granted on canned fruit led to a GATT panel finding that the EC production aids had nullified US benefits under EC tariff concessions legally bound under GATT Article II.<sup>19</sup> *Second*, a number of complaints (e.g. by the EC, US, Canada, Brazil) challenging the legal consistency of countervailing duties led to various Panel findings clarifying and enforcing the legal disciplines of the Subsidies Agreement for the application of countervailing duties on subsidized imports.<sup>20</sup>

During the Uruguay Round (1986-1994), GATT dispute settlement challenges of import protection and subsidies for agricultural goods remained frequent. GATT dispute settlement practice confirmed that import restrictions, domestic subsidies and countervailing duties could be challenged more effectively through

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15 BISD 27S/98.

16 BISD 28S/92.

17 SCM/42 (not adopted).

18 SCM/43.

19 The Panel report (L/5778) was not adopted after the parties agreed on a settlement of their dispute.

20 See, e.g. the 1986 Panel report on the EC complaint against the US definition of industry concerning wine and grape products (BISD 39S/436).

GATT dispute settlement proceedings than export subsidies for agricultural goods. Several GATT Panels found, for example, that:

- EC import restrictions for apples and bananas were inconsistent with GATT Articles XI and XIII;<sup>21</sup>
- US import restrictions on sugar violated Articles II and XI of GATT;<sup>22</sup> and
- US import restrictions on tobacco were inconsistent with GATT Article III.<sup>23</sup>

The 1990 Panel report on the US complaint against EC subsidies for producers and processors of oilseeds established a violation of GATT Article III:4 as well as the impairment of tariff bindings under GATT Article II.<sup>24</sup> Some of these disputes illustrated the various shortcomings of GATT dispute settlement procedures and legal remedies, for instance if adoption of panel reports was blocked for political reasons (e.g. in the banana disputes); or when illegal safeguard measures were re-introduced on an annual basis necessitating repeated complaints (e.g. against seasonal EC restrictions on imports of apples). Interrelationships between GATT negotiations and dispute settlement practice were obvious in various ways:

- The successful dispute settlement challenges of import restrictions, domestic subsidies and countervailing duties demonstrated that many agricultural non-tariff trade barriers appeared to be inconsistent with GATT (e.g. Article XI:2,c). One major objective of the Uruguay Round Agreements was to avoid such disputes by means of reciprocal market access commitments, ‘tariffication’ of non-tariff trade barriers, ‘minimum access’ for agricultural imports, and a ‘peace clause’ (Article 13 of the Agreement on Agriculture) limiting access to WTO dispute settlement proceedings.
- As export subsidies for agricultural goods had eluded effective GATT disciplines, the Uruguay Round negotiations led to additional export subsidy reduction commitments and stricter disciplines on subsidies (e.g. in the Agreements on Agriculture and on Subsidies).
- The frequent ‘blocking’ of consensus on the adoption of panel reports for political reasons (e.g. in the case of the dispute settlement findings on the EC’s import restrictions on bananas), and the annual re-introduction of

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21 BISD 36S/93; 135; DS32/R (1993 – not adopted); DS38/R (1994 – not adopted).

22 BISD 36S/331.

23 DS44/R.

24 BISD 37S/86; 39S/91.

safeguard measures that had been previously found to be in violation of GATT (e.g. in the case of the EC's import restrictions on apples), demonstrated that GATT dispute settlement procedures needed further reforms (as finally agreed in the DSU).

- Mutual agreements on the settlement of agricultural disputes (e.g. the EC-US oilseed dispute from 1988-1992) were of crucial importance for reaching political agreement on stricter rules for trade in agricultural goods (e.g. the 1992 Blair House Agreement clearing the way for the Uruguay Round Agreement on Agriculture).

This admittedly incomplete survey of GATT dispute settlement proceedings over agricultural market access restrictions, domestic subsidies and export subsidies confirms that political GATT negotiations (e.g. on market access commitments and new rules) and quasi-judicial dispute settlement proceedings have been closely interrelated in GATT practice for a long time. For example, consultations in the EC-US dispute over subsidies for wheat flour began during the Tokyo Round in 1977; formal panel proceedings challenging the EC's subsidies, as well as the US's countermeasures, started, however, only in the 1980s after the entry into force of the Tokyo Round Agreement on Subsidies. Recourse to GATT dispute settlement proceedings could depoliticize a dispute by transforming it into a technical legal exercise, which could help to fend off domestic political pressures and mitigate international disparities in power (e.g. in the case of the various complaints by Latin-American agricultural exporters against EC import restrictions). Many disputes:

[W]ere settled bilaterally, some reached the panel report stage but the report was never adopted, and others were subsumed in broader ongoing trade negotiations. In a few cases, a subsidy war replaced diplomacy and resulted in an *ad hoc* accommodation.<sup>25</sup>

The disputes helped all GATT contracting parties to better understand the scope of their GATT obligations. The oilseed dispute settlement proceedings, and the parallel Uruguay Round negotiations on new rules for agriculture, facilitated not only a resolution of the oilseed conflict, but also the 1992 Blair House Agreement clearing the way for the 1994 Uruguay Round Agreement on Agriculture:

The existence of the talks had facilitated the conclusion of the GATT dispute, but the need to resolve the dispute had provided an

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25 T. Josling and S. Tangermann, 'Production and Export Subsidies in Agriculture: Lessons from GATT and WTO Disputes Involving the US and EC' in: Petersmann and Pollack, *supra*, n. 9, 207-232, at 208.

opportunity for a ‘package deal’ that might not have been possible if each element would have been considered in isolation.<sup>26</sup>

GATT disputes over the legal disciplines for *domestic subsidies* and countervailing duties have led to rather precise legal findings. GATT disciplines on agricultural *export subsidies* were no longer effectively enforced through GATT dispute settlement proceedings, notwithstanding the rather strict GATT Panel report back in 1958 which had found French export subsidies for wheat and wheat flour to violate GATT Article XVI.<sup>27</sup> This negative dispute settlement experience reinforced the Uruguay Round negotiations on more precise legal disciplines for export subsidies and more effective legal and judicial remedies, as provided under the Uruguay Round Agreements on Agriculture and on Subsidies.

#### **IV. Agricultural Disputes in the WTO: Interrelationships between Negotiations, Consultations, Prevention and Settlement of Disputes in the WTO**

The 1994 Uruguay Round Agreements on Agriculture (AoA), Subsidies and Countervailing Measures changed radically the rules for market access commitments and subsidies in agricultural trade. They increase the transparency and legal precision of market access and subsidy commitments; offer additional political procedures for the multilateral surveillance (e.g. by the Committee on Agriculture) of compliance with the agreement; and conditionally shelter certain export subsidies (e.g. by the allowable subsidy limits specified in the schedules of commitments), ‘green box’ subsidies (for non-trade-distorting payments that are not related to output or prices) and other subsidy practices for a 9-year ‘implementation period’ (as defined in Article 1,[f]) from legal challenges (cf. Article 13). The declining use of export subsidies in agriculture is one of the reasons why pressures from competing interest groups—which are the starting point for many GATT and WTO dispute settlement proceedings—also appear to have declined, at least until the expiry of the peace clause in Article 13 of the Agreement on Agriculture.

Even though the ‘Peace Clause’ limited recourse to WTO dispute settlement procedures until its expiry in 2003/2004,<sup>28</sup> the improved accessibility, enhanced

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26 Josling and Tangermann, *supra*, n. 25, at 214.

27 BISD 7S/46, 22.

28 The precise date (end of 2003 or end of the marketing year in 2004) depends on the contested interpretation of Articles 1(f) and 13 AA. The WTO Panel Report on *United States – Subsidies on Upland Cotton* (WT/DS267/R of 8 September 2004) did not have to clarify this issue because Brazil and the US agreed that Brazil’s panel request was within the nine year

procedures and quasi-automatic decision-making in the WTO dispute settlement system contributed to a large number of WTO disputes over the consistency of agricultural market access restrictions and subsidies with WTO legal disciplines. The timing and legal targets of some of the various agricultural disputes suggest that WTO complaints, panel and appellate proceedings were used not only for the settlement of bilateral disputes, but also for clarifying existing WTO obligations, identifying the need for additional WTO rules, improving the bargaining position of countries in multilateral WTO negotiations, and putting pressure on other WTO Members to engage in WTO negotiations on additional rules and commitments to reduce agricultural support and subsidy levels. WTO negotiators confirmed that ‘the impact on negotiations of the dispute settlement system of the WTO and its predecessor the GATT is substantial.’<sup>29</sup>

A large number of requests for DSU consultations in the field of agriculture remain pending and focus on market access restrictions (e.g. Korean measures concerning the testing and inspection of agricultural products, Japanese restrictions on imports of pork, US measures affecting imports of poultry products, EC import duties on rice and corn gluten feed) rather than subsidy practices (e.g. alleged EC subsidies on processed cheese).<sup>30</sup> Most of the completed WTO panel reports relating to agricultural products concern market access restrictions (e.g. for imports of salmon, desiccated coconut, bananas, hormone-fed beef, poultry products, apples, milk and other dairy products, beef, wheat gluten, lamb, vegetable oils, sardines, peaches). The 1999 Panel and Appellate Body reports on *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* led to the first WTO dispute settlement ruling that export subsidies for certain dairy products exceeded the quantity commitment levels specified in Canada’s Schedule in violation of Articles 3.3 and 8 of the Agreement on Agriculture.<sup>31</sup> The 1999 Panel report and 2000 Appellate Body report on *US – Tax Treatment for Foreign Sales Corporations* (FSC) led to a dispute settlement ruling that the US acted inconsistently with its obligations under Articles 10.1 and 8 of the AoA by applying export subsidies, through the FSC measure, in a manner which results in, or threatens to lead to, circumvention of its export subsidy commitments with respect to agricultural products; however,

... continued

implementation period. The Panel report clarified, however, that Article 13 is not in the nature of an affirmative defence and does not preclude dispute settlement based on GATT 1994 and the Subsidies Agreement.

29 Cf. Weekes, *supra*, n. 7.

30 Cf. Update of WTO Dispute Settlement Cases, *supra*, note 6, 1-34.

31 The Panel findings (WT/DS103/R, WT/DS113/R of 17 May 1999) were partly upheld, partly reversed by the Appellate Body and adopted in October 1999, cf. Update (note 6).



the Appellate Body reversed the Panel's finding that the FSC measure involved 'the provision of subsidies to reduce the costs of marketing exports' of agricultural products in violation of Articles 3.3 and 9.1(d) of the Agriculture Agreement.<sup>32</sup> The findings, in the Panel report on *Measures Affecting Imports of Beef*, that Korea's domestic support for beef exceeded Korea's commitment levels in violation of Articles 3:2 and 7:2(a) of the AoA, were reversed by the Appellate Body.<sup>33</sup>

The 2004 Panel report on *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* found that certain Canadian import restrictions were inconsistent with GATT Article III:4 but that the US had failed to establish its claim that the Canadian Wheat Board export regime was inconsistent with the rules for state-trading in GATT Article XVII:1.<sup>34</sup> In the dispute over *United States – Subsidies on Upland Cotton*, the panel report of 8 September 2004 found that several US support measures for upland cotton violate the WTO Agreements on Agriculture and Subsidies and do not fall under the peace clause (Article 13 AoA). The Panel found, *inter alia*, that:

- US export credit guarantee programmes offered export subsidies that are inconsistent with Articles 8 and 10.1 AoA and Articles 3, 5 and 6 of the Subsidies Agreement;
- US user marketing payments to domestic users of upland cotton constituted an import substitution subsidy prohibited by Article 3 of the Subsidy Agreement; and
- US domestic support measures had caused serious prejudice, within the meaning of Article 5(c) of the Subsidy Agreement, to the interests of Brazilian producers by suppressing cotton prices.<sup>35</sup>

The cotton dispute is also the first dispute challenging a WTO Member's classification of domestic subsidies as 'green box subsidies' exempted from WTO subsidy reduction commitments. Press reports quoted Brazil's trade minister as commenting that the ruling would be very important for the future of the Doha Round as Members might find negotiations a better way to achieve

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32 The Appellate Body report (WT/DS108/AB/R) and the Panel report, as modified by the Appellate Body, were adopted in March 2000, cf. Update, *supra*, n. 6.

33 Cf. WT/DS161/R, WT/DS169/R and WT/DS161,169/AB/R and note 6. The Appellate Body was unable, in view of the insufficient factual findings made by the Panel, to complete the legal analysis of the alleged violations of the Agreement on Agriculture.

34 WT/DS276/R of 6 April 2004. These findings were essentially confirmed by the Appellate Body, cf. WT/DS276/AB/R of September 2004.

35 WT/DS267/R of 8 September 2004. The panel findings are currently under appeal before the Appellate Body.

their subsidy reduction ambitions than dispute settlement where the implementation of WTO rulings can drag on for several years.<sup>36</sup>

The complaints by Australia, Brazil and Thailand against *EC- Export Subsidies on Sugar* have given rise to three panel reports which found, *inter alia*, that the EC sugar regime had provided export subsidies within the meaning of Article 9.1 (a) and (c) AoA in violation of the EC's obligations under Articles 3.3 and 8 of the Agreement on Agriculture.<sup>37</sup> The participation of 25 WTO members as third parties, intervening either for the three complainants or for the defendant, in this *sugar dispute*—similar to the intervention of 13 WTO Members (counting the EC as one Member) in the *cotton dispute*—illustrates the systemic importance attached to these disputes by WTO Members. Other currently pending WTO panel proceedings—e.g. challenging an alleged lack of protection of trademarks and geographical indications for agricultural products in the EC—<sup>38</sup> are likewise linked to contentious issues in the Doha Round negotiations (e.g. on the extension of geographical indications).

## V. First Conclusion: WTO Dispute Settlement Proceedings Can Help to Advance WTO Negotiations on Agriculture

According to the case-studies by Josling and Tangermann, 'experience in the Kennedy, Tokyo and Uruguay Rounds suggests that subsidy disputes can be used as a lever in GATT/WTO negotiations.'<sup>39</sup> This paper offers additional evidence that, also in the Doha Development Round, WTO Members resort to WTO dispute settlement proceedings not only as a means for settling bilateral disputes over market access restrictions or trade-distorting agricultural subsidies. The timing and legal targets of WTO dispute settlement proceedings suggest that WTO complaints, panel and appellate proceedings are also used for clarifying existing WTO obligations, identifying the need for additional WTO rules, improving the bargaining position of countries, or putting pressure on other WTO Members to engage in negotiations on additional rules and commitments. The terms and temporary nature of the Peace Clause confirm that WTO Members perceived such interrelationships between recourse to dispute settlement proceedings and trade negotiations, after the expiry of the

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36 *Bridges*, ICTSD May 2004, at 7.

37 WT/DS265/R, 266/R and 283/R of 15 October 2004, currently under appeal before the WTO Appellate Body.

38 WT/DS174 (complaint by the US), 290 (complaint by Australia).

39 Josling and Tangermann, *supra*, n. 25, at 225.

peace clause, as legitimate tools for reaching agreement on new rules and reciprocal liberalization commitments. According to Article 20 of the AoA, the mandated negotiations on agriculture, now folded into the Doha Round, were to begin 'one year before the end of the implementation period', i.e. at the beginning of 2000. The Peace Clause afforded, at a minimum, an additional four years of conditional protection as from 2000 while the negotiations were underway. One could hypothesize that these time-frames were likewise motivated by the insight that—while a temporary assurance of peace on the dispute settlement front could be conducive to negotiated trade liberalization in agriculture—the potential leverage of dispute settlement findings was perceived to be important for the final conclusion of the negotiations.

Trade negotiators sometimes react to adverse dispute settlement findings by claiming that, for example, 'developing countries risked damaging the Doha Round world trade negotiations if they were to file new dispute cases aimed at forcing the US to dismantle its farm subsidy programs'.<sup>40</sup> This paper suggests that WTO dispute settlement proceedings should not be viewed as inconsistent with WTO negotiations:

[L]itigating (where the facts warrant, of course) and negotiating are *complementary* means of motivating the reduction of particular trade-distorting subsidies, whereas failing to demonstrate a clear willingness to invoke dispute settlement may actually be the best way to keep the negotiations stalled ... initiating a case does not necessarily mean pursuing it all the way through to judgment; merely waiving around a ready-to-file complaint, or holding consultations under the DSU, may be sufficient to concentrate the minds of potential defenders.<sup>41</sup>

Many trade negotiators commented on the WTO cotton ruling by saying that it:

[C]ould have a significant impact on continuing multilateral agriculture negotiations by increasing pressure on the US and other developed countries to ensure that negotiations move forward in order to avoid a host of new legal challenges from developing countries.<sup>42</sup>

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40 US Trade Representative R. Zoellick, commenting on the preliminary WTO Panel finding that US subsidies for cotton growers violate WTO rules, quoted in: *Financial Times*, 29 April 2004, at 3. 'If other countries decide to stand back and litigate their way, as opposed to negotiate, I think it's going to be a very complicated and non-productive result for everybody.'

41 J. R. Magnus, *The Evils of a Long Peace: Legal Consequences of WTO 'Peace Clause' Expiry and Practical Issues for New Litigation over Farm Subsidies*, Washington conference paper dated 4 December 2003, at 3.

42 Cf. *Inside US Trade*, 30 April 2004: 'Cotton Decision Could Increase Pressure to Reach Framework Deal'.

The special provisions on liberalization of trade barriers and trade distortions for cotton in the WTO Decision of 1 August 2004 confirm this view. Lack of progress in WTO negotiations could trigger additional WTO dispute settlement proceedings challenging the legality of existing subsidy programmes.

The expiry of the Peace Clause has rendered EC and US agricultural subsidies more vulnerable to legal challenges (e.g. under Articles 5 and 6 of the Subsidy Agreement).<sup>43</sup> The WTO dispute settlement findings on EC sugar and US cotton subsidies confirm the enhanced:

[B]argaining power of non-subsidizing countries, which may demand 'payment' in the form of further subsidy reduction commitments and a shift toward tariffs-and-decoupled-payments systems in exchange for extending the Peace Clause. Ultimately, expiry of the Peace Clause will do what it was intended to do: light a fire under negotiations on trade-distorting agricultural subsidies.<sup>44</sup>

The *US Cotton Panel* finding that several US support measures for cotton are not covered by the Peace Clause and violate WTO rules, further suggests that—following the GATT Panel finding in the 1958 *French Wheat Flour Case* that French subsidies on the export of wheat flour had resulted in 'more than an equitable share' of world export trade in violation of GATT Article XVI:3—<sup>45</sup> WTO Panels are capable of applying the often vaguely drafted WTO subsidy disciplines if the complainants can demonstrate trade-distorting effects.<sup>46</sup>

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43 Cf. e.g. R. H. Steinberg and T. E. Josling, 'When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge' in: *Journal of International Economic Law* 2003, 369-417.

44 Steinberg and Josling, *supra*, n. 43, at 372.

45 BISD 7S/46, at 50-51. In several subsequent GATT dispute settlement proceedings relating to GATT Article XVI:3, the Panels concluded that the complainant had not been able to prove the causal relationship between agricultural subsidies and displacement of sales of non-subsidized, competing products.

46 On the interpretative problems of applying cumulatively the subsidy disciplines in the WTO Agreements on Agriculture and on Subsidies, see e.g. D. Chambovey, 'How the Expiry of the Peace Clause (Article 13 of the WTO Agreement on Agriculture) Might Alter Disciplines on Agricultural Subsidies in the WTO Framework' in: *Journal of World Trade* 2002, 305-352.

## VI. Second Conclusion: The 'WTO Tricycle' Needs to Be Transformed into a Four-wheel Drive so as to Improve the Quality and Culture of WTO Bargaining

Conflicts of interests are inevitable facts of life, as much in international trade relations as elsewhere. Just as individual rationality and justice require 'examining', 'reviewing' and impartially 'judging' contested facts, contrary arguments and self-imposed disciplines in one's own mind, so the normality of trade conflicts justifies the large number of WTO provisions on dispute prevention (e.g. by negotiations, rule-making and rule-application) and dispute settlement through recourse to domestic courts (cf. Article X:3 GATT) or to the compulsory WTO/DSU jurisdiction for intergovernmental consultations, good offices, mediation, conciliation, panel, appellate or arbitration procedures. Frequent recourse to these WTO dispute settlement proceedings is a sign of well-functioning legal and judicial systems, rather than of socially harmful conflicts. Most WTO disputes can be seen positively as serving legitimate functions for the (quasi)judicial clarification and protection of agreed rights and obligations, without detriment to the different functions of legislatures (e.g. rule-making by WTO Members) and executives (e.g. rule-application by trade bureaucracies).

Dialectic 'checks and balances' among the legislative, executive and (quasi)judicial branches of the WTO are likely to improve the quality of arguments, negotiations and agreements among the 148 WTO Members. For example, when—in the *Canada-Dairy* dispute—the Appellate Body reversed the finding of an Article 21.5 report relating to the interpretation of the WTO export subsidy disciplines, the extensive discussion in the WTO's Dispute Settlement Body on the relative merits of the Appellate Body and Panel interpretations led to severe criticism by WTO Members that the Appellate Body had developed a new definition of 'payment' (based on the cost of production of individual farmers) that:

- Had no basis in the treaty texts;
- Had never been discussed before;
- Offered a 'particularly unworkable standard'; and
- '[S]hould be of concern to other Members from a systemic standpoint.'<sup>47</sup>

As the Appellate Body's Article 21.5 report had not applied the new legal findings to the complex factual situation, the complainants requested a second Article 21.5 panel report whose findings were again appealed. The second Article 21.5 Appellate Body report was, once more, criticized in the DSB

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47 Cf. the discussion in the DSB meeting of 18 December 2001 on the *Canada - Dairy* dispute reported in WT/DSB/M/116, 7-13.

because—in the view of some WTO Members—the new ‘cross-subsidization standard’ clearly ‘went beyond the ordinary meaning of the words in the Agreement on Agriculture’ and ‘had found its way into another WTO dispute’,<sup>48</sup> namely the WTO Panel proceeding over *EC – Export Subsidies on Sugar*.<sup>49</sup> The examples illustrate that WTO dispute settlement proceedings, apart from their judicial function for the settlement of disputes through legally binding rulings, do not curtail the right of WTO Members to criticize alternative interpretations and negotiate agreements on more precise and more coherent rules.

This paper has shown that bi-level trade negotiations in GATT and the WTO over the reciprocal liberalization of domestic and foreign trade barriers, and also over general rule-making, have become increasingly influenced by (quasi)judicial GATT and WTO dispute settlement findings. The transformation of the old ‘GATT 1947 bicycle’ into a ‘WTO tricycle’—driven forward by intergovernmental negotiations, ever more comprehensive WTO jurisprudence, and domestic implementing measures—has resulted in imbalances between the protracted slowness of consensus-based rule-making processes, on the one side, and the dynamically progressing (quasi)judicial clarification of the contested meaning of WTO rules, on the other. WTO Members clearly prefer resorting to WTO dispute settlement proceedings rather than to WTO rule-making by majority decisions: given the lack of democratic governance in many WTO Members, the redistributive effects of many WTO decisions, and the fact that only 30 WTO Members account for about 90% of world trade, WTO majority decisions could lack legitimacy and unduly limit policy autonomy and democratic governance at the national level. The prevailing mantra of a ‘member-driven WTO’ needs to be replaced by adding a fourth wheel to the WTO tricycle, i.e. empowering the WTO Director-General to defend more effectively the general interests of WTO Members in a consumer-driven, mutually beneficial and socially just world trading system. Just as European integration processes tend to be driven by independent Commission proposals protecting the ‘Community interest’ and by more flexible ‘enhanced cooperation’ among ‘coalitions of the willing’, so could WTO negotiations and rule-making processes benefit from empowering the WTO Director-General to initiate ‘public interest proposals’ and from increased recourse to ‘plurilateral agreements’ among interested WTO Members inside

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48 Cf. WT/DSB/M/141, at 2-6.

49 The three complainants (Australia, Brazil and Thailand) claimed, *inter alia*, that the EC is cross-subsidizing sugar exports by the high price guarantees for internally sold sugar. EU trade diplomats were quoted in the press as saying that a ‘panel finding in favor of this claim would have huge implications for major subsidizers and exporters such as the EU and the United States ... since many commodities—such as sugar, cotton, and dairy—are sold on global markets below the cost of production’ (*WTO Reporter*, 5 April 2004, at 2).

the WTO, rather than to the ever increasing number of free trade agreements outside the WTO.

The numerous producer-biases of GATT and WTO rules (e.g. on anti-dumping measures) confirm that national trade politicians have proven to be highly ineffective guardians of general consumer welfare. The more than 270 billion US dollars of financial support for farmers in rich countries in 2003, amounting to 32% of their gross receipts,<sup>50</sup> could certainly be used in more efficient, less trade-distorting and more equitable ways. Also national parliaments in European and many other WTO member countries have shown little interest in effectively controlling rule-making in the WTO; the 1994 Uruguay Round Agreements, for instance, were ratified by most national parliaments after only a few hours of parliamentary debates, sometimes even without a complete translation of the more than 500 pages of treaty texts into the official national language (e.g. in the German Parliament).<sup>51</sup> Empowering the WTO Director-General to initiate *collective interest proposals* could promote 'principled bargaining'<sup>52</sup> in the WTO and be crucial for overcoming *collective action problems*. The modern literature on 'deliberative politics' demonstrates that the quality and out-put of political discourse and of positional bargaining can be improved—especially in 'two-level' negotiations (as in the WTO) where the intergovernmental bargaining requires consensus and its ratification in domestic parliaments requires democratic legitimacy and majority-voting—by institutional rules which promote a 'spirit of accommodation' and 'principled negotiations' that attach more importance to better arguments (in terms of the common good) than to bargaining power (in terms of threats of punishment and promises of reward).<sup>53</sup> Additional powers of the WTO Director-General to influence WTO bargaining by independent public interest proposals could also help to improve the public image and democratic legitimacy of WTO negotiations by forcing WTO diplomats to pursue not only narrow national self-interests and group interests, but also to justify their national and individual preferences against alternative proposals focusing on *collective interests* and better arguments.

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50 See the 2004 OECD report on agricultural policies in OECD countries, summarized in: *Financial Times* 11 June 2004, at 6.

51 Cf. the comparative studies in: J. Jackson and A. Sykes (eds), *Implementing the Uruguay Round Agreements* (1997).

52 On the advantages of 'principled' over 'positional bargaining' see: R. Fisher and W. Ury, *Getting to Yes. Negotiating Agreement without Giving In* (2<sup>nd</sup> ed. 1991) chapter 1. In the WTO Preamble, WTO Members express their determination 'to preserve the basic principles ... underlying this multilateral trading system.'

53 Cf. J. Steiner *et alii* (eds), *Deliberative Politics in Action* (2004).

## **Part IV**

# **Less-developed WTO Members in the Doha Round Negotiations**





# *Operationalizing the Concept of Policy Space in the WTO:*

## **Beyond Special and Differential Treatment**

*Bernard Hoekman*<sup>1</sup>

World Bank, Washington

### **I. Introduction**

There are large differences between WTO members in terms of resource capacity constraints and national trade policy and investment priorities. These affect the ability and willingness to incur the costs associated with implementation of new rules, as well as the net benefits of doing so. The ‘adjustment burden’ of new rules mostly will fall on developing countries, as such rules will reflect the status quo in industrialized countries (‘best practice’). This paper discusses options that have been proposed to address country differences and increase the ‘development relevance’ of the WTO. These include shifting back to a club approach, more explicit special and differential treatment provisions in specific WTO agreements, and a concerted effort to establish a mechanism in the WTO where development concerns can be considered. A case is made for the latter—involving a serious effort to increase the transparency of applied policies, including assessments of their effectiveness and the magnitude of any negative spillovers imposed on other developing countries.

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## II. Beyond Special and Differential Treatment

A major constraint impeding progress in the Doha round is how to deal with demands by many developing country WTO members for strengthened and more effective 'special and differential treatment' (SDT). Traditionally, developing countries have sought 'differential and more favourable treatment' in the GATT/WTO with a view to increasing the development relevance of the trading system.<sup>2</sup> Formally, SDT was made an element of the trading system in 1979 through the so-called 'Enabling Clause', (Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries). This calls for preferential market access for developing countries, limits reciprocity in negotiating rounds to levels 'consistent with development needs' and provides developing countries with greater freedom to use trade policies than would otherwise be permitted by GATT rules.

The premise behind SDT is couched in the belief that trade liberalization under most favoured nation (MFN) auspices does not necessarily help achieve growth and development insofar as industries in developing countries need to be protected from foreign competition for a period of time. This infant industry (import substitution) rationale is reflected in greater flexibility and 'policy space' for developing country trade policies, as well as the call for preferential access to rich country markets. However, SDT goes beyond market access and limited reciprocity—it also spans the cost of implementation of agreements and the approach towards the possible negotiation of disciplines on new issues (e.g., investment and competition policy).

The Doha Ministerial Declaration reaffirmed the importance of SDT by stating that 'provisions for special and differential treatment are an integral part of the WTO agreements'. It called for a review of WTO SDT provisions with the objective of 'strengthening them and making them more precise, effective and operational' (para. 44). The Declaration also states that 'modalities for further commitments, including provisions for special and differential treatment, be established no later than 31 March 2003' (para. 14).

Efforts to come to agreement on SDT during 2002-03 were not successful, reflecting deep divisions between WTO members on the appropriate scope and design of SDT. In part this reflects wide differences between WTO members in terms of resource capacity constraints and national policy and investment priorities, with consequent differences in the ability (willingness) to incur the costs associated with implementation of new rules, as well as differences in the

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2 Hudec, Robert, *Developing Countries in the GATT Legal System* (1987); Finger, J. Michael, 'Development Economics and the GATT', in J. De Melo and A. Sapir (eds.), *Trade Theory and Economic Reform* (1991).

net benefits of doing so. The ‘adjustment burden’ of new rules will mostly fall on developing countries, as the rules that are likely to emerge will reflect the status quo in industrialized countries (‘best practice’). Longer transition periods—the approach used in the Uruguay Round—is now recognized as an inadequate response, as these are arbitrary and are not accompanied by or based on an objective assessment of whether (and when) implementation of a specific set of (proposed) rules will be beneficial to a country. If the Doha Development Agenda is to live up to its name, the fact that country priorities and capacities differ enormously will need to be addressed. There are two basic options: shift back to a club approach, or pursue universal membership agreements that are accompanied with more effective development provisions.

While most of the Singapore issues have now been taken off the multilateral negotiating table, it seems clear that many members will continue to seek to expand the scope of the WTO (if only because this is also being pursued through regional agreements). One approach to moving forward on new areas that could address the problem of differences in priorities and capacities across the WTO membership is to expand the number of plurilateral agreements in the WTO. This would allow WTO members to decide whether to sign on to new disciplines on a voluntary basis, while allowing all countries to be involved in the negotiating process. Another option is to develop a set of general rules that in principle apply to all members but to adopt specific development provisions that apply to (subsets of) developing countries. Yet another is to seek to adopt a new ‘development framework’ in the WTO to determine the reach of disciplines.

Many of the provisions of the WTO make good sense from an economic development perspective. However, some agreements may not pass a cost-benefit analysis test. Insufficient attention is generally paid to issues related to the costs of (and preconditions for) implementation of resource-intensive agreements. These considerations suggest that an approach that allows for greater flexibility while at the same time maintaining—indeed, preferably, increasing—the accountability of governments for performance could provide the basis for a more effective approach to address development concerns and objectives in the WTO.

### **III. The ‘Old Approach’**

The traditional approach to SDT comprises trade preferences through the Generalized System of Preferences (GSP), limited reciprocity in trade negotiations, and temporary exemptions from certain rules, conditional on level of development (albeit undefined).

### **A. Non-reciprocal Trade Preferences**

Nonreciprocal trade preferences have been a major feature of North-South trade relations for decades. Recent years have witnessed the deepening of trade preferences for least developed countries (LDCs) and sub-Saharan Africa.<sup>3</sup>

While these schemes can have a positive effect on the exports of beneficiary countries, much depends on their supply-side capacity—often very limited; the share of any associated rents that accrue to exporters—often much less than 100 percent; and the impact of ancillary documentary requirements imposed by preference-granting countries, such as rules of origin, which have been shown to be a major impediment, especially for key sectors such as clothing, leading to low utilization rates. Research suggests that most countries have not benefited much from preferential trade programmes given uncertainty/costs created by ‘political conditionality’, product exclusions and rules of origin.<sup>4</sup> The importance of liberal rules of origin has been demonstrated in the context of the African Growth and Opportunity Act (AGOA)—where (temporary) relaxation of triple transformation or yarn-forward rules underpinned an export boom in countries such as Lesotho.<sup>5</sup>

Preferences are discriminatory in nature—they not only imply but depend for any effects on not giving such access to others. In practice, there is a hierarchy of preferences, with the most preferred countries generally being members of reciprocal free trade agreements, followed by LDCs (which often enjoy free access to major markets), and other developing countries (which generally get GSP preferences). From a poverty reduction point of view a case can be made that preferences should focus on the poor, wherever they are geographically located, and not on a limited set of countries. In absolute terms, most poor people live in countries that are not LDCs—especially the large countries of East and South Asia. Moreover, efforts to maintain (or deepen) preference margins on a selective basis have the potential (indirect) downside of reducing pressure on high-income countries to reform their most trade distorting policies—farm policies, tariff peaks, etc.—on an MFN basis, which is critical for

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3 Two examples of these are the EU Everything But Arms Initiative and the US African Growth and Opportunity Act (AGOA).

4 See, e.g., Brenton, Paul, ‘Integrating the LDCs into the World Trading System: The Current Impact of EU Preferences under Everything But Arms’ (2003) *Journal of World Trade* 37(3): 623-46; World Bank, *Global Economic Prospects and the Developed Countries: Making Trade Work for the Poor* (2002).

5 Mattoo, Arvind, Devesh Roy and Arvind Subramanian. *The Africa Growth and Opportunity Act and its Rules of Origin: Generosity Undermined?*, Policy Research Working Paper 2908, World Bank (2002).

these 'less preferred' countries. Finally, preferences are a costly way to transfer resources—it has been estimated that one US dollar worth of additional income created by preference programmes may cost five dollars.<sup>6</sup>

Giving priority to MFN liberalization of trade in goods and services in which developing countries have an export interest is superior in global welfare terms to piecemeal preferences.<sup>7</sup> The recent trend has been towards a mix of MFN liberalization (through tariff reductions, the phase out of the MFA as of 1 January 2005) and deepening of reciprocal preferential trade agreements (FTAs). The implication of both developments is that those nonreciprocal preferences with value to recipients are increasingly being eroded, independent of what may happen in the Doha round. These trends, and the presumption that an MFN-based approach to liberalization is first-best for the world as a whole, suggest that efforts are needed to assist countries in dealing with the negative impacts of any erosion, as well as more generally to meet adjustment costs and enhance supply capacity. A credible commitment to replace trade preferences with more efficient instruments of assistance should be an important part of any new approach towards development and the WTO.

### **B. Market Access, Core Disciplines and Reciprocity**

Government interventions are justified where there are market distortions and to achieve social (equity) objectives. In the case of market failures, policy interventions should directly target the source of the failure. Trade policy will rarely do so. Even if trade policies are used, there is a clear efficiency ranking of trade policy instruments, with quotas and quota-like instruments being particularly costly. WTO rules that impose disciplines on the use of such instruments will benefit consumers and enhance welfare in developing countries. Similarly, there are benefits to binding tariffs—not least of which is that this is a negotiating coin in trade rounds—and abiding by WTO rules and criteria for taking actions against imports that are deemed to injure a domestic industry.

There is a huge literature on these issues.<sup>8</sup> The main conclusion suggested by both theory and practice is that a good case can be made that the core trade

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6 World Bank, *supra*, note 4

7 Hoekman, B., Michalopoulos C. and L. Alan Winters, 'Special and Differential Treatment in the WTO After Cancún' (2003), *The World Economy* 27(4): 481-506.

8 See, Noland, Marcus and Howard Pack., *Industrial Policy in an Era of Globalization: Lessons from Asia* (2003) for a review of the East Asian experience and the relevant literature; more generally, on the economics of the WTO, McCulloch, N., L. Alan Winters and Xavier Cirera, *Trade Liberalization and Poverty: A Handbook* (2001).

policy rules of the WTO make good sense for all countries, developed and developing. Core rules arguably span MFN, national treatment, the ban on quantitative restrictions, committing to ceiling bindings for tariffs, and engaging in the process of reciprocal trade liberalization.<sup>9</sup> Currently, these core principles do not apply equally to all members, due to SDT provisions and the Enabling Clause (which calls for reciprocity in negotiating rounds by developing countries to be limited to what is ‘consistent with development needs’).

Reciprocity is the engine of the WTO, the means through which to obtain concessions from trading partners. More important, it is also in a country’s own interest insofar as what is being conceded is a ‘bad’, i.e., a policy that does not increase welfare. In practice, much of the benefit from trade policy reforms is generated by a country’s own actions. Overuse of the ‘non-reciprocity’ clause has, in the past, excluded developing countries from the major source of gains from trade liberalization—namely the reform of their *own* policies. Non-reciprocity is also a reason why tariff peaks today are largely on goods produced in developing countries. While there is certainly a need for differentiation between developing countries in determining the extent of reciprocity in market access—some countries rely substantially on tariffs for revenue, and countries with high tariffs will need to reduce them gradually to manage adjustment costs—the WTO can, has and is providing mechanisms through which market access liberalization can be tailored to reflect the interests of individual (groups) of countries. Not employing the ‘technology’ offered by the WTO—i.e., a commitment mechanism for credible, gradual market access reforms—reduces the value of membership.<sup>10</sup>

### **C. Regulatory and ‘Resource-intensive’ Disciplines**

Increasingly, the focus of high-income WTO members has turned to international cooperation on ‘behind the border’ regulatory policies. Often these may entail pecuniary spillovers on other members, but this is not necessarily the case. In part the expansion of the agenda is driven by a need to mobilize (political) support for reducing the trade distorting effects of policies in areas such as agriculture. The Uruguay Round was premised on such a grand bargain, with developing countries accepting new disciplines in a variety of areas (TRIPS,

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9 Hoekman, Michalopoulos and Winters, *supra*, note 7.

10 The foregoing is not to deny that weak institutional capacity, market imperfections and lack of financial resources may require that developing countries pursue second best trade policies. However, existing WTO provisions—allowing tariff bindings above applied rates, safeguards, waivers, and renegotiation of concessions—arguably provide ample scope for countries to do so.

services) in return for the elimination of the MFA, outlawing of VERs and inclusion of agriculture into the WTO. The regulatory standards that are written into the WTO generally start from the status quo prevailing in OECD countries, so that the lion's share of associated implementation costs tends to fall on developing countries. In recognition of the differential capacity of developing countries to incur the implementation costs associated with the new disciplines, SDT was provided in the form of longer transitional periods and offers of technical assistance from rich countries. By the end of the 1990s many countries had come to the view that the WTO was unbalanced, reflected *inter alia* in numerous implementation-related issues and concerns.<sup>11</sup> The net returns to implementation were perceived to be low, i.e., there was a lack of 'ownership' of agreements by domestic constituencies.<sup>12</sup>

If the Uruguay round demonstrates that uniform transition periods are inadequate for agreements that require investments of scarce human and financial resources as well as institutional development and strengthening, the experience pre- and post Seattle that culminated in the 2003 Cancún WTO ministerial illustrated that seeking to expand the negotiating set by adding 'behind the border' issues can be counterproductive. The strategy of adding investment, competition law and procurement to the agenda proved divisive, with many poor countries in particular concerned that multilateral rules might not be in their interest and would do little to promote progress on key market access issues such as agriculture. Post-Cancún, an increasing number of calls could be heard on the part of *demandeurs* for new disciplines to consider shifting from a universal membership approach for new disciplines to a 'code' or club approach with voluntary membership as a way of avoiding the need to define SDT and allow movement on new areas. Many others argued instead that both the Uruguay Round itself and the ambitious proposals to expand the WTO's ambit further had clearly been misconceived and called for a return to 'basics'—a market access agenda.

Trade-related technical assistance is an important part of the SDT agenda. A major problem with provisions in the WTO offering help to countries is that there were no mechanisms to link these to the actual provision of development assistance. Much has been done post-Seattle to integrate such assistance more

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11 Finger, J. M. and P. Schuler, 'Implementation of Uruguay Round Commitments: The Development Challenge' (2000), *The World Economy*, 23:511-26.

12 One consequence has been that the relevant committees in the WTO—e.g., on customs valuation and technical barriers/SPS—became focal points for discussions on implementation and technical assistance. I argue below that the activities of such committees in considering capacity constraints could be the basis for a more general approach to address differences in circumstances across countries.



integrally into the activities of the WTO. A major example is the Integrated Framework for LDCs; more generally, there is a greater awareness of the need to incorporate trade into national processes through which policy reform and investment priorities are determined.<sup>13</sup> However, as discussed below, much more can and should be done to enhance the 'coherence' of trade and development policies and to assist poor developing countries make use of market access opportunities.

#### IV. Options for a New Framework

The traditional approach to SDT sketched out above has not been effective. The predominant view among analysts and practitioners is that many if not most SDT provisions are either exhortatory or unlikely to be beneficial.<sup>14</sup> A solution will require actions (and concessions) by both rich and developing countries. One way forward is to distinguish between the market access and rule-making dimensions of the WTO. The approach could involve three basic elements:

- Acceptance by developing countries of the core disciplines of the WTO on market access, including undertaking liberalization commitments, albeit differentiated across countries.
- Adoption of a cooperative, 'enabling' approach for the use of a yet to be determined (negotiated) set of WTO rules. This would span resource-intensive agreements requiring investments and complementary reforms, as well as disciplines where governments believe (continued) use of policies that are subject to WTO rules are warranted for development purposes. The approach would involve commitments by developing countries to identify clearly the underlying objectives that motivate the continued use of such policies, and accepting multilateral scrutiny to determine the impact of these policies. It would act as a 'circuit-breaker' in cases where otherwise dispute settlement procedures may have been launched, but would not remove issues from the reach of the DSU—if actions by one member are

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13 Prowse, Susan, 'The Role of International and National Agencies in Trade-Related Capacity Building' (2002), *The World Economy* 25(9):1235-1261.

14 See Hoekman, Michalopoulos and Winters, *supra*, note 7; Hart, Michael and Dymond, Bill, 'Special and Differential Treatment and the Doha 'Development' Round' (2003) *Journal of World Trade*, 37(2) 395-415; Pangestu, Mari, 'Special and Differential Treatment in the Millennium: Special for Whom and How Different?' (2000) *The World Economy* 23(9), 1285-1302; Whalley, John, 'Special and Differential Treatment in the Millennium Round' (1999) *The World Economy* 22(8), 1065-1093.

considered by another member to impose serious negative spillovers, recourse to the DSU would remain possible.

- Credible commitments by high-income countries to assist countries/groups to benefit from trade opportunities, by removing policies that negatively affect developing countries, adoption of internal mechanisms to enhance the coherence of domestic policies, and the use of aid resource transfers to poor countries to assist in meeting adjustment costs from reforms.

### **A. A (Very) Short Review of Recent Proposals on SDT**

Several options have been proposed in the literature for a new approach to SDT:

- Acceptance of the principle of ‘policy space’—implying flexibility for all developing countries as currently (self-) defined in the WTO whether to implement a specific set of (new) rules, as long as this does not impose significant negative (pecuniary) spillovers;<sup>15</sup>
- A country-specific approach that would make implementation of new rules a function of national priorities. WTO disciplines implying significant resources would be implemented only when this conforms with or supports the attainment of national development strategies. A process of multilateral monitoring and surveillance, with input by international development agencies, would be established to ensure that decisions are subject to scrutiny and debate.<sup>16</sup>
- An agreement-specific approach involving the *ex ante* setting of specific criteria on an agreement-by-agreement basis to determine whether countries could opt out of the application of negotiated disciplines for a limited time period. Criteria could include indicators of administrative capacity, country size and level of development, and implementation could be made conditional upon adequate financial and technical assistance being offered;<sup>17</sup>

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15 As in practice small countries are likely not to be confronted with the DSU, in effect this would to some extent formalize the prevailing status quo. See Stevens, Christopher, *The Future of SDT for Developing Countries in the WTO*, Institute for Development Studies, Sussex, Working Paper 163 (May 2002).

16 See Prowse, *supra*, note 13.

17 Wang, Z. K. and L. A. Winters, *Putting ‘Humpty’ Together Again: Including Developing Countries in a Consensus for the WTO*, CEPR Policy Paper No. 4. (2000); Keck, Alexander and Patrick Low, *Special and Differential Treatment in the WTO: Why, When and How?* (2003) mimeo.

- A simple rule-of-thumb approach that would allow opt-outs for resource-intensive agreements for all countries satisfying broad threshold criteria such as minimum level of per capita income, institutional capacity, or economic scale.<sup>18</sup> The presumption here is that this would allow the bulk of identified difficulties to be tackled at little or no negotiating cost. The criteria would apply to *all* new resource-intensive agreements. Invocation of an opt-out would be voluntary. As countries come to surpass thresholds over time, disciplines automatically would become applicable.

A common element of all these proposals is that use is made of economic criteria to determine the applicability of (resource-intensive) rules.<sup>19</sup> This is controversial, as it implies differentiation among countries, something that is rejected by many developing country representatives in the WTO. Currently, whether SDT is invoked is left to individual members (i.e., whether or not to self-declare as a developing country) and a mix of unilateral action and bargaining by developed country members whether to accept this and provide SDT.

Country classification inevitably creates tensions among governments as to which countries would be counted in and which out. A major advantage of simple criteria is that it is 'clean'—there is no need for additional negotiation. The disadvantage is that criteria are inherently arbitrary, and of course this is not a route that has proven successful to date. The alternative is a case-by-case approach to determining the criteria that define the reach of rules. What constitutes 'resource-intensive', for example, and the extent to which specific agreements will give rise to implementation costs are questions that are country-specific. Past experience illustrates that agreeing on a rule- or agreement-specific set of criteria is feasible—witness the Subsidies Agreement *per capita* income threshold for the use of export subsidies or the net food importers group in the Agreement on Agriculture. The downside is that poor countries will be confronted with inevitable negotiation costs and the need to allocate scarce human resources to issues that may not be priorities.<sup>20</sup> Neither type of approach does much to engage governments and stakeholders, or to help them identify better policies or areas where complementary actions/investments are needed. Instead, the focus is purely 'legalistic': SDT is needed as a mechanism to prevent

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18 See Hoekman, Michalopoulos and Winters, *supra*, note 7. Some WTO disciplines may not be appropriate for very small countries if the institutions that are required are unduly costly—that is, countries may lack the scale needed for benefits to exceed implementation costs.

19 This is also the case in the first option, as implicitly this approach introduces a size criterion.

20 Winters, L. Alan, 'Doha and the World Poverty Targets', presented at the 14<sup>th</sup> Annual Bank Conference on 'Development Economics' Washington DC (2002).

countries from undertaking investments or implementing rules they do not wish to and to avoid being confronted by the threat of retaliation for non-compliance.

### ***B. Towards a More Cooperative Approach?***

A basic issue that underlies the calls for strengthening of SDT by developing countries is a perception that many WTO rules are not beneficial. One can also point to the disparity between the current binding enforcement regime—which does not permit blocking dispute settlement and delegates ultimate enforcement decisions to a very small number of people (panellists and Appellate Body members)—and the fact that most of the current disciplines were negotiated in an institutional framework where there was no such binding enforcement.<sup>21</sup> One way forward is to renegotiate the rules. Another, complementary approach is to focus on the enforcement side of the picture, and make recourse to the DSU conditional on a ‘development test’ for some issues. Various options could be considered to implement this, including the creation of a formal ‘circuit-breaker’ mechanism that would make recourse to panels under the DSU conditional on a prior process of consultation mediated by an independent body that focuses not solely on legal issues but on the likely net benefits of (non-)implementation and the magnitude of any negative spillovers associated with the use of policies that are subject to WTO disciplines.

A precondition for ownership of international agreements is that governments and stakeholders perceive the rules to benefit the economy overall. A more economically based discussion of instances where countries are not in conformity with WTO rules could help enhance such ownership. That is, rather than invoke the (immediate) threat of a panel, a more cooperative approach could be envisaged that is geared towards assisting countries attain their objectives in an efficient manner as opposed to one that is aimed solely at safeguarding or attaining market access or minimizing negative terms of trade externalities. An important corollary of such an approach would be greater accountability of governments for performance and outcomes—a determination of whether the policies that are used are effective.

Such an empowerment or enabling mechanism implies a shift at the margin towards a so-called soft law approach.<sup>22</sup> Soft law involves establishment of a framework for international cooperation focusing on the provision of information and learning through regular interactions of relevant policymakers

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21 I owe this point to Claus-Dieter Ehlermann.

22 To some extent, this can be seen as building on the consultations part of the DSU, with the difference that the focus goes beyond compliance narrowly defined.

and constituents (stakeholders), peer review, and (multilateral) monitoring of the impacts of policies and their effectiveness in attaining stated objectives. From an economic development perspective, depending on the issue, a soft law approach towards identifying ‘good practices’ may make good sense, as often these will differ across countries. There is an emerging literature that argues in favour of a ‘learning’ approach to international cooperation in complex regulation-intensive domestic policy domains.<sup>23</sup> One premise that underlies arguments for soft law (be it implicit or explicit) is that the mechanism of reciprocity may be inappropriate to define common rules for ‘behind the border’ regulatory policies. The specific content of regulation should reflect national (or local) circumstances. Thus, what may be most appropriate from an economic welfare (development) perspective is to create a framework for assisting governments to identify good policies, not a system that aims at harmonization enforced by binding dispute settlement.<sup>24</sup> This could also allow a more considered and flexible approach towards determining at what level cooperation on *new* issues should occur—bilateral, regional, or multilateral.

### C. Pros, Cons and Open Questions

Some of the advantages of a ‘softer’ approach have already been noted. A major advantage is that it could allow the WTO to avoid the vexed problem of agreeing on country classification and dealing with the issue of ‘graduation’—matters that have proven to be hugely controversial, although in practice one can observe acceptance of greater differentiation in specific WTO discussions.<sup>25</sup> As there is currently no legal basis in the WTO for greater differentiation across developing countries, and insofar as a necessary element for any solution on SDT is that there is no *a priori* exclusion of any country (still an open issue, of course), a soft law option could help WTO members advance on the ‘development dimension’. The approach implies that the WTO would take development considerations

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23 E.g., Abbott, K. and D. Snidal, ‘Hard and Soft Law in International Governance’ (2000) *International Organization* 53(3), 421-56; Chayes, Abram and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); Helleiner, G. 2000. ‘Markets, Politics, and Globalization: Can the Global Economy be Civilized?’ (2002) 10<sup>th</sup> Prebisch lecture, UNCTAD, mimeo; Finger, J. M. *The Doha Agenda and Development: A View From the Uruguay Round* (2002); Sabel, Charles and Sanjay Reddy, *Learning to Learn: Undoing the Gordian Knot of Development Today* (2002), mimeo ([www.sopde.org/discussion.htm](http://www.sopde.org/discussion.htm)).

24 This is clear-cut if there are no pecuniary spillovers.

25 This is most prominent in Doha discussions on market access negotiating modalities on agriculture and NAMA. The TRIPS/public health decision also differentiates between developing countries, as does the WTO subsidies agreement.

more seriously—and this is after all a premise of the Doha agenda. A mechanism that involves the need to explicitly assess the impact of trade policies on specified development objectives could also help raise the profile of trade issues in national capitals, a potentially significant benefit given the difficulty the national trade community often has in ensuring trade issues and problems are considered in domestic priority setting processes.

Related to this, another potential benefit is that it would provide a context to identify more efficient instruments that might be supported by the donor community to achieve specific objectives. For example, basic economics suggests that subsidies are more efficient instruments to address market failures than trade policies. If binding budget constraints in a developing country precludes the use of subsidy instruments, these may be overcome through development assistance. This also has the advantage of introducing a credible exit mechanism, a key condition to prevent capture and control rent seeking. The process can help reveal where such interventions can make trade policies redundant, in the process also enhancing policy coherence. Finally, and perhaps most important, an enabling-cum-peer review process can increase the accountability of governments by creating incentives—the need—to reveal (identify) true differences across countries (and true preferences of governments).

Among the concerns (cons) that are likely to arise regarding a move towards soft law are free riding and the possible negative spillovers created by the use of a policy that is otherwise subject to WTO rules if developing country status—and thus access to the mechanism—continues to be defined by self-declaration; the reduction in certainty associated with conditional enforcement or non-enforcement of rules for developing countries; a hollowing out of the principle of a rules-based trading system; the likely difficulty of obtaining agreement on what set of rules the mechanism should apply to (i.e., what are the core rules that should apply to all WTO members unconditionally and be subject to the DSU?); the transactions (and possible negotiation) costs that will be associated with the operation of the mechanism; and, more generally, the desirability of using the WTO as a forum for development-oriented policy dialogue on trade-related issues.

These are all valid concerns. Insofar as the policy (policies) in question impose negative pecuniary spillovers on other countries, one option would be to allow affected countries to document the magnitude of such spillovers, and agree that the soft law option is conditional on there not being significant spillovers—otherwise recourse could be made to renegotiation or the DSU. Spillovers could also be considered as part of the functioning of the relevant WTO monitoring mechanism, and perhaps factored into recommendations for the use of less trade-distorting policies (e.g. aid). In many cases, the developing economies concerned will be too small to impose substantial harm on large trading partners, although the impact of their policies on other small developing

countries may be significant—one reason why recourse to the DSU should remain possible.

Arguments concerning the need for (benefits of) legal certainty and the importance of safeguarding the integrity of the rules-based trading system, while relevant in principle, do not have much force as long as it is clear what the rules of the game are. The process of determining the impact and effectiveness of a particular policy should in itself enhance both transparency and accountability of governments; indeed, the associated monitoring of the impact of policies provides scope for those that pay for the use of inefficient policy instruments to press for policy changes. If the mechanism leads to greater substitution of inefficient trade instruments for less distorting subsidy type intervention—e.g., financed by aid—spillover effects will also be attenuated.

Perhaps the major potential downsides concern the possible hollowing out of the reach of the DSU and the transactions costs associated with the process. The latter is very much a cost-benefit issue, i.e., will the benefits outweigh the costs? This cannot be determined *ex ante*, but clearly thought must be given to the potential for redundancy as the type of policy dialogue and review that is proposed is also undertaken to some extent by institutions such as the World Bank, IMF and European Commission (in the context of accession negotiation, Association Agreements and assistance programmes). However, this also suggests there is potential for synergies. The Integrated Framework diagnostic process already brings together 6 agencies to identify technical assistance needs; a focal point in the WTO that focuses on the development impacts of trade-related policies of a country, as well as the effects of partner country policies, could help improve overall policy coherence. That said, it must be recognized that the suggested approach will impose a burden on already very scarce administrative and human resources in low-income countries. There is a strong counter argument that it would be preferable to maintain the status quo and let development organizations take the lead on such policy dialogue.<sup>26</sup>

What about concerns pertaining to a hollowing out of the DSU? Here again clarity regarding the conditions (limits) on the proposed 'soft law' approach will be important. As mentioned, from an economic perspective a (temporary) 'circuit breaker' that involves constraining access to panels (the Dispute Settlement Body) is likely to generate downsides for developing countries primarily insofar as actions of one developing country impinge negatively on another developing country. The small size of most developing countries in world trade suggest that negative spillovers imposed on OECD members will be small. This suggests countries should have the opportunity to raise spillover

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26 Finger, *supra*, note 23.

objections in the context of the operation of the proposed WTO ‘monitoring’ or consultative body and that this should factor into the recommendations that are made. One could also envisage developing countries that perceive that a policy imposes a significant negative externality continue to have the opportunity to invoke the DSU, whereas this would not be available to high-income countries.

#### ***D. Plurilateral Agreements as an Alternative?***

Another option that can be used to reflect differences across countries in priorities and capacity is to adopt a dynamic variable geometry approach that would break issues and agreements into parts.<sup>27</sup> This might involve only some minimum disciplines applying to a set of countries, and stronger or additional rules applying to others. Over time, countries could elect on a voluntary basis to shift category and take on more disciplines.<sup>28</sup> In this approach, presumably either countries would recognize the value of the disciplines and have established the preconditions for benefiting from their implementation, or they could be induced to take on additional disciplines in the context of a quid pro quo elsewhere.<sup>29</sup> The most straightforward approach in pursuing such a variable geometry approach is to expand the use of plurilateral agreements.

WTO Art. X:9 states: ‘The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4.’ Annex 4 lists so-called Plurilateral Trade Agreements that have been accepted by the membership.<sup>30</sup> Art. II:3 WTO specifies that the agreements and associated legal instruments included in Annex 4 are part of the WTO Agreement ‘for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.’ Thus:

1. The creation and addition of new plurilateral agreements under Annex 4 requires consensus; and
2. Signatories are not required to apply them on an MFN basis.

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27 This terminology is due to Eduardo Perez-Motta.

28 Alternatively, they could be required to do so if specific criteria or indicators have been met—although that raises the issue of country classification.

29 Yet another approach that could address this issue in the case of new rules/agreements is to limit membership of (binding) agreements to the minimum set of countries that internalizes most of the spillovers—as was done with the Information Technology Agreement (ITA).

30 Currently there are only two plurilateral agreements: the Agreement on Government Procurement and the Agreement on Civil Aircraft.



Plurilateral agreements are close in effect to those SDT options that allow for countries to opt out from specific agreements. A key difference, however, is that in the case of a plurilateral, there is no presumption that eventually a country will join and thus be subject to the rules—this would be the case if the rules in principle apply to all. Plurilaterals used to be more prevalent under the pre-WTO GATT regime reflecting the difficulty of amending the GATT. In the Kennedy and Tokyo Rounds, for example, a number of agreements were negotiated that bound only signatories. Most of these agreements did not attract many developing country contracting parties. During the Uruguay Round, virtually all of the GATT codes of conduct were transformed into multilateral agreements that are binding on all WTO members.

Useful criteria in assessing the upsides and downsides of a plurilateral approach are whether:

1. It permits all countries to engage in the negotiation of a proposed rule even if they may not apply it immediately, if at all;
2. Whether they are able to engage in a fully informed way, i.e., are able to determine the ‘return’ to applying a proposed rule (this requires taking into account direct administrative costs and the size of net economic impact of implementation);
3. If agreements are implemented on an MFN basis; and
4. Whether and how the DSU would apply.<sup>31</sup>

Although a plurilateral approach to determining the country coverage of new disciplines would ensure that developing countries that do not want to apply new rules could opt out, there are nonetheless a number of downsides to the pursuit of this option. First, the approach would move the WTO towards a two-track regime. Many developing countries have argued that this is contrary to the basic character of the WTO and conflicts with the consensus-based approach that has historically been the norm.<sup>32</sup> A major advantage of continued efforts to agree to multilateral disciplines that apply in principle to all members—even if SDT

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31 Lawrence, Robert, *Rule-Making Amidst Growing Diversity: A ‘Club of Clubs’ Approach to WTO Reform and New Issue Selection* (2004) mimeo, provides a set of criteria for plurilateral agreements to be consistent with the objectives of the WTO. Suggested requirements are that all members be able to participate in the negotiations, membership is voluntary, and cross-retaliation be prohibited—i.e. enforcement threats would be limited to withdrawal of the commitments made within the subject area covered by an agreement.

32 Singapore Issues: The Way Forward, Joint Communication from Bangladesh (on behalf of the LDC Group), Botswana, China, Cuba, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Philippines, Tanzania, Uganda, Venezuela, Zambia and Zimbabwe, WTO document WT/GC/W/522, 12 December 2003.

implies that some will not implement for some time—is that all countries have a say in whether an issue belongs in the WTO.

Second, plurilateral agreements would define the rules of the game in a specific area. Even if countries opt out, over time there would undoubtedly be pressure for non-members to sign on.<sup>33</sup> Moreover, the rules are likely to reflect the interests and current practices of high-income countries, in part because of negotiating capacity constraints, and in part because of the expectation that many developing countries will not sign a specific agreement. This makes it less likely that the agreement will address issues that are of primary concern to low-income economies. Experience illustrates that it is very difficult to amend disciplines, so that a plurilateral approach may well become analogous to the *Acquis Communautaire* for prospective members of the EU—i.e., non-negotiable.

#### ***E. Beyond Access and Rules: Trade Capacity and Trade-related Assistance***

The discussion so far has centred mostly on the ‘policy space’ dimensions of the SDT debate. Also important is what rich countries could do pro-actively to assist developing countries. A major constraint limiting export growth in many small and low-income countries is a lack of supply capacity and a high-cost business environment. Firms in these countries may also find it difficult to deal with regulatory requirements such as health and safety standards that apply in export markets. In the literature a useful distinction between market access and market entry has been developed. The latter pertains to the ability of firms to make effective use of market access opportunities. A frequent example of such a ‘barrier to entry’ is health and safety standards, which may be excessively strict and weigh disproportionately heavily on low-income country producers. Within these countries trade facilitation and trade-related transactions costs—including the costs and quality of services inputs—are important determinants of competitiveness.

Development assistance can play an important role in helping to build the institutional and trade capacity needed to benefit from increased trade and better access to markets. This assistance must go beyond the implementation of trade agreement rules narrowly defined and focus on supply capacity more

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33 This has been emphasized by the NGO community as a major downside of plurilateral agreements in the WTO. See e.g., Green, Duncan and Claire Melamed, ‘Four Arguments Against a Plurilateral Investment Agreement in the WTO’, *Paper on behalf of Cafod, Christian Aid, Oxfam, Action Aid and World Development Movement*, November 2003.

broadly, as well as addressing adjustment costs associated with reforms. While priorities will differ, in many cases assistance will be needed to address trade-related policy and public investment priorities, to help adapt to a reduction in trade preferences following further non-discriminatory trade liberalization, or to assist in dealing with the potential detrimental effects of a significant increase in world food prices should these materialize. The development community made commitments to this effect at the International Conference on Financing for Development in Monterrey in March 2002—what is needed is a clear articulation of trade-related requests by developing countries, complemented by action on the part of high-income countries to allocate funding to address the priority areas for finance and technical assistance.<sup>34</sup>

One option to be considered in connection with this is to establish a multilateral facility that would temporarily expand the financial envelope available to support the adjustment process that is associated with trade reforms. Mobilizing such funding should be feasible as the aggregate (global) gains from trade are much greater than the aggregate losses associated with restructuring. The problem is that in practice the compensation (transfers) that is called for often does not occur domestically, and barely occurs at all internationally, as reflected in low ODA levels—in the US\$55 billion range—relative to the estimates of the net income gains associated with past multilateral rounds (in the \$200-500 billion range), the magnitude of total support to farmers in OECD countries (currently some \$350 billion), or the potential gains from further global liberalization (upwards of \$500 billion, especially if services trade is included).<sup>35</sup>

There are various ways in which such redistribution could be realized. The most direct way would be through a small consumption tax on goods and services whose prices will be falling as a result of the implementation of negotiated multilateral liberalization commitments. Administrative convenience and collection cost considerations may make a small uniform levy on imports whose tariffs are being cut more feasible. To give a sense of the orders of magnitude involved, a 0.25 percent levy on imports of OECD countries would be

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34 In order to maximize financing for trade-related assistance *and* to ensure that assistance in this area addresses priority areas for intervention, the trade-related technical assistance and capacity-building agenda must be embedded in a country's national development plan or strategy. In the case of low-income countries the primary example of such an instrument is the PRSP—implying that governments and stakeholders must take action to embed trade in PRSPs in those instances where trade is seen as a priority.

35 See Anderson, Kym, 'Subsidies and Trade Barriers' paper prepared for the Copenhagen Consensus project, World Bank (2004) mimeo, for a review of the estimates found in the literature.

equivalent to over US\$ 12 billion (total OECD imports are some \$5 trillion). However, as much of trade into OECD countries is duty free, and it is not desirable to re-impose duties on such trade, any such levy should be restricted to currently dutiable imports where tariffs are subject to reduction commitments. An option to consider here would be to negotiate commitments that all or a certain share of currently collected revenue would be made available to low-income countries.<sup>36</sup> As tariffs are gradually lowered—as is the case in WTO agreements—the total revenue available would automatically decline over time, which is appropriate given that the motivation is to facilitate adjustment. Indeed, it is important that there be general acceptance that any such levy not be an additional tax, but is explicitly based on the recognition that any process of multilateral liberalization will create losers as well as winners. Despite the well-known case for and potential feasibility of compensating losers, in practice this often does not occur. A small reduction in the price gains/benefits that will accrue to consumers as a result of liberalization is one practical means of redistributing some of the gains from trade reform to those who gain less or may lose.<sup>37</sup>

## V. Concluding Remarks

The traditional approach to SDT in the GATT/WTO has not been a success in promoting development. Indeed, it is fundamentally flawed. It has helped create incentives for developing countries not to engage in the WTO process, resulting in the highest trade barriers—in both the North and the South—being on goods in which developing countries have a comparative advantage. Trade preferences have proven to be a double-edged sword, offering only limited benefits and substantial downsides.<sup>38</sup> Further, the traditional approach has not helped the

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36 What follows draws on discussions and joint work in progress with Alan Winters.

37 This funding mechanism could also help to address the preference erosion problem that will emerge for those countries that rely heavily for export revenues on preferences. Research suggests the number of such countries is small, but that some countries may confront a substantial adjustment burden, ranging up to 5 percent of current exports, or higher. For further discussion see Alexandraki, Katerina and Hans Peter Lankes, *Estimating the Impact of Preference Erosion on Middle-Income Countries*, IMF Working Paper (2004); Page, Sheila and Kleen, Peter, *Special and Differential Treatment of Developing Countries in the World Trade Organization*, Report for the Ministry of Foreign Affairs, Sweden (2004); Stevens C. and J. Kennan, *The Utilisation of EU Preferences to the ACP*, presented at the Seminar on Tariff Preferences and their Utilization, WTO, Geneva, 31 March 2004.

38 See Hoekman, B. and Ozden, C., *Trade Preferences and Differential Treatment of Developing Countries: A Selective Survey* (2004), mimeo, for a review of the literature.

WTO move forward in the arena of rule making by not taking differences in country circumstances and priorities seriously. In short, SDT has not focused on helping to put in place policies that will promote development. Hence the need for SDT to be recast if the WTO is to become more effective in helping poor countries use trade for development.

There is a basic choice to be made between the pursuit of universal rules that in principle apply to all members, and that will by necessity require SDT-type provisions to account for country differences, and a move to a two- or multi-track trading system based on a plurilateral approach (and regional trade agreements) without SDT. The latter appears to be an attractive way of allowing a subset of the membership to move forward in the absence of consensus. However, many developing countries are on record in the WTO as opposing moves towards greater use of such agreements, primarily on the basis of resistance to the creation of a multi-tier trading system.<sup>39</sup> Such an approach also does little to help promote development. A recast framework that aims to take development concerns seriously could do much to make plurilateral agreements redundant by both facilitating new rule making *and* improving the substance of disciplines from a development perspective. Key elements of a possible new approach could include:

- Acceptance of the core rules by all WTO members: MFN, national treatment, the ban on quotas, and binding of maximum tariffs, as well as engagement in the market access dimension of WTO negotiating rounds;
- Greater reliance on explicit cost-benefit analysis to identify net implementation benefits for countries and the magnitude of negative (pecuniary) spillovers created by development-motivated policies on other countries;
- Movement towards the adoption of mechanisms that strengthen the consultative and 'pre-panel' dimensions of WTO dispute settlement by mandating a focus not just on the legality of a policy instrument but consideration of the rationale and impact of policies used by developing countries that may be inconsistent with WTO disciplines, with the aim of assisting governments to attain their objectives in an efficient way; and
- A credible commitment to establish a global funding mechanism to provide the resources to address adjustment costs, including those resulting from an erosion of trade preferences, and enhancing supply capacity, in recognition of the need to transfer some of the gains from trade from winners to losers.

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39 See WTO document WT/GC/W/522, *supra*, note 32.

Clearly this type of approach will be significantly more resource-intensive than a simple set of rules of thumb that allow countries to opt out from certain WTO agreements. The latter has a number of important advantages, including simplicity and minimal transactions (negotiating) costs.<sup>40</sup> However, it is vigorously resisted by many developing countries, and, as discussed, does not do much to actively assist countries in the development process. A shift away from opt outs and arbitrary transition periods towards the creation of a process that involves policy dialogue and accountability on all sides could do much to enhance the development relevance of the WTO, while at the same time reducing the perceived downside risk of undertaking new commitments for developing countries.

A fundamental question that must be answered if members are to move down this track is whether the WTO should be the focal point for this type of international cooperation on trade-related policies. Compelling arguments have been made in the literature<sup>41</sup> that the WTO should not become embroiled in development issues. Many will agree that the WTO is not a development organization and should not become one—this is certainly my view as well.<sup>42</sup> Many of the questions that will come up in discussions will revolve around prioritization, sequencing, complementary reforms and investment needs/decisions. Development banks and similar institutions have the mandate, mechanisms, and capacity to engage in such policy dialogue with governments. Will the benefits of engaging in such discussions in the WTO outweigh the costs? The potential for a positive return are certainly there, but much will also depend on how the mechanism is implemented, who is involved, how it relates to the activities of development institutions—who clearly will have to play a role in any policy dialogue that occurs in a WTO setting. It is important to keep in mind that the focus of discussions in the WTO would be limited to policies that are covered by the institution—i.e., the review and dialogue process would have pre-defined boundaries. Moreover, while the suggested approach may seem a rather far-reaching change in the *modus operandi* of the WTO, there are already numerous mechanisms in the WTO that can be—and at times are—used to engage in policy discussions. These include the committees that oversee the operation of specific agreements and the Trade Policy Review Mechanism. One committee that explicitly includes a multilateral process of assessment of the prevailing economic situation in countries as a justification for the use of trade restrictions is the Balance of Payments Committee—which operates with inputs from the

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40 See Hoekman, Michalopoulos and Winters, *supra*, note 7.

41 E.g., Finger, *supra*, note 23.

42 Hoekman, B., 'Strengthening the Global Trade Architecture for Development: The post-Doha Agenda' (2002), *World Trade Review* 1(1): 23-45.

IMF on the balance-of-payments situation in a member that invokes the relevant GATT articles as cover for trade barriers. In practice deliberations have mostly been ‘cooperative’, with only very few cases of recourse being made to the DSU.<sup>43</sup>

The foregoing has just sketched the outlines of a possible way forward. Much work will be required to map out how the suggested mechanisms might work. Issues to be determined include what agreements/rules the new development framework would apply to—what are ‘core’ disciplines in addition to market access commitments that should apply to all members on an unconditional basis? What national and international entities would participate in the multilateral trade and development body? To what extent could/should this be linked to the TPRM? Under what conditions would countries be able to initiate panel proceedings under the DSU? How might a (global) trade adjustment facility be financed? What mechanisms would be used to allocate the revenue generated? Clearly there are many open questions. What matters most at this point is that a decision in principle be taken to consider a new approach to recognizing the huge disparities in capacity and priorities across the WTO membership. The options include simple country-based criteria; greater reliance on plurilateral agreements; and/or a shift to a case-by-case approach that relates multilateral disciplines to national circumstances and is accompanied by explicit and credible mechanisms through which to transfer additional financial resources to low-income countries—‘aid for trade’. The latter will be the most challenging to operationalize, but offers the greatest potential to promote development and increase policy coherence.

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43 Prowse, *supra*, note 13.

# *Can WTO Technical Assistance and Capacity Building Serve Developing Countries?*

*Gregory Shaffer*<sup>1</sup>

University of Wisconsin Madison

*Should capacity-building aim to widen the scope  
of actual economic policy choices for developing countries?  
Or should it be limited to helping them cope with the  
burden of commitments they have taken on  
—sometimes lightly, it has turned out—  
for the benefit of their more developed partners?*<sup>2</sup>

## **I. Introduction**

Technical assistance and capacity building are large and complex issues. A sprawling literature has developed about them since World War II, picking up in the 1960s, and passing through various paradigm shifts through today. These issues, however, are rather new to the World Trade Organization (WTO). They gained particular salience following the expiration of the transition periods for developing country implementation of obligations under the 1995 Uruguay

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1 I give my sincere and warm thanks to the twenty-six individuals whom I interviewed for purposes of this project and who took time out of their demanding schedules to meet with me, and, in some cases, to read earlier versions of this chapter. These hard-working and committed individuals respectively work for the WTO, international development agencies, member delegations to the WTO, and development-oriented NGOs. I also wish to thank Peng Zhao for his research assistance. All errors of course remain my own.

2 Henri-Bernard Solignac Lecomte, 'Capacity-building and Technical Assistance for Developing Countries After Doha', *Bridges (ICTSD)* (Jan. 2002) 3. Solignac Lecomte is an official at the OECD writing in his own capacity.



Round agreements and the launch of the Doha negotiating round in November 2001. As the transition periods elapsed, many developing countries balked at implementing WTO requirements on account of the costs of doing so and the perception that they had not benefited from market access as promised. They received intellectual support from a number of international economists and development specialists. As Michael Finger and Philip Schuler of the World Bank wrote:

Our analysis indicates that WTO regulations reflect little awareness of development problems and little appreciation of the capacities of the least developed countries to carry out the functions that [sanitary and phytosanitary standards], customs valuation, intellectual property, etc. regulations address. For most of the developing and transition economies—some 100 countries—money spent to implement the WTO rules in these areas would be money unproductively invested.<sup>3</sup>

Leading trade economists noted that the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS' Agreement) 'is almost certain to redistribute welfare away from developing countries' to the developed world.<sup>4</sup> In these circumstances, WTO 'capacity building' programmes, if they are simply designed to assist developing countries in the implementation of WTO contractual obligations, could actually work against developing country interests.

When developing countries agreed to enter into new trade negotiations at Doha, Qatar, they obtained a commitment that the round, dubbed the 'Doha development round', would address issues important to their development, and that they would receive capacity building assistance to facilitate their participation in the negotiations and the eventual integration of their economies into the

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3 J. Michael Finger & Philip Schuler, 'Implementation of Uruguay Round Commitments: The Development Challenge', 23 *The World Economy* (2000) 511. See also J. Michael Finger, 'Implementing the Uruguay Round Agreements: Problems for Developing Countries', 24 *The World Economy* (2001) 1097. Finger is Lead Economist and former Chief of the World Bank's Trade Research division. Schuler is a senior economist in the World Bank.

4 The quotation is from Alan Deardorff, 'Should Patent Protection Be Extended to All Developing Countries?' 13 *World Economy* (1990) 497, 507. See also *Intellectual property and development: lessons from recent economic research*, eds. Carsten Fink and Keith E. Maskus (World Bank 2004); Keith Maskus, *Intellectual Property Rights in the Global Economy* (2000); Keith Maskus, 'Intellectual Property Issues for the New Round', in Jeffrey Scott ed., *The WTO After Seattle* (2000) 142 (noting an estimate of 'static risk transfers... of some \$5.8 billion per year' to the United States, and 'a net outward transfer of around \$1.2 billion per year' for Brazil); Carlos Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (2000) 35 (citing World Bank and IMF studies on detrimental impacts of TRIPS on developing countries); and Frederick Abbott, 'The WTO TRIPS Agreement and Global Economic Development', in Frederick Abbott & David Gerber (eds.) *Public Policy and Global Technological Integration* (1997).

international trading system. The Doha Ministerial Declaration dedicated more text to capacity building than to any other issue, including four paragraphs on technical assistance, one paragraph on trade and technology transfer, two paragraphs on least-developed countries, and other references sprinkled throughout the document.<sup>5</sup> The 2003 World Trade Report declared: ‘The Doha Declaration marked a new departure in the GATT/WTO approach to technical assistance and capacity building.’<sup>6</sup> One member of the Secretariat characterized the WTO’s capacity-building programme as a ‘sea change’ for the organization, one that ‘we [at the WTO] are still digesting’.<sup>7</sup>

Whether these capacity building commitments are tailored toward contractual negotiations that will serve developing country interests, however, remains an open question. Many of the promises for technical assistance were in exchange for developing country agreement to negotiate over the four ‘Singapore issues’ advanced by the European Union (‘EU’), concerning trade and investment, competition policy, government procurement, and trade facilitation.<sup>8</sup> Indeed, when WTO Director-General Mike Moore cautioned that the provision of technical assistance and capacity building was a ‘condition of further progress on the development dimension’, he was referring expressly to the Singapore issues.<sup>9</sup> Now that developing countries have refused to negotiate

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5 Paragraphs 38-41 of the Doha Ministerial Declaration address overall technical assistance and capacity building. Paragraph 38 explicitly calls for the Secretariat ‘to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction.’ Paragraph 39 calls for coordination between the relevant international agencies, bilateral donors, and beneficiaries so as to rationalize the ‘IF’ and ‘JITAP’ programmes (see below). Paragraph 40 calls for a plan to ensure long-term funding for WTO technical assistance, which eventually led to the establishment of the Doha Development Agenda Global Trust Fund in December 2001. Paragraphs 42-43 focus on assistance to least-developed countries, and paragraphs 2, 20-21, 23-24, 26, 27, and 33 respectively address assistance in respect of trade and investment, trade and competition policy, transparency in government procurement, trade facilitation, and trade and environment. Specific technical assistance provisions were also contained in paragraphs 2.2, 3.5, 3.6, 5.1, 5.4, and 14 of the Decision on implementation-related issues and concerns. See WT/MIN (01)/W/17.

6 See WTO, World Trade Report 2003, at xix. The 2003 World Trade Report also highlighted ‘that technology transfer had never been included explicitly on the GATT/WTO agenda before’, but now was part of the work programme (at 164). GATT refers to the General Agreement on Tariffs and Trade.

7 Interview, June 23, 2004, Geneva.

8 At the WTO ministerial meeting in Singapore in 1997, WTO members agreed to establish working groups to examine these four issues and their potential integration into the WTO system.

9 See ‘Report to the Council by the Director General’, *WTO News*, 13 Feb 2002 at para. 6, available at [http://www.wto.org/english/news\\_e/news2002\\_e.htm](http://www.wto.org/english/news_e/news2002_e.htm). See also the remarks of

over three of these issues—trade and investment, competition policy, and government procurement—one wonders whether donor funding of developing country trade-related capacity building requests will be cut back.

A central conundrum for effective WTO technical assistance lies in how the Secretariat views its capacity building role in relation to the conventional sense of its ‘mandate’. WTO members and the WTO Secretariat often refer to the WTO as a ‘contract organization’. By contract organization, they refer to a ‘member-driven’ institution that facilitates the negotiation of trade agreements (the ‘contracts’), helps oversee implementation of the resulting contractual commitments, and, where requested, issues judicial decisions over these commitments. WTO Secretariat officials thus view their role as one of servicing negotiations (occurring in various negotiating groups), servicing member oversight of obligations (through various ‘committees and councils’), and assisting with dispute resolution (before the dispute settlement panels and the Appellate Body). Capacity building, however, is a quite different endeavour.

One’s view of WTO substantive rules will shape one’s appreciation of WTO capacity building projects. Should WTO rules be viewed as contingent in time, and subject to debate and modification in relation to changing development challenges, as in domestic political and contractual contexts? Or should they be viewed as fundamental, ‘constitutional’, ‘rule of law’-type commitments that domestic administrations must internalize? As Finger, Schuler, and others point out, many WTO rules represent political choices reflective of contractual bargaining rather than constitutive rules for a global ‘constitutional’ order. Yet unlike in domestic political and contractual settings, WTO rules are much more difficult to modify over time. WTO Secretariat officials therefore face a dilemma. If they travel to developing countries simply to promote existing WTO rules, they elide the political and development choices implicated by the rules. They cut off what could be valuable discussion, in meetings with those most up-to-date about WTO developments, as to how developing countries can shape the rules through implementation and renegotiation in order to advance trade-related development objectives. If the Secretariat views WTO rules as fundamental commitments, then WTO technical assistance will tend to operate as a form of ‘soft’ power to shape understandings of WTO obligations and thereby alleviate the need for ‘harder’ enforcement measures through formal WTO dispute settlement.

WTO Secretariat officials stress that the WTO is not a development agency mandated to provide development consulting or to finance the provision of

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Director-General Mike Moore concerning the ‘conditionality’ of technical assistance and capacity building, *WTO Press Release 279* of March 11, 2002.

roads, port facilities, sanitary testing equipment, information technology, and other trade infrastructure needs. These development tasks lie within the competence of other international organizations, such as the World Bank and the United Nations Development Programme ('UNDP'). However, now that the WTO has received significant funding for trade-related capacity building, the WTO Secretariat also receives requests for programmatic funding from developing country members.<sup>10</sup> As a result, there is again tension between the Secretariat's internal understanding of its 'mandate' and the call for enhanced WTO trade-related 'capacity building' initiatives.

This chapter is in four parts. Part I sets forth the competing (and sometimes conflicting) rationales for WTO trade-related capacity building and technical assistance efforts. These competing rationales have led to contention over how the funding is used. Part II addresses the political and operational constraints on the Secretariat's implementation of a meaningful WTO capacity building programme. Part III provides historical background to, and a summary of, the WTO's technical assistance and capacity building initiatives and some of the criticisms that they have generated. Part IV concludes by suggesting how developing countries, donors, and the WTO Secretariat could build from current initiatives, while noting the challenges posed.

## **II. Competing Rationales for Trade-related Capacity Building and Technical Assistance**

At first glance, enhancing trade-related capacity in poor countries seems uncontroversial. All developing countries suffer from capacity constraints that impede their ability to promote their interests through the WTO. The least-developed members are in the most strained situation. A number of WTO members do not have a single representative in Geneva to even consider choosing among over seventy different WTO councils, committees, working parties and other groupings, involving over 2,800 meetings each year.<sup>11</sup> Because

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10 Interviews with Secretariat officials, June 2004, Geneva.

11 See Gary Sampson, *Trade, Environment and the WTO: The Post-Seattle Agenda* (2000) 24. As Sampson, the former Director of the WTO's Trade and Environment Division notes, the Egyptian delegation to the WTO has estimated that there were 2,847 meetings in the WTO in 1997, or an average of 10 meetings per working day. (citing Communication from Egypt, High Level Symposium on Trade and Development, mimeo WTO 17 March 1997, at 30). In consequence, many countries' representatives simply do not attend or keep up with developments in most WTO committees. Developing countries may lack the capacity to attend meetings in Geneva scheduled for their express benefit. As reported by a WTO official interviewed by Braithwaite and Drahos, 'We set up a Subcommittee with a Chair and a

of capacity constraints, developing countries are less able to advance their interests in WTO negotiations, before WTO committees, and in dispute settlement. Not surprisingly, they face considerable trade barriers for the product markets of greatest importance to their economies, which developed countries label as 'sensitive'. A 2001 World Bank report maintained: 'The prevailing pattern of protection in the world today is biased against the poor in that barriers are highest on goods produced by poor people—agriculture and unskilled labour-intensive manufacturers and services.'<sup>12</sup> Similarly, developing countries are less able to shape their internal implementation of WTO rules in a manner that protects their interests.

In practice, however, capacity building programmes can be controversial. Who defines the purpose of technical assistance and capacity building, and who oversees how funding is used, can shape programmes toward different ends. Technical assistance programmes can be relatively donor-driven to serve donor-defined interests, or they can be relatively demand-driven to serve interests defined within the recipient countries. Constituency interests in developing countries can differ, fragmenting, and spurring conflict over, capacity building projects. Donors can work through allies in developing country bureaucracies to act as brokers to serve both personal and donor interests. What looks like a 'demand-driven' request can actually be donor-driven. In the words of Thandika Mkandawire, director of the UN Research Institute for Social Development, developing country 'nationals' may simply serve to champion 'externally driven policy agendas', so that the resulting 'dialogue' between donor and recipient can take on 'the character of the conversation between a ventriloquist and a puppet'.<sup>13</sup> As one African representative to the WTO contends: 'The problem [with the WTO Secretariat's capacity building programme] is that it is ideological. They come to tell us what to think, what our positions should be.'<sup>14</sup> As he states,

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Secretary who turned up for the first meeting on trade needs of LDCs [least developed countries]. No LDCs came. No developed countries came. No one came. Not one country showed up. If it had been telecoms, the chamber would have been packed [with special interests and states pushed by telecom interests].' John Braithwaite and Peter Drahos, *Global Business Regulation* (2000), at 196. As of November 1999, twenty-eight WTO members did not even maintain permanent offices in Geneva because of a lack of resources. See 'WTO organizes Geneva Week for non-resident delegations', 43 *WTO Focus* (Nov. 1999) 16.

12 See World Bank, *Global Economic Prospects and the Developing Countries: Making Trade Work for the World's Poor* (2001). See also Bernard Hoekman, 'Strengthening the Global Trade Architecture for Development', 1:1 *World Trade Review* (2002) 1, 29.

13 Thandika Mkandawire 'Incentives, Governance and Capacity Development in Africa' in *Capacity for Development: New Solutions to Old Problems*, Sakiko Fukuda-Parr, Carlos Lopes, Khalid Malik eds., (2002) 147, 155.

14 Interview July 2004.

WTO technical assistance is often about ‘the use of ideas to transform developing country negotiating positions’.<sup>15</sup> Even if donor-driven technical assistance does not directly conflict with a developing country’s interests, in a world of limited resources, technical assistance in one area can divert human and material resources from others that may be of greater priority.

There are at least four competing rationales for WTO trade-related technical assistance efforts:

1. To facilitate trade liberalization;
2. To support specific trade-related aspects of a country’s development strategy;
3. To assist with the costs of the implementation of WTO agreements; and
4. To enhance the capacity of developing countries to participate in the shaping of international trade rules, their interpretation and understanding, and their monitoring and enforcement.

These four rationales can overlap and conflict. Trade is widely recognized as important for development, especially for countries with small internal markets. Because of their small markets, these countries do not benefit from specialization, economies of scale, and competition. There is considerable evidence that a larger market, made possible through trade, facilitates specialization so that productivity improves and costs decrease.<sup>16</sup> The import substitution model for development is now widely viewed as unsuccessful. In contrast, the great development stories since World War II were those from East Asia that benefited from competitive export sectors.<sup>17</sup> Developing countries can benefit, in particular, from opening their markets to each other’s products, as some Asian countries now demonstrate.<sup>18</sup>

Development, however, is a much broader objective than trade liberalization. From a development perspective, trade is a tool. As the OECD technical assistance guidelines state: ‘Trade and trade liberalisation are not ends in themselves ... [although] they can enhance a country’s access to a wider range

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15 Id.

16 See WTO 2003 World Trade Report, *supra* note 6 at 85.

17 Growth rates in East Asia were on average 5.5 percent per year from 1965-1990, implying a doubling of national income every thirteen years. See S. Radelet and J. Sachs, ‘The East Asian Financial Crisis: Diagnosis, Remedies and Prospects’ *Brookings Papers on Economic Activity* (1998).

18 See WTO 2003 World Trade Report, *supra* note 6.

of goods, services, technologies and knowledge.<sup>19</sup> Development analysts may agree on the importance of trade, but they also disagree over the scope and timing of internal trade liberalization.<sup>20</sup> Some high-growth Asian countries were more free-trade oriented, such as Hong Kong and Singapore, while others were more mercantilist, such as Japan, Korea, China, and Chinese Taipei. While all of these WTO members have moved toward freer trade, the rapid jump in their development was not because of uniformly liberal trade policies.

The East Asian countries' experience demonstrates the importance of internal trade-related capacity both in government and in the private sector. Exports may have been central to the growth models of East Asian countries, but so was a strong state having a competent bureaucracy and a private sector subject to internal competition.<sup>21</sup> These countries understood the importance of investing in education and skills development, and of transferring skills through the private sector, so that they had broader-based internal capacity to absorb and deploy technical assistance.<sup>22</sup> Although all development contexts differ,

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19 Organization for Economic Cooperation and Development (OECD), *The DAC Guidelines: Strengthening Trade Capacity for Development* (2001) at 17, available at <http://www.oecd.org/dac/trade>. The guidelines call for collaboration 'in formulating and implementing a trade development strategy that is embedded in a broader national development strategy.' See also United Nations Conference on Trade and Development, *The Least Developed Countries Report 2004: Linking International Trade with Poverty Reduction* (2004).

20 Compare D. Dollar and A. Kray, *Growth is Good for the Poor*, World Bank Policy Department Working Paper No. 2587 (2001); T. N. Srinivasan and J. Bhagwati, *Outward Orientation: Are the Revisionists Right?*, Center Discussion Paper 806, Yale University (1999); Dani Rodrik, *The Global Governance of Trade as if Development Really Mattered*, available at <http://www.cid.harvard.edu/cidtrade/issues/developmentpapers>; Dani Rodrik, 'Development Strategies for the 21<sup>st</sup> century', in *Annual World Bank Conference on Development Economics 2000*, (2001) 85-101; Alan Winters, *Trade Liberalization and Poverty: The Empirical Evidence* (Oct. 2002) at 64, available at <http://www.sussex.ac.uk/Units/economics/dp/Wintersetal88.pdf> (concluding 'The evidence surveyed in this paper demonstrates that there can be no simple generalisable conclusion about the relationship between trade liberalisation and poverty'); and Oxfam, *Rigged Rules and Double Standards: Make Trade Fair* (2002).

21 See e.g., Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (1990); and Meredith Woo-Cumings, ed., *The Developmental State* (1999). Interestingly, a study by Schiavo-Campo has 'measured the share of the number of civil servants for 100 people', and found that 'the average ratio for sub-Saharan Africa (1.5) is less than that of Asia (2.6) or of Latin America (3.0)', although 'Mauritius and Botswana—the best-performing countries in terms of growth, and with bureaucracies touted as efficient—have more than three times the African average: 5.5 and 5.8 respectively.' See Thandika Mkandawire, *supra* note 13 at 151.

22 Korea, for example, has a large programme for promoting technological development in the private sector. See Sanjaya Lall, 'Social Capital and Industrial Transformation', in Sakiko

countries can learn from each other's successes and failures. In a globalizing world, they can 'scan globally, reinvent locally'.<sup>23</sup> The East Asian experience suggests that technical assistance will be of less value without a competent state bureaucracy, engaged private sector, and civil society with a developing skill base to absorb it.

Technical assistance for the implementation of WTO obligations is a conceptually different goal than those of trade liberalization and development promotion. No longer is the WTO and GATT system just about trade liberalization, if it ever was. The WTO's mandate has expanded to include intellectual property and other regulatory issues. Implementing obligations under these new agreements entails significant costs, distracting resource-strapped developing country officials from other priorities. If trade-related capacity building programmes are simply created to help developing countries implement their WTO obligations, these programmes will serve more limited (and possibly donor-driven) goals.<sup>24</sup>

Finally, the primary aim of a WTO capacity building programme can be to empower developing countries to better define their trade objectives, to integrate these objectives in development plans, and to advance them in international trade negotiations, monitoring, and enforcement, as well as in the shaping and sequencing of internal regulatory policies. These aims could be advanced through close coordination with other development institutions. As Henri Bernard Solignac Lecomte of the OECD writes: 'There can only be one ultimate objective: to empower developing countries in the multilateral trade

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Fukuda-Parr, Carlos Lopes, Khalid Malik (eds.) *Capacity for Development: New Solutions to Old Problems*, (2002) 101, 114 at 115.

- 23 See Sakiko Fukuda-Parr, Carlos Lopes, Khalid Malik, 'Institutional Innovations for Capacity Building', in Sakiko Fukuda-Parr, Carlos Lopes, Khalid Malik (eds.), *Capacity for Development: New Solutions to Old Problems*, (2002) 1, 18. See also Charles Sable and Sanjay Reddy, *Learning to Learn: Undoing the Gordian Knot of Development Today*, Columbia University, mimeo, available at <http://www.sopde.org/discussion.htm>; Peter Evans, 'Transferable Lessons? Re-examining the Institutional Prerequisites of East Asian Economic Policies', in Yilmaz Akyuz (ed.), *East Asian Development: New Perspectives* (1999); and Lall, *supra* note 22, (noting that there is a debate as to whether 'social capital' is inherent in the Confucian ethic in Asian culture, or grew through their development strategies).
- 24 Implementation of WTO obligations is a complex issue. Countries need to analyze the tradeoffs in choices over how they implement WTO requirements in order to facilitate their development strategies. See e.g. Carlos Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (2000); and J. H. Reichman, *Managing the Challenge of a Globalized Intellectual Property Regime* (draft for the second Bellagio meeting on Intellectual Property and Development 2003) (on file).



system, and help their products to penetrate OECD and other world markets.<sup>25</sup> Although this latter empowerment objective may overlap with the others, it is much broader, adopting more of a process-based approach. Its aim is to enhance developing countries' capacity to define their own objectives and policies, as opposed to enhance 'ownership' of substantive policies that others may have defined for them.

### **III. Political and Operational Challenges to Implementing a WTO Capacity Building Programme**

WTO technical assistance and capacity building programmes face at least four major interrelated challenges. They are:

1. The difficulty of ensuring that WTO technical assistance is coherently integrated into larger development strategies, and consists of more than a fragmented hodgepodge of 'one-off' events;
2. The incentives of donors to frame capacity building projects to advance donor constituency interests;
3. The risk of dependency, which can undermine local capacity, unless technical assistance is absorbed institutionally; and
4. The threat of discontinuation of significant WTO and other trade-related technical assistance after the completion (or termination) of the Doha round, so that trade-related capacity building does not remain a significant WTO function.

#### **A. The Challenge of Coherence with Broader Development Strategies**

Technical assistance projects can appear to be random and uncoordinated. Because donors like to take 'credit' for assistance projects, they prefer not to provide substantial funding through an international organization or a common fund.<sup>26</sup> As Susan Prowse of the UK's Department for International Development writes, different agencies thus often support 'a vertical multiplicity

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25 Henri Bernard Solignac Lecomte, *Building Capacity to Trade: A Road map for Development Partners: Insights from Africa and the Caribbean*, Overseas Development Institute paper, (July 2001) (on file) at 7.

26 Interview with a developed country representative to the WTO, June 2004.

of trade-related assistance initiatives with little to no horizontal coordination'.<sup>27</sup> The resulting challenge is to ensure greater coherence of trade-related technical assistance programmes in relation to a recipient's overall development strategy.

The WTO has struggled with its attempts to provide a coherent capacity building programme. As the former Director of the Trade and Development Division, Chiedhu Osakwe, stated:

[W]e have to realize that we have a monumental problem with coordination... There are coordination challenges at every level, there are coordination challenges within the Secretariat, ... among the beneficiary countries, ... and amongst the donors. Frequently we are in the middle of friendly fire with regard to the same Missions and their capitals.<sup>28</sup>

The WTO's Technical Cooperation Audit Report for 2002 found:

The activities of the TA Plan in 2002 were not planned, designed or implemented as part of a systematically and coherently developed multi-year technical cooperation project or programme for a technical sector, a country or a region or sub-region. The plan lives and dies from one year to the next. Therefore, the cumulative benefits of the current TAs for the beneficiaries are more the result of coincidence than systematically thought out efforts.<sup>29</sup>

Most activities were of short duration and involved the 'dissemination of information ... rather than real skill development and capacity building'.<sup>30</sup> Early WTO technical assistance reports merely described activities in such terms as: 'present detailed information', 'inform the government', or 'explain the structure of GATS'.<sup>31</sup> The WTO's 2003 technical assistance plan admitted 'coordination challenges remain acute ... at the national level, amongst agencies, and amongst bilateral donors.' The report found too many '*ad hoc* demands and fitful

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27 Susan Prowse, 'The Role of International and National Agencies in Trade-Related Capacity Building', 25 *The World Economy* (2002) 1197 at 1239, (citing OECD, *Building Trade Policy Capacity in Developing Countries and Transition: A Practical Guide to Planning Technical Cooperation Programmes* (2001)).

28 Report to the Secretariat, High Level Briefing/Meeting on Technical Cooperation and Capacity Building for Capital-based Senior Officials, WT/COMTD/43, at 10 (Sept. 20, 2002).

29 See Note by the Secretariat, Technical Cooperation Audit Report for 2002, WT/COMTD/W/111, at 5 (March 28, 2003).

30 *Id.* at 5.

31 'Only six per cent of the back-to-office reports' included reference to 'pre-set indicators' of capacity objectives: Audit report for 2002, *supra* note 29 at 8.

Secretariat responses'.<sup>32</sup> The Secretariat nonetheless maintains that, having learned from these experiences, it has built a more effective plan for 2004 and the future, involving a more coherent set of products, each with a clear capacity building objective.

Conceptualizing capacity building goals is much easier than implementing them. Part of the conundrum is that a country needs capacity to coordinate, rationalize, and absorb the technical assistance provided. As development analyst Devendra Panday writes, 'integrating and transforming [donor assistance] into a coherent national strategy and then implementing the strategy is a very difficult proposition for a poor country whose coordinating capacity is swamped from all directions.'<sup>33</sup> Thus, some countries have told the Secretariat that 'they need technical assistance to identify their domestic technical assistance needs.'<sup>34</sup> They also need resources just to manage the assistance provided. They admit that 'seminars and workshops ... will be of little value as we are finding out, ... if the objective is to develop capacity in the broad sense.'<sup>35</sup> Yet *ad hoc* demands are much easier to formulate, especially when a country lacks internal capacity.

Implementing a trade-related technical assistance strategy, moreover, must respond to the dynamic of WTO negotiations and dispute settlement.<sup>36</sup> The WTO Director-General has consistently emphasized 'the urgency underpinning the on-going Doha trade negotiations and work programme... Time frames and deadlines need to be adhered to.'<sup>37</sup> Developing countries must also respond to regional and bilateral trade negotiations. They thus need 'flexibility' in the

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32 See Note by the Secretariat, Coordinated WTO Secretariat Annual Technical Assistance Plan 2003, WT/COMTD/W/104 (Oct. 3, 2002) at 8.

33 See Devendra Raj Panday, 'Technical Cooperation and Institutional Capacity Building for Development: Back to the Basics', in *Capacity for Development: New Solutions to Old Problems*, Sakiko Fukuda-Parr, Carlos Lopes, Khalid Malik (eds.), (2002) 61, 79.

34 See Note by the Secretariat, Coordinated WTO Secretariat Annual Technical Assistance Plan 2003, WT/COMTD/W/104 (Oct. 3, 2002), at 8.

35 Remarks of Bangladesh, High Level Briefing/Meeting, *supra* note 28 at 21.

36 See e.g., High Level Briefing/Meeting on Technical Cooperation, *supra* note 28 at 24. The representative of Chile remarked 'it is very difficult to anticipate what specific needs a developing country will have next year, because we don't know exactly what it is that is going to be required, and the challenges that will have to be faced in the course of the negotiations' (at 25). The negotiating dynamic reflects the 'bicycle theory' of trade policy which claims that, 'unless there is forward movement, the bicycle will fall over.' See John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (1998), at 24.

37 See Report on the Mainstreaming Seminar II, 31 October-1 November 2002, WT/IFSC/2, at 17.

formulation of technical assistance requests in order for them to participate effectively in multiple, complex negotiations.<sup>38</sup> They do not wish to finalize technical assistance requests six months or a year in advance when the dynamics of negotiations and disputes can raise new needs. This understandable desire for ‘flexibility’ can conflict with the aim of integrating WTO technical assistance into long-term strategies unless the requests fit into a coherent umbrella framework.

### **B. The Political Context**

A major challenge for the creation of a meaningful WTO capacity building programme is that development objectives can conflict with the interests of powerful constituents within donor countries. Government officials in every country respond to their constituents, whether they be protectionist or export-oriented. Not surprisingly, donors respond to the demands of constituents that wish to impede access to ‘sensitive sectors’ and to press for immediate implementation of intellectual property and other requirements, regardless of another country’s development priorities. Donors may ‘tie’ aid to profit national companies and consultants.<sup>39</sup> Technical assistance is not necessarily ‘free’.

One may thus question if developing countries are ‘beneficiaries’ of some WTO ‘technical assistance’ initiatives. For most development analysts, implementation of intellectual property protection, especially in the manner desired by some richer countries, is not a priority for the poor.<sup>40</sup> Yet the first organization with which the WTO signed a ‘Cooperation Agreement’ for the provision of technical assistance was the World Intellectual Property Organization

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38 For example, Colombia asked for technical cooperation for home officials to be conducted back-to-back with meetings of negotiating groups. See High Level Briefing/Meeting, *supra* note 28 at 30. Similarly, Kenya spoke of the need to ‘focus on upgrading technical skills and capacity... to negotiate on various subjects under discussion in the WTO’ (at 10). Mauritania expressed a similar need. See Note on the Meeting of 27 and 28 November 2003, WT/COMTD/M/47 (Jan. 14, 2004) at 12.

39 See, for example, efforts within the OECD to eliminate ‘tied aid’, where development assistance is subject to conditions, such as a requirement that the recipient use companies from the granting state. See Report on Export Credits in the OECD (2002), available at <http://www.oecd.org/publications&documents/guidelines/2002.htm>.

40 See Finger and Schuler, *supra* note 4 (estimating that the implementation of the TRIPS, Customs Valuation, and SPS Agreements would cost developing countries around US\$ 50 million dollars, which equals a year’s development budget for most LDCs); and the sources cited in *supra* note 4.

(‘WIPO’).<sup>41</sup> In July 1998, the WTO and WIPO announced a new joint initiative ‘to help developing countries which are members of the WTO meet the 1 January 2000 deadline—less than a year and a half away—for conforming with the [TRIPS Agreement].’<sup>42</sup> Similarly, other early WTO capacity building plans consistently referred to:

[T]echnical missions ... aimed at helping individual countries to adapt their existing legislation and regulations to the WTO Agreements in areas such as customs valuation, trade remedies and TRIPS, and transposition of tariff schedules.<sup>43</sup>

A special initiative for African countries likewise proclaimed that it is ‘assisting beneficiary countries implement their obligations under the WTO’.<sup>44</sup> In the build-up to the Cancun ministerial meeting in 2003, ‘of the 1048 TA/CB priorities communicated by Members to the WTO Secretariat, the largest number were to be “Singapore issues” (investment, competition policy, transparency in government procurement and trade facilitation)’, which were the primary demands of the EU.<sup>45</sup> When it appeared that implementation issues were being given less attention in the 2004 capacity building plan, the EU complained that ‘no TA was foreseen for the actual implementation and application of existing WTO Agreements.’<sup>46</sup> Even if one takes a favourable view of WTO-promoted regulatory change, in a world of limited resources, there are opportunity costs

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41 See Note by the Secretariat, A New Strategy for WTO Technical Cooperation: Technical Cooperation for Capacity Building, Growth and Integration, WT/COMTD/W/90 (Sept. 21, 2001) at 3 (referring to the 1995 document).

42 See WTO Press Release 108, July 21, 1998.

43 See e.g., Note by the Secretariat, Report on Technical Assistance 2000, WT/COMTD/W/83, (May 2, 2001) at 31. The report maintained, for example, that a ‘systematic’ purpose in the ‘cooperation’ was to assist developing countries with their notification obligations. In the words of the WTO report, ‘In order to raise Members’ awareness of their notification obligations, the Secretariat almost systematically includes a module on notification requirements in national as well as in regional seminars’ (at 13). Interestingly, Santa Lucia (a non-resident member of the WTO) expressed the need for flexibility to respond to developing country needs, but the example that it cited was its need ‘to do notifications’ to the subsidies committee concerning ‘subsidy programmes’: see High Level Briefing/Meeting on Technical Cooperation, *supra* note 28 at 29.

44 See High Level Briefing/Meeting on Technical Cooperation, *supra* note 28 at 20 (referring to the JITAP, see below).

45 ‘Technical Assistance and Capacity-building’, *ICTSD Doha Round Briefing Series* (Feb. 2003), at 3.

46 See Note on the Meeting of 16 and 23 October 2003, WT/COMTED/M/46 at 15.

when development assistance is provided in one area—say for intellectual property protection—and not in another.<sup>47</sup>

Developing countries often view the WTO Secretariat's provision of technical assistance with circumspection because the Secretariat could be advancing the interests of those who oversee the WTO budget—the major donors.<sup>48</sup> An official at an international development agency complains that WTO Secretariat members, when they travel to a developing country to provide technical assistance, 'do not engage in exchange with stakeholders where it is an open question as to whether a WTO rule is good or bad for development, and what are the implementation options and their tradeoffs for a country.'<sup>49</sup> WTO Secretariat officials are discouraged from offering counsel as to how a WTO obligation could be interpreted by a country to facilitate a development objective. WTO Secretariat officials rather have been known to complain that officials from other development agencies that might be critical of a WTO rule are 'not being helpful for the WTO agenda'.<sup>50</sup> As one representative from Africa remarked, 'you have to be wary of them [members of the WTO Secretariat]', and 'need to fight constantly' for your interests to be respected.<sup>51</sup>

In the 2004 capacity building plan, the Secretariat spoke of the need for Secretariat 'management of the demand' for technical assistance because of the Secretariat's limited resources and the potentially unlimited requests.<sup>52</sup> The EU supported the idea that 'the WTO Secretariat assumes a more proactive and strategic role in assisting those members that have difficulties in identifying their technical assistance needs.'<sup>53</sup> Although there is a strong rationale for bureaucratic coordination to ensure greater coherence, developing countries distrust Secretariat discretion. They demand that the Secretariat serve their requests in a 'transparent' manner. India, for example, stressed that technical assistance must remain 'demand-driven rather than having any aspects that might suggest a

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47 Unlike for the United States and Europe, implementation of WTO obligations often requires developing countries to create entirely new regulatory institutions and regimes.

48 See e.g. Braithwaite and Drahos, *Global Business Regulation*, *supra* note 11, at 196 (maintaining that the WTO's upper management faces an incentive structure 'which is symbiotically linked to the power of the US and EC').

49 Discussion, June 2004.

50 *Id.*

51 Discussion, June 2004.

52 See High Level Briefing/Meeting on Technical Cooperation, *supra* note 28 at 7. The Secretariat notes the need 'to move away from demand-driven TA' to one in which members set priorities for managed TA: *Id.*, at 11.

53 See High Level Briefing/Meeting on Technical Cooperation, *supra* note 28 at 22.

prescriptive approach from the part of the Secretariat'.<sup>54</sup> Morocco expressed concern that the Secretariat's approach for 2004 will give the Secretariat too much 'discretionary power'.<sup>55</sup> Costa Rica likewise supported the need to 'provide more flexibility to individual members in deciding national activities'.<sup>56</sup> So did Kenya.<sup>57</sup> At the following meeting of the Committee on Trade and Development, Mauritania expressed similar views on behalf of the Africa Group, a perspective that Thailand, Colombia and Morocco also supported.<sup>58</sup>

### **C. The Need to Avoid Dependency**

For most development specialists, the measurement of a development project's success lies not in the quantity of assistance, but in the extent to which the project empowers a country to devise and implement effective strategies on its own over time. As David Ellerman writes, the 'fundamental conundrum' will remain the paradox of 'supplying help to self-help'.<sup>59</sup> The OECD guidelines similarly speak of the need for approaches that 'strengthen the ability of partner countries to continue helping themselves after the donors have left'.<sup>60</sup> The challenge is to avoid what Ellerman dubs 'Say's Law of Development Aid—the supply of aid seems to create and perpetuate the demand for it'.<sup>61</sup> The temptation to become dependent on aid is high. Developing countries strapped for funds may conform to donor demands simply to get the funds. 'In 1989, for example, for the countries of sub-Saharan Africa, excluding Nigeria, technical cooperation was equivalent to 14 percent of government revenues. For ten countries, it was equivalent to at least 30 percent'.<sup>62</sup> Not surprisingly,

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54 See Note on the Meeting of 16 and 23 October 2003, WT/COMTED/M/46, at 18 (Nov. 24, 2003).

55 *Id.*, at 12.

56 *Id.*, at 23.

57 *Id.*, at 26.

58 See Note on the Meeting of 27 and 28 November 2003, WT/COMTD/M/47 at 12.

59 David Ellerman, 'Autonomy-respecting Assistance: Towards New Strategies for Capacity-Building and Development Assistance', in *Capacity for Development: New Solutions to Old Problems*, Sakiko Fukuda-Parr, Carlos Lopes, Khalid Malik (eds.), (2002) 43.

60 OECD, *The DAC Guidelines: Strengthening Trade Capacity for Development*, (2001), available at <http://www.oecd.org/dac/trade>, at 17.

61 *Supra* note 59 at 50. See also Peter Morgan, 'Technical Assistance: Correcting the Precedents', *Development Policy Journal*, Dec. 2002, 1, 5 ('TA in many instances led to the erosion of ownership, commitment and independent action of national actors. Put in place to help generate independence, TA led in too many cases to a sense of dependence').

62 Fukuda-Parr et al, *Institutional Innovations for Capacity Building*, *supra* note 23 at 12.

beneficiaries of a current WTO assistance programme for Africa do not wish to 'graduate' from it, although they may have to do so if the programme is to be extended to other African countries. When developing countries become dependent on external funding, whether for WTO matters or otherwise, technical assistance programmes can actually undermine the development of local capacity.

#### ***D. The Challenge of Ensuring Sustainability in Light of Short-term Negotiating Goals***

Donors wish to see payoffs from the funds that they provide. If trade-related technical assistance does not generate desirable results, then it may be discontinued. Donor governments have thus demanded improvements in the evaluation and reporting of how WTO capacity building efforts work.<sup>63</sup> The WTO Secretariat now organizes meetings about every six weeks with donors, and beneficiaries regarding the use of WTO capacity building products.<sup>64</sup>

The problem, however, arises in the definition of success and its timeline. Is success to be measured by whether the Doha round is concluded? Is it to be measured by whether the Doha round leads to market access in sectors desired by developing countries? Or are capacity building programmes now institutionalized within the WTO so that their objectives are longer term? Certainly the Doha round will not in itself resolve developing countries' trade-related capacity needs.

There exists some pressure to link WTO capacity building initiatives to the conclusion of the Doha negotiating round. The technical assistance now provided was granted 'explicitly and implicitly' in response to developing countries' agreement to launch the round, which included the Singapore issues.<sup>65</sup> When three of the Singapore issues dropped out of the negotiations in July 2004, the future of donor funding was put in question. As the EU representative warned following the Cancun ministerial when developing countries rebelled against inclusion of these issues in the work programme: 'The Cancun outcome required a re-assessment of TA priorities... Members needed to reconsider the scope of future TA since it was not clear what the scope of the DDA would be in the future.'<sup>66</sup> Canada suggested that the Secretariat reduce trade-related

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63 See Meeting of 22 May and 12 June 2003, WT/COMTD/M/45, at 14 (US remarks).

64 Interview with Secretariat member, June 23, 2004.

65 Interview with a developed country representative to the WTO, June 2004, Geneva.

66 WT/COMTD/M/46 at 14 (the DDA refers to the Doha development agenda).



technical assistance over time, and become coordinator, rather than a deliverer, of such assistance.<sup>67</sup>

Developing countries, in contrast, generally insist that ‘technical cooperation and capacity building should be considered as a fundamental aspect of the activities of the WTO.’<sup>68</sup> Some Secretariat observers maintain that it may be politically difficult for donors to significantly curtail technical assistance now that it has been institutionalized within the WTO. At a high-level WTO meeting, a US representative agreed that capacity building should be ‘an enduring component of the work of the WTO’.<sup>69</sup> Nonetheless, donors’ perceptions of WTO capacity building projects’ effectiveness in achieving the programme’s goals, however those goals might be defined, will shape future funding decisions.

#### **IV. Historical Overview: The WTO’s Capacity Building Programmes in Context**

Countries have obtained technical expertise from foreign experts throughout history in furtherance of development goals, but technical assistance efforts have become more central aspects of policy since World War II. As Peter Morgan remarks:

[T]he approach to TA [technical assistance] that began in the late 1940s departed radically from much of what had gone before... TA became, for the first time, an issue of public policy... TA was now to be managed as a public sector activity ... [as] part of projects and programmes for which staff in new international development organizations were accountable.<sup>70</sup>

In the first decades following World War II:

[T]housands of experts and consultants fanned around the world, taking up residence in ministries and project offices, partly to supervise aid projects, but also to plant the skills and expertise... The underlying assumption was that developing countries lacked

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67 See High Level Briefing/Meeting on Technical Cooperation and Capacity Building for Capital-Based Senior Officials, WT/COMTD/43 at 22.

68 See High Level Briefing/Meeting on Technical Cooperation, *supra* note 28, at 30 (remarks of Colombian official in reference to paragraph 38 of the Doha Declaration). Confirmed in numerous interviews in Geneva, June 2004.

69 See High Level Briefing/Meeting on Technical Cooperation, *supra* note 28 at 26.

70 Peter Morgan, ‘Technical Assistance: Correcting the Precedents’, *Development Policy Journal* (Dec. 2002) at 1-2.

important skills and abilities—and that outsiders could fill these gaps with quick injections of know-how.<sup>71</sup>

The term ‘technical assistance’ referred to skill transfers to foster modernization.

After a couple of decades, development analysts switched their focus to that of ‘technical cooperation’ to emphasize that development programmes should work through a collaborative process. This term was later complemented by that of ‘capacity building’ to highlight the importance of local ‘ownership’ and ‘absorption’ of technical assistance to bolster recipients’ ability to pursue their development goals.<sup>72</sup> The OECD’s development guidelines, for example, now call for ‘local ownership and participation in all trade-related development cooperation activities’.<sup>73</sup> The lack of local ownership in previous development assistance efforts is shown by the fact that of 113 public expenditure review exercises completed up to 1993, ‘only three included local members on the review team, not one in Africa where most were done and where the ownership problem was most acute.’<sup>74</sup> Capacity building efforts have also shifted toward the development of broader-based ‘social capital’, defined as ‘the norms and networks facilitating collective action for mutual benefit’.<sup>75</sup> Initiatives that focus on the development of social capital target private and civil groups, as well as public officials.

The provision of technical assistance and capacity building has changed over time within the GATT and WTO, although the type of assistance that the WTO Secretariat can deliver remains limited by the Secretariat’s human resources and its perception of its mandate.<sup>76</sup> Although Secretariat officials refer to a ‘member-driven’ mandate, some members play more predominant roles than others.

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71 See Fukuda-Parr et al, *Institutional Innovations for Capacity Building*, *supra* note 23 at 2.

72 See e.g. Organization for Economic Co-operation and Development/Development Assistance Committee (OECD/DAC), *Principles of New Orientations in Technical Cooperation* (1991); and Elliot Berg and the United Nations Development Programme, *Rethinking Technical Cooperation: Reforms for Capacity-Building in Africa* (1993).

73 See OECD Guidelines, *supra* note 19.

74 See Elliot Berg, ‘Why Aren’t Aid Organizations Better Learners?’ in Jerker Carlsson & Lennart Wohlgemuth (eds.) *Learning in Development Co-operation* (2000) 25.

75 See Stephen Woolcock, ‘The Place of Social Capital in Understanding Social and Economic Outcomes’, 2:1 *Canadian Journal of Policy Research* (2000) 11; and Lall, Social Capital and Industrial Transformation, *supra* note 22. See also the work of Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (1995); and Robert Putnam, ‘The Prosperous Community: Social Capital and Public Life’, 4 *The American Prospect* (1993) 13.

76 The total size of the WTO Secretariat remains under six hundred persons, over two hundred of which are translators or providers of secretarial and cataloguing services. Compare these figures to that of a World Bank staff of around 9,300 and of an IMF staff of around 2,700.

Donor governments play a central role on the WTO's budget committee, which is a primary means through which they oversee and constrain what the Secretariat does.

Until the creation of the WTO, GATT technical assistance largely took the form of 'trade policy courses' taught in Geneva. The Secretariat organized around seventy-seven of these courses during the GATT's forty-seven year history.<sup>77</sup> As WTO membership grew, and as WTO rules proliferated and their scope expanded, more developing countries complained about the demands of WTO developments. The WTO launched a fund for technical assistance for least-developed countries in September 1995.<sup>78</sup> In 1996, the WTO published guidelines for WTO Technical Cooperation 'to improve knowledge of multilateral trade rules', and 'to assist in the implementation of commitments and full use of its provisions'. The first 'modes of delivery' were, once again, 'training courses' and the 'development of information and training material', complemented by 'specialized technical seminars'.<sup>79</sup>

At the Singapore ministerial meeting of December 1996, the WTO announced a broader Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (the 'IF'). The IF, coordinated out of the WTO, brings together six international agencies (UNCTAD, ITC, UNDP, WTO, IMF, and the World Bank) to collaborate with bilateral donors to ensure greater coherence in the provision of trade-related technical assistance in least developed countries.<sup>80</sup> The WTO, UNCTAD, and ITC concurrently launched a

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77 See 'Second WTO Trade Policy Course opens in Geneva', Press Release (Aug. 28, 1995).

78 'Norway provides \$2.5 Million to launch a WTO fund for Least-Developed Countries', WTO Press Release/23 (Sept. 29, 1995).

79 See Guidelines for WTO Technical Cooperation, Committee on Trade and Development, WT/COMTD/8, at 1 (Oct. 16, 1996).

80 The IF has taken a 'process'-oriented approach of awareness-building combined with diagnosis of trade-related challenges, with the aim of integrating trade strategies in national development plans. As part of a revised IMF/World Bank strategy, between 1999 and 2001, around fifty countries prepared 'Poverty Reduction Strategy Papers' (PRSPs) in which they define priorities. However, trade initially did not figure prominently in most PRSPs. See discussion in Khalid Malik and Swarnim Wagle, 'Civic Engagement and Development: Introducing the Issues', in *Capacity for Development: New Solutions to Old Problems*, eds. Sakiko Fukuda-Parr, Carlos Lopes, Khalid Malik (2002) 85, 96. According to Prowse, one of the objectives of the IF was that trade-related capacity building be granted greater attention 'in relation to other development assistance needs.' See Prowse, *The Role of International and National Agencies*, *supra* note 27 at 1242. See also Terms of reference for IF pilot programme, WT/LDC/SWG/IF/13. In most developing countries, trade ministries play an extremely weak role compared to finance and other ministries: interviews with members of WTO, UNCTAD, and ITC secretariats, June 2004, Geneva. These interviewees also noted

Joint Integrated Technical Assistance Programme to selected Least Developed and other African countries ('JITAP').<sup>81</sup> The WTO's portion of JITAP's work has focused on strengthening WTO 'reference centres' located in these countries, which include computer terminals and internet access, and on providing updates to officials on WTO developments.

Analysts criticized the early WTO technical assistance programmes, including the IF and JITAP efforts.<sup>82</sup> Overall funding was limited. The WTO Secretariat was unschooled in the provision of technical assistance, which lay outside its traditional competence. Requests for assistance largely came from Geneva-based representatives so that capacity building efforts were not well-coordinated with national capitals, with a resulting lack of local ownership. Although there were some successes,<sup>83</sup> the system allegedly operated in a 'rigid' manner, with requests for assistance required to be fixed at least six months prior to the start of the annual plan's implementation.<sup>84</sup> Many of the activities were considered to

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the problem of rapid turnover in the trade bureaucracies in developing countries, and, in particular, in the least developed countries. The IF was endorsed at a WTO high level meeting in Oct 27, 1997: see 'Inter-agency trade assistance programme launched for least-developed countries', WTO Press Release 83 (Oct. 30, 1997). The IF received US\$ 19 million in pledges through 2003, of which around US\$ 10 million were disbursed through 2003. UNCTAD is the United Nations Conference on Trade and Development. The International Trade Centre (ITC) is a joint venture of the WTO and UNCTAD. The IMF is the International Monetary Fund.

- 81 The JITAP is a 'results-oriented' programme involving specific activities and products. JITAP was first announced at UNCTAD IX in Midran, South Africa in 1996. By September 2003, the JITAP had received US \$12.6 million in its Common Trust Fund, of which US \$11 million had been pledged by donors. In JITAP, UNCTAD's work focuses on providing support for the beneficiaries' development of trade policies through 'inter-institutional committees.' The ITC focuses on trade capacity issues that are more commercially oriented: interview, WTO Secretariat member, June 23, 2004, Geneva, and with ITC officials, June 28, 2004.
- 82 See generally Michel Kosteci, *Technical Assistance Services in Trade-Policy: A contribution to the discussion on capacity-building in the WTO* (ICTSD Resource Paper No. 2) (Nov. 2001); Susan Prowse, *The Role of International and National Agencies in Trade-related Capacity Building*, available at [http://www.unido.org/file-storage/download/?file\\_id=12962](http://www.unido.org/file-storage/download/?file_id=12962); and Brian Larson, 'Meaningful Technical Assistance in the WTO', 6 *Wisconsin Law Review* (2003) 1164, 1194-95.
- 83 The JITAP received a positive evaluation in 2002 (document on file with author). The JITAP helped establish WTO 'resource centres' in its beneficiary countries, a programme that was then expanded to cover developing country members generally. JITAP also allegedly facilitated the coordination of trade policy within beneficiaries through 'inter-institutional committees': interview with a member of the WTO Secretariat, June 23, 2004, Geneva.
- 84 Interview with member of the WTO Secretariat, June 23, 2004, Geneva.

be ‘one-off’ events that would have little sustainable impact, so that there was an overall focus on quantity rather than quality.<sup>85</sup> A representative of one development organization characterized WTO technical assistance as ‘a joke’.<sup>86</sup>

With the launch of the Doha round in 2001 and the creation of the Doha Development Agenda Global Trust Fund, trade-related technical assistance and capacity building programmes increased. Members pledged over 21.5 million Swiss francs (about US \$15.7 million dollars) in 2002.<sup>87</sup> In 2003, funds for WTO capacity building projects from the annual budget and the new trust fund slightly exceeded 30 million Swiss Francs. The same amount was also budgeted for 2004.<sup>88</sup> These figures do not include overhead costs, including the salaries of around thirty-eight officials in the WTO Institute for Training and Technical Cooperation, nineteen ‘L’ officials hired on fixed-term contracts to provide assistance, and other ‘operational staff’ asked to help.<sup>89</sup> Moreover, these funds complement the considerably greater amounts of trade-related capacity building that donors provide directly or through other international organizations.<sup>90</sup>

Problems with WTO technical assistance efforts spurred the WTO to announce a ‘new strategy’ in 2001 whose stated aims were to make technical assistance more demand-driven, to create financial stability through the Doha

85 Audit Report for 2002, *supra* note 29 at 11. To give an example, the WTO’s 2000 report on technical assistance largely consisted of *ad hoc* examples broken down by WTO agreement, mode of delivery, numbers of activities, and percentage of geographical distribution.

86 Discussion, July 2004.

87 ‘Technical Assistance and Capacity-building’, *ICTSD Doha Round Briefing Series* (Feb 2003). Governments pledged Sw Fr 30 million to the Doha Development Agenda Global Trust Fund (DDAGTF) at a pledging conference held on March 11, 2002 at the WTO. See WTO Press Release 279 (March 11, 2002). As Larson notes, the DDAGTF ‘grew to three times the size of [the IF’s funding] overnight.’ See Larson, *supra* note 82 at 1195. The 2004 technical assistance plan was estimated to cost around Sw Fr 36.2 million, with around Sw Fr 30 million coming from WTO sources. About Sw Fr 6 million was to come out of the WTO’s general budget and about Sw Fr 24 million out of the DDAGTF.

88 WTO members contributed Sw Fr 24.6 million to the Doha trust fund in 2003, of which only Sw Fr 14.4 million was expended. See WTO 2004 World Trade Report, at 131.

89 Interview with WTO Secretariat official, Geneva, June 22, 2004.

90 The second joint WTO/OECD report on trade-related technical assistance and capacity building of 2003 divided trade-related capacity building programmes into three categories which had generated the following amounts of funding: (i) trade policy and regulations, US\$ 719 million; (ii) trade/business development, US\$ 1.4 billion; and (iii) infrastructure, US\$ 8.1 billion. The total of these three items constituted about 4.8% of total aid, more than went to basic education or basic health. The Second Joint WTO/OECD Report on Trade-Related Technical Assistance and Capacity Building (TRTA/CB) 2003, available at [www.oecd.org/dataoecd/27/4/11422694.htm](http://www.oecd.org/dataoecd/27/4/11422694.htm).

trust fund, and to enhance the capability of the WTO Secretariat to deliver products within its mandate in a manner that was both coherent and flexible to meet developing country needs.<sup>91</sup> The WTO's 'new strategy' nonetheless initially continued to focus on the more limited objectives of trade liberalization and rule implementation. The opening paragraph of the new strategy stated:

The core mandate of the WTO is trade liberalization... WTO technical assistance ... provides enabling assistance for Members to undertake trade liberalization... [The role of the Secretariat is] to assist them in understanding WTO rules and disciplines.<sup>92</sup>

WTO trade-related capacity building plans were, however, modified and became somewhat more sophisticated over time. The plans have taken account of audits of the previous year's activities. An audit of the Technical Assistance Plan for 2003, for example, criticized the plan's implementation for a lack of coherence, maintaining that the Secretariat was largely servicing *ad hoc* requests.<sup>93</sup> In response, the Secretariat prepared a plan for 2004 that was to be more 'quality-oriented, aiming at building long-term—i.e. sustainable—, human and institutional capacity', setting forth clearer 'objectives' for each type of capacity building 'product'.<sup>94</sup> The 2004 Plan set forth a long list of 'products' that included Geneva-based, region-based, nation-based, and distance-learning activities, as summarized in Table I.

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91 Note by the Secretariat, A New Strategy for WTO Technical Cooperation: Technical Cooperation for Capacity Building, Growth and Integration, WT/COMTD/W/90 (Sept. 21, 2001). Note, however, that the 1996 guidelines for WTO Technical Cooperation also proclaimed that they should 'be demand-driven': see WT/COMTD/8 at 1.

92 See Secretariat, A New Strategy for WTO Technical Cooperation, *supra* note 41 (Sept. 21, 2001) at 1.

93 The 2003 Technical Assistance Plan focused on the need to build capacity to understand the rules and implement WTO agreements, on the one hand, and to develop negotiating capacity, on the other, although it called for 'capacity building based on Members' explicitly determined priorities': see Note by the Secretariat, Coordinated WTO Secretariat Annual Technical Assistance Plan 2003, WT/COMTD/W/104/Rev.2, adopted on Nov. 22, 2002, para. 15.

94 Technical Assistance and Training Plan 2004, WT/COMTD/W/119/Rev.3, 18 Feb. 2004. The 2004 plan aimed 'to enhance institutional and human capacity in beneficiary countries and to address trade policy issues and concerns, "mainstreaming" trade into national development and poverty reduction policies and facilitating a fuller participation of beneficiaries in the Multilateral Trading System and effective participation in the negotiations' (at 1).

**Table I**  
**Summary of 2004 Technical Assistance**  
**and Training Plan Products**

The WTO Secretariat offered the following ‘products’ in its 2004 plan:

- Four three-month trade policy courses at the WTO in Geneva, two in English, and one each in French and Spanish, for which participants first undergo a selection process;
- Four three-month regional trade policy courses, scheduled in Nairobi, Kenya for Anglophone Africa; in Rabat, Morocco for Francophone Africa; in Hong Kong for Asia/Pacific members; and at the University of West Indies, Jamaica for the Caribbean. The Secretariat hopes to hold regional courses in other regions in the future for ‘Arab and Middle East Countries, Latin America, Central and Eastern Europe, Central Asia and the Caucuses’.<sup>95</sup> Through these regional courses, the Secretariat hopes to build regional institutional partnerships and academic networks;
- Two-to-five day regional seminars on specific WTO issues, from agriculture to textiles, dispute settlement to the TRIPS Agreement. These seminars, which aim to provide ‘more advanced levels of training’ that may build on previous programmes, are to be conducted in partnership with other international and regional agencies;
- Shorter Doha Development Agenda courses for senior government officials that focus on the state and process of the Doha negotiations, which are ‘held in each region’;
- National seminars which are provided flexibly in response to developing country requests, with up to two seminars allocated for each developing country, and three for least-developed countries (in addition to the assistance that the latter may receive under the JITAP and IF programmes);
- Five specialized courses held in Geneva on dispute settlement

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95 See 2004 TA Plan, *supra* note 93, at 7.

- Two introductory courses in Geneva for least developed countries;
- Other Geneva-based support, including an induction day for new diplomats, two ‘Geneva weeks’ for those WTO members without permanent representation in Geneva, video conferencing, advisory assistance on dispute settlement issues, and *ad hoc* assistance;
- Distance learning courses through computer-based training modules, interactive guides, and on-line fora;<sup>96</sup>
- Establishment and upgrading of ‘WTO Reference Centres’, of which around 130 operated in ninety countries as of June 2004.<sup>97</sup> For poorer countries, the WTO has provided information technology equipment and helped with internet access outside of the local power grid. (One of the aims is to facilitate trainees’ ability to maintain contact with members of the WTO Secretariat and with each other);
- WTO internship and trainee programmes to build hands-on practical learning;
- Through collaboration with the OECD, creation of a database

According to the Secretariat, beneficiaries and donors have supported the way that the 2004 plan has operated.<sup>99</sup> The Secretariat hopes that courses held in developing countries, in particular, can foster the creation of ‘academic networks with institutions of higher learning’ in developing countries.<sup>100</sup> Over time, the

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96 The first WTO eTraining programme was scheduled for June 21 to July 30, 2004: First WTO eTraining Course for government officials, WTO News 14 May 2004, available at <http://www.wto.org/news/news2004.htm>.

97 Email from a member of the WTO Secretariat, June 2004.

98 See Doha Development Agenda Trade-Related Technical Assistance and Capacity-Building Database, available at <http://tcdbd.wto.org>.

99 Interview with Secretariat official, June 22, 2004, Geneva.

100 One of the plan’s objectives is to ‘enhance the capacity of [local] academic institutions to backstop policy-making’: see 2004 TA Plan, *supra* note 94, at 6. See also, ‘Note on the



Secretariat would like the regional partners to assume ‘a growing share of the responsibility of the courses’, with the Secretariat overseeing quality control.<sup>101</sup> The Secretariat also plans to begin a PhD mentor programme in Geneva, where PhD candidates from developing countries can have space in the WTO library and be assigned a mentor from within the Secretariat.<sup>102</sup>

The IF and JITAP programmes were revamped in 2003 and 2004 in order to better ‘aim at mainstreaming trade within national development strategies by promoting trade policies supportive of the poverty reduction objectives of those countries.’<sup>103</sup> The JITAP programme was expanded in 2003 to include sixteen countries, and its modules were reduced to five core programmes, from fifteen. The IF’s coverage was expanded from three to fourteen countries in 2003, and to thirty-two by October 2004.<sup>104</sup> The IF opened a second ‘window’ to include ‘bridging’ funding of up to US\$ 1 million per country for priority needs, in addition to diagnostic studies (its ‘first window’).<sup>105</sup>

Sceptics outside of the WTO nonetheless question whether WTO trade-related capacity building will be reoriented in practice. They suspect that WTO capacity building programmes will continue to focus on power point presentations of ‘rules’ and on developing countries’ implementation obligations because of a restrictive ‘interpretation’ of the WTO’s rule-oriented mandate

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Meeting of 16 and 23 October 2003’ WT/COMTED/M/46, at 18 (Nov. 24, 2003) (remarks of Secretariat). Confirmed in interviews with Secretariat members in Geneva, June 22, 2004.

101 See 2004 Plan, *supra* note 94.

102 See October Meeting, *supra* note 100 at 29.

103 The quote is from the ‘Financial Report on the Integrated Framework Trust Fund’ Integrated Framework Steering Committee, WT/IFSC/W/7/Add.1 (May 1, 2002).

104 E-mail from WTO Secretariat member, Oct. 12, 2004. One interviewee in the WTO Secretariat characterized this as a ‘mini-crisis of success’ for the IF: interview, June 2004, Geneva.

105 The ‘first window’ consisted of diagnostic studies prepared on a pilot basis for three least-developed countries (LDCs). It was then extended to fourteen LDCs in 2003: see 2004 TA Plan, *supra* note 94 at 21; confirmed in interview with WTO Secretariat member, June 22, 2004, Geneva. Following the diagnostic studies, IF beneficiaries were to obtain funding from donor organizations, but it allegedly turned out that there was little follow-up. A World Bank official blamed the donors for not coming through with funding: discussion, July 2004. A donor representative, in contrast, blamed the World Bank for, among other matters, hiring consultants from Washington DC to prepare ‘huge fat’ diagnostic studies instead of using the Bank’s local people: discussion with a donor representative, July 2004. Because it has taken so long to move beyond the diagnostic and pilot stages, some development analysts have labelled the IF ‘if and when’: interview with an official at a development organization, Geneva, June 29, 2004.

which is pressed by donor countries monitoring the WTO's budget.<sup>106</sup> As one developing country representative remarked, 'the donors were careful that the Doha trust fund went into the WTO where they could control it, and not into another organization.'<sup>107</sup> As he concluded:

[...] the delivery modes [of the Secretariat's new plan] may be better, but the orientation is likely to be the same. Ultimately, the donors will control how the money is used. For example, when technical assistance is provided on WTO agricultural issues, the US Department of Agriculture will send an expert who will tell you what your position should be in the Doha round agricultural negotiations. They and the WTO guys go to countries to tell them what to do, not how to analyze and review options and their implications. WTO capacity building and technical assistance are important, but we need to fight all the time over how they are applied.<sup>108</sup>

## V. Conclusion: Some Potential Adaptations within Developing Countries, the WTO and Donors

The role of capacity building programmes should be to empower developing countries to take advantage of trade-related opportunities, whether through shaping WTO law and tariff concessions to facilitate development goals, through deploying WTO rights in dispute settlement, through implementing WTO law more effectively, or otherwise. It is, of course, always easier to examine challenges and failures than to implement strategies to capitalize on new opportunities. This concluding section aims to highlight positive developments in WTO capacity building efforts and some potential adaptations to be considered.

First, we should recognize that donors came through with a significantly greater amount of funding for trade-related technical assistance and that the WTO Secretariat improved in delivering its part. The Secretariat now provides a broader spectrum of products that include regional courses hosted by local

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106 Many developing countries would like to have the WTO mandate explicitly include 'development' issues, but developed countries prefer to keep it narrow, focusing on the 'rules' of a 'contract' organization: interviews with officials in other Geneva-based international organizations and developing country non-governmental organizations, Geneva, June 2004 (noting who is 'interpreting' and 'defining' the 'mandate'). One interviewee from another international organization characterized changes in the WTO regarding development issues as ones of 'rhetoric', since the WTO will remain a 'rule-based system' (June 29, 2004, Geneva).

107 Discussion, July 2004.

108 Id.

universities, specialized regional courses, workshops on negotiation techniques,<sup>109</sup> partnerships with academic and other institutions, and WTO reference centres set up around the world. The provision of this assistance has been somewhat more demand-driven, resulting in a better understanding of WTO rules and negotiating dynamics among a broader network of developing country government officials. WTO observers note that developing countries have been much more engaged in the Doha round of trade negotiations than they were in the past, indicating much greater ‘ownership’ of the technical assistance provided.<sup>110</sup> Such engagement could, however, result from assistance from organizations and networks that are independent of the WTO, rather than through the WTO itself.

How can developing countries, donors, and the WTO Secretariat build on past developments? First, developing countries need to increase their institutional coordination at multiple levels in a broader-based manner to include government departments, the private sector, and civil society representatives.<sup>111</sup> Technical assistance and capacity building endeavours will be most sustainable if they permeate broadly throughout institutions and societies. Donor capture is less likely if a broad array of stakeholders is included. The WTO’s 2002 audit, however, showed that the ‘representation of other economic sectors remains insignificant [with representatives being limited to officials from certain ministries], ... despite general recognition that the involvement of the private sector and civil society representatives is desirable.’<sup>112</sup> If the focus of technical assistance were to remain on individual capacity instead of larger societal and institutional capacity, then the WTO could simply be training individuals whose objectives and career paths are unpredictable.<sup>113</sup> Trade-related

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109 The WTO held its first course on ‘negotiating trade agreements: from theory to practice’ from Dec. 2-13, 2002, and its second from June 16-27, 2003.

110 As Faizel Ismail, the head of the South African delegation to the WTO, said following the Cancun meeting, ‘The only silver lining to the disappointment felt by G-20 members at the abrupt end of the WTO Cancun Ministerial Conference was that developing country negotiators had come of age. They had galvanized a formidable group of developing countries and skillfully built a common negotiation position that provided a sound platform to continue negotiations for a fair and freer global market for developing countries’ agricultural products’: Faizel Ismail, ‘Agricultural Trade Liberalisation and the Poor: A Development Perspective on Cancun’, *Bridges* (January 2004) at 4.

111 The OECD guidelines refer to ‘effective mechanisms for consultation among three key sets of stakeholders: government, the enterprise sector, and civil society’, *supra* note 19.

112 See Audit Report for 2002, *supra* note 29 at 4.

113 Some WTO trainees will leave government service or be assigned to agencies that do not work on trade matters. One interviewee noted that the trade policy course was extremely valuable for him and others, but that some students appeared to treat the course as an

capacity building will be more effective if it also responds, directly or indirectly, to local constituent demands, including those of the private sector, academics, and other civil groups, as part of a bottom-up process.

If developing countries are to shape the international trading system to facilitate their economic development and if they are to take advantage of WTO rules, they will need to work with the private sector to enhance the resources at their disposal. They will also need strong civil society networks to provide government representatives with greater negotiating leverage. The United States and Europe have learned how to harness private resources—informational and material—to advance their agendas.<sup>114</sup> Developing countries will need to develop strategies of their own that involve broader-based constituencies. To give a few examples, civil society organizations have been instrumental in reframing debates over the TRIPS Agreement and agricultural subsidies, and Brazil's private sector has helped finance WTO legal challenges against US cotton and EU sugar subsidies.

There are some signs that WTO capacity building efforts are becoming broader-based. The Secretariat's 2004 plan explores ways to increase the absorptive capacity of technical assistance projects through coordination with broader networks of actors. Developing country representatives have welcomed the Secretariat's initiative to work with developing country academic institutions and think tanks, to provide WTO internships, and to organize a programme for their doctoral students to use the WTO library. Developing country hosts of WTO regional courses, in particular, hope that the courses stimulate greater awareness of WTO trade issues in government ministries and universities, as well as in the general public as a result of media coverage.<sup>115</sup> Nonetheless, some developing country representatives have been reticent about civil society and parliamentarian-oriented capacity building projects, at least where the funding comes out of the WTO's technical assistance budget. India and Egypt have stated, for example, that they do not view 'outreach programmes for

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opportunity for 'tourism': interview with developing country representative, June 30, 2004, Geneva. Similarly, a WTO official questioned the extent to which some beneficiaries are 'serious' about capacity building in light of the minimal efforts of some students in the courses: interview, June 23, 2004, Geneva.

114 See Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (2003).

115 Interview with a representative from an African country.

parliaments and civil society as TA activities but rather as national activities'.<sup>116</sup> Thailand agreed.<sup>117</sup>

Developing countries could also benefit from mechanisms to network and pool their resources at the regional and international levels. Most developing countries are small. These countries will never have the capacity to follow and advance their interests effectively in the WTO system by acting alone. Just as European countries, they could benefit from networking and pooling resources through regional and other institutions. The WTO's 'regional' technical assistance programmes could, at least in theory, facilitate this coordination. Although strategies for pooling resources have their limits, they need to be compared with the alternative of each developing country working on its own, in which case the trading powers can more easily play developing countries off against each other.<sup>118</sup>

As for the WTO Secretariat, although the WTO may be a member-driven organization, it is not entirely so. Secretariat members are able to exercise authority in numerous contexts, including in the provision of technical assistance. Some elements of the Secretariat's assistance raise fewer tensions than others. For example, capacity building programmes regarding trade negotiating practices and the use of the WTO's dispute settlement system address how developing countries can better defend and advance their objectives. Technical assistance for implementation, in contrast, can represent a form of 'soft' persuasion by the Secretariat of what developing countries must do in respect of other members' demands. To put this in context, were Secretariat

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116 See October 2003 Meeting, *supra* note 100 at 22. Curiously, Pakistan's representative supported the inclusion of outreach programmes for parliamentarians and civil society (Id. at 23); so did the representative from Venezuela: see Note on the Meeting of 27 and 28 November 2003, WT/COMTD/M/47 (Jan. 14, 2004), at 20.

117 Id. at 18.

118 See e.g. Peter Drahos, 'When the Weak Bargain with the Strong: Negotiations in the World Trade Organization', 8 *International Negotiation* (2003) 79-109; and Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies* (ICTSD monograph, Geneva) (March 2003) 1-65, available at [http://www.ictsd.org/pubs/ictsd\\_series/resource\\_papers/DSU\\_2003.pdf](http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf). The proliferation of bilateral trade negotiations and agreements, and the manner of implementation of the general system of preferences, often divide developing countries, making it more difficult for them to coordinate across issues in a sustained manner: see Gregory Shaffer and Yvonne Apea, 'Putting the GSP Case in Context: Who Decides the Conditions for Trade Preferences?' in Thomas Cottier and Joost Pauwelyn eds., *Trade and Human Rights* (forthcoming 2005). Developing countries nonetheless would have to monitor and develop trust that the secretariats of regional associations and the lead representatives in regional networks work effectively on their behalf.

representatives to travel to Washington DC or to European capitals to tell administrative officials (in a potentially doctrinaire manner) what WTO rules require them to do and why these rules are ‘good’ for their countries, sparks could fly. If the WTO Secretariat believes that it lacks the independence to engage with developing country representatives and stakeholders in an open way about whether WTO rules serve varying development contexts and about how WTO disciplines might be flexibly interpreted to promote development objectives, then developing countries should be wary. In such a case, developing countries should be sure that representatives from development agencies and other consultants who have greater independence are included in relevant WTO trade-related ‘capacity building’ projects.

Although the WTO’s organizational culture is not that of a development institution, members could further integrate certain development orientations. The Trade Policy Review Mechanism (‘TPRM’) could be given a greater development orientation when applied to developing countries.<sup>119</sup> If trade strategies are to be integrated into development plans, as called for by the Integrated Framework, the JITAP, and the WTO’s technical assistance programmes, then it makes sense to adapt the Trade Policy Review Mechanism accordingly. TPRM implementation reviews could examine the ways in which a developing country has mainstreamed trade policy as part of a development strategy. Implementation of WTO requirements could be viewed through the lens of sequencing based on development thresholds. This adaptation could be applied on a trial basis with least-developed and other low-income countries. As Prowse points out, a development approach is not alien to GATT-WTO traditions that include such issues as infant industry promotion and balance of payment concerns.<sup>120</sup>

Similarly, as the scope of WTO rules continues to expand, a single set of disciplines becomes less appropriate for all WTO members. One can, and should, distinguish between core GATT rules of non-discrimination, which apply to all members, and other substantive rules.<sup>121</sup> Article XXXVI of Part IV of GATT 1994 expressly provides that ‘developed countries do not expect reciprocity for commitments made to them in trade negotiations [from] ... less-developed contracting parties.’ It further specifies that ‘the less-developed

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119 See also *The DAC Guidelines: Strengthening Trade Capacity for Development* (OECD, 2001), at 9 (suggesting that the TPRM be used ‘to raise awareness of constraints to trade and investment in developing countries’ so as ‘to ensure coherence between trade policies and regulatory regimes on the one hand, and overall development goals on the other’).

120 See Prowse, *The Role of International and National Agencies*, *supra* note 27 at 1242 (referring to GATT articles XVIII:B and XII).

121 See Bernard Hoekman’s contribution to this volume.

countries should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.' In practice, however, developing countries often have only received longer transition periods to implement WTO obligations, periods that by now have largely elapsed. There is a role for greater differentiation of members based on less-developed countries' capacities and levels of development. That variation can be implemented through conditioning implementation on defined development thresholds and through enhanced special and differential treatment provisions.<sup>122</sup>

Institutionalizing a capacity building component in the WTO could play a transformative role for the Secretariat itself. Such institutionalization could induce the Secretariat to become more conscious of the development context of trade. Just as the Secretariat admirably has been self-critical regarding its past provision of technical assistance, so it could be self-critical in its understanding of the role of trade in development. It could view trade rules not as ends in themselves, but rather as tools that can be applied to different development contexts. The WTO could, in particular, open permanent WTO regional offices where WTO staff can become more attuned to region and country-specific needs.<sup>123</sup>

As regards donors, they will continue to be under pressure from domestic constituents to shape technical assistance to advance those constituents' interests. Constituents that lose from reduced donor government subsidies or increased access to donor markets will oppose technical assistance provided to developing countries that facilitates these objectives. Capacity building initiatives, however, are more likely to be effective if donors view them as longer-term foundational issues to enhance developing country trading options in the global economy, and not as shorter-term concessions as part of a trade negotiation package. Initiatives will also be more effective if donors coordinate among, and do not compete between, each other. Donors will need to support these programmes before their own publics in this light.

The unstable security situation that the world now confronts offers opportunities and sets constraints for trade-related development strategies. On the one hand, the threat of terrorism can impede and disrupt trade, which could particularly harm countries with small internal markets. On the other, global

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122 The national treatment obligations under the General Agreement on Trade in Services ('GATS'), for example, only apply to sectors listed in a country's GATS schedule.

123 This idea was considered in Technical Cooperation Audit Report for 2002, *supra* note 29, at 11.

concern with terrorism could focus developed countries' attention toward the development of stable developing states that can serve as critical allies. In this regard, there are analogies between the current situation and the past, in which East Asian countries benefited from the United States' desire for strong and economically successful allies during the Cold War. Developed and developing countries' security interests are both ultimately linked with global development. As one high-level member of the WTO Secretariat quipped, 'the Doha round was a gift of Osama bin Ladin.'<sup>124</sup> Similarly, the 2002 US *National Security Strategy* states: 'A world where some live in comfort and plenty, while half of the human race lives on less than \$2 a day, is neither just nor stable. Including all of the world's poor in an expanding circle of development and opportunity is a moral imperative and one of the top priorities of US international policy.'<sup>125</sup> The test of such a 'security policy' will be in the doing. WTO capacity building programmes could play a small, but beneficial, part.

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124 Interview, Geneva, June 2002.

125 The policy is set forth in a document entitled *The National Security Strategy of the United States*, Sept. 17<sup>th</sup>, 2002, available at: <http://www.whitehouse.gov/nsc/nss.pdf>. The strategy is best known for its justification of the need for preemptive strikes, so that its development dimension is often overlooked.





# *Developing Countries' Issues in the Doha Round Negotiations:*

## **Comments**

*Ambassador Matthias Meyer*

Swiss State Secretariat for Economic Affairs

### **I. Special and Differential Treatment (SDT): Comments on Hoekman's Paper**

Bernard presented a thorough review of the present obstacles to effective SDT in the WTO and the options for reform. I would like to comment on the following four elements.

#### **A. Regulatory Policies**

It is true that many developing countries have problems in implementing complex technical agreements (e.g. customs valuation, SPS, TBT, TRIPS) and that their apprehension to negotiate new agreements (e.g. on trade facilitation) is determined mainly by the recognition that quite often local skills and institutions are lacking to deal with new obligations and standards. I am less convinced that many governments consider implementation costs too high as no important national interests are to be protected (negative cost-benefit), except in the case of the TRIPS agreement, that is obviously less interesting for countries that do not yet export significantly goods or services incorporating local intellectual property. Most of the agreements are essential to lower costs of trade or to ensure better market entry and, therefore, are prerequisites for higher competitiveness. The thrust of Bernard's recommendation is correct: countries need to be given time to create the capacity to implement agreements and they should have access to technical assistance in doing so. To be authorized to a transition period in the agreement is not enough. But from there it is a big step to give the majority of WTO members the possibility to opt out of agreements for an undetermined time. This would discriminate against other developing countries that are bound

by the rules, and probably would also contribute to an unattractive local business climate.

In the Doha negotiations, we have recommended a more WTO-like approach that, like Bernard's proposal, also takes into account the experience coming from development cooperation. The deadline for an agreement's effectiveness would be set initially (for all developing countries and Least Developed Countries [LDCs]) but with the understanding that they could be changed by the relevant WTO committee, that is by the members collectively. The WTO Secretariat (or another authorized agency like ITC, UNCTAD or the World Bank) would establish an action plan with the country to establish the institutional requirements for implementing the agreement. Technical assistance would be provided by bilateral or multilateral agencies to help implement the action plan. Periodically, the WTO committee would review the status of the action plan based upon a report presented together by the country and the WTO Secretariat and would then decide on the date of effectiveness. It should be possible to apply such a process also to agreements that are already effective but where developing countries are still in transition to effectiveness or not in a position to comply with effective obligations.

It is quite obvious that not all developing countries have similar difficulties in implementing technical agreements. Also, an opting of countries for this 'assisted learning' process would probably violate the non-discrimination principle of WTO. Therefore, it would be necessary to determine how to focus this special treatment on countries that are in particular need owing to a low development of their institutions. We assume that this modality would concern mainly small-market low-income countries and small economies. Of course, such flexibility in concentrating on specific groups of developing countries (outside of the distinction developing countries/LDC) does not exist at the present time. Yet, in this case like in quite a few others in the present Doha Round, a consensus on introducing flexibility into the existing country categories (probably on a case-by-case basis) will be crucial for the success of the negotiations.

### **B. Trade Preferences (GSP)**

A majority of academic reviews on the effects of GSP preferences has been quite negative and a rethinking about their use is in order. There is no doubt that the first goal has to be to lower MFN tariffs and eliminate quotas for exports from developing countries; the ensuing preference erosion should be dealt with through compensatory measures, e.g. internationally-funded structural adjustment programs. It is also true that preferences to developing countries are sometimes, particularly in agriculture, a way for industrialized countries to reduce the pressure to liberalize *erga omnes*. This is why it will be important to await the extent of MFN and subsidy reduction that can be expected from the

Doha Round before deciding on the future of GSP preferences. Although 'second-best', we can still see some promise for preferences in the future.

Initiatives to eliminate over time, without exception, both tariffs and quotas for LDC are very useful. The European Commission, through the 'Everything but Arms' Initiative has shown the way. Although the immediate trade creation may be weak in case of a limited export potential of many LDCs, this is not true for certain products and certain countries. As agricultural quotas are eliminated in this case, a first step is being taken towards tariff-only agricultural protection in industrialized countries. For example, this could become an important incentive for sugar reform. The trade effects are enhanced if rules of origin are simplified (this is particularly important in textiles and agricultural processing because it stimulates investment in LDC) and if the group of beneficiary countries is enlarged (which is the case of the AGOA-Initiative of the US in Africa).

Developing countries have been increasingly discriminated against over the last ten years through the growth of Free Trade Agreements of OECD countries with other OECD members or (mostly) emerging market economies. To the extent that these gaps persist at the end of the Doha Round, an adjustment could take place through new GSP tariffs.

Tariff preferences for low-income countries are often a tool that is not useful, if it is used alone, since other entry barriers in industrialized markets impede trade and the supply response to the new export incentives in the developing market is not strong enough. This means that the methods of quota management in agriculture have to be looked at as well as the capacity of the exporting country to improve the respect for SPS and TBT norms and standards among its exporters. This is typically an area on which trade-related technical assistance has to focus.

The end of textile quotas in OECD countries at the end of 2004 could be an occasion for a specific use of tariff preferences in favour of small textile exporters among developing countries that are threatened particularly by the great export potential of China and India. Zero tariffs would give the small exporters some breathing space to adjust (in some countries textiles represent more than half of total exports) while overall the sometimes very high tariffs in OECD countries will be substantially reduced or eliminated, hopefully over the next ten to fifteen years.

Whatever happens specifically with the level of trade preferences, it is urgent to make them more predictable and to harmonize the conditions among OECD countries and also emerging market economies. Predictability would be enhanced by eliminating political or specific developmental conditions. Maybe OECD countries could try to agree on a common lowest denominator for conditionality? To harmonize country and product eligibility, rules of origin and

safeguard clauses, at least an effort could be made by OECD countries to agree on common guidelines, assuming that a binding of preference levels and rules will be impossible to achieve multilaterally in the WTO.

### **C. SDT in Old GATT/WTO Agreements**

Bernard Hoekman makes a valid case on the renegotiation of SDT provisions in the existing legal framework (there are 88 proposals on the table on how to make these provisions more operational or binding). He argues that many of the proposals, as they stand, would not lead to positive development results. Therefore, their costs and benefits for LDC and developing countries should be analyzed first.

I agree. In fact, these negotiations have not made any notable progress so far. Some of the more significant proposals appear to put into question pillars of WTO orthodoxy (like non-discrimination or the binding of country commitments) without necessarily contributing to better development or better trade integration. What he suggests is actually being done in Geneva as a way to unblock the negotiations: specific reform proposals are being looked at taking into account the development and trade effects they would have on members and alternative tools that could be used to reach the same objectives. It is probable that this exercise will also lead to a better view on which developing countries would really benefit from a specific SDT provision, that is, a practical way could be found to differentiate among developing countries in specific cases.

### **D. Core Trade Policies**

Bernard Hoekman pleads for the respect by all Members of basic WTO principles like non-discrimination (MFN and national treatment), a use of tariffs only, implying the elimination of quotas, and the binding of all tariffs. He sees a threat to the respect for these principles coming from certain SDT measures like Art. XVIII GATT that provides for exceptions to developing countries owing to balance of payments constraints and infant industry concerns. These principles are indeed the pillars of WTO, and I assume that all Members agree with them. The problem is that they are also long-term objectives since none of them has been achieved yet. SDT is about giving all or some developing countries better means and more time than industrialized countries to reach these objectives (except, of course, in the case of agriculture, where subsidies and border protection are in some cases higher in OECD countries than in developing countries). While his argument is useful in identifying other parts of WTO rules that are 'non-essential' and therefore leave more space for exceptions to and exclusion from rules for developing countries, it begs the question, which SDT is justified in the core part of the WTO framework dealing with market access.

Indeed, the negotiations in the Doha Round are based on sector formulas for tariff reduction in the case of agricultural and industrial goods. The question is, once the modalities of tariff reduction will have been determined, do developing countries have to apply similar or lower reductions or should they apply different modalities? Also, and this might become a make or break issue, should different groups of developing countries, according to their development level, market size or other more specific sector indicators make differentiated commitments? I am not sure whether the two elements that Bernard Hoekman mentions as justification for smaller commitments—the importance of tariffs as fiscal revenue and adjustment costs—are a sufficient analytical guide for these difficult negotiations.

I also doubt whether Art. XVIII GATT is as important a deviation from good practice as he appears to imply. The infant industry part has practically never been used, its procedures are complex and require interpretation, while reliance on the balance of payments' exception has not been frequent either and conditions for its application have also been contested. Much more threatening deviations from core principles have been textile quotas applied by industrialized countries under the MFA (soon to be discontinued) and the liberal use of anti-dumping measures, practically without time limits. Anti-dumping measures are now used also by developing countries, often by 'big market' economies against their smaller neighbours.

## **II. Developing Countries and Capacity Building: Comments on Shaffer's Paper**

Gregory Shaffer gives us a comprehensive view of capacity building in the Doha Round and the tensions and inefficiencies that accompany its growing role. I would like to reflect on my experience as a participant in this process when commenting on his report under three headings.

### **A. *The Complexity of Enhanced Capacity Building***

The Ministerial Declaration at Doha mentions many times that a stronger participation of developing countries in the negotiating process and their capacity to implement WTO obligations will depend to an important extent on their access to technical cooperation and capacity building (often called Trade-Related Technical Cooperation, TRTC). That access has improved in important ways through joint efforts by multilateral organizations, including the WTO itself, and bilateral agencies, that have built up their professional capacities and budgets. Technical cooperation and particularly training is expensive and its effects (and even more so its impact) is difficult to measure, in all sectors. The main message

coming from experience is that the objective of TRTC has to be to create well functioning institutions and that the training of people is only one aspect of it.

This explains the concerted move by donors to take stock (through a common data bank on TRTC), to coordinate efforts e.g. through a reform of the Integrated Framework (that was created in 1997 but was ineffective) and through a more concerted association of the concerned developing countries. Developing countries are involved through training on demand and regional decentralization at the WTO and also in the Integrated Framework, where representatives of LDC are associated with the management of the programme and where analytical country studies and national priority setting in the trade sector is part of national poverty reduction strategies (in most cases, poverty reduction strategies are prepared and decided locally and then confirmed at the Boards of the World Bank and the IMF).

It is impossible to assess the results of this collective effort at the present time. As always in such cases, a 'credibility gap' is developing as visible success stories and quick improvements are expected that contrast with the often slow and patchy progress made on the ground and in externally funded trade projects. The Integrated Framework requires a stronger technical secretariat (located at WTO) and a better separation of powers between, on the one hand, the secretariat and the six multilateral agencies that should manage and, on the other hand, bilateral donors and recipient countries that should control and provide strategic guidance.

Gregory Shaffer gives too much weight, in his report, to the role of TRTC of WTO itself. WTO expanded its programme massively in the last three years for good political reasons. This was the quickest and easiest way to prove to developing countries that their voice had been heard. Still, WTO spends today about CHF 36 Million annually (accounting for all financing and co-financing sources) which is less than the annual budget for TRTC of the Swiss Government. In other words, this is a very small part of the global effort of assistance. It is focused on the immediate need of trade officials and negotiators of poorer Members and accession candidates to become familiar with the agreements and the rights and obligations of Members. It contributes, of course, to build trade institutions in developing countries but only marginally. Despite being limited, this expansion effort taxes heavily WTO staff whose main function is to support technically the organization's deliberations and negotiations.

### ***B. TRTC and the Negotiating Agenda***

Gregory Shaffer argues the case for a longer-term perspective of capacity building (to integrate developing countries in the world economy) as opposed to it being part of a negotiating package and therefore meddled with by the interests of the negotiating partners. This is a concern often expressed by

bilateral cooperation experts that I don't think is valid. Of course, institutional development is complex and takes a long time to materialize anywhere in the world, certainly beyond the end of the Doha Round negotiations. But the same is true for the transition periods required for most low-income developing countries to be able to comply with technical rules of WTO. In these cases, capacity building is a long-term venture that takes its priority and sequencing from the Doha negotiations.

He is right in the sense that there are many needs for capacity building which are not directly related to the Doha agenda concerning some operational trade and investment institutions and trade infrastructure. Yet, for a considerable part of TRTC a close link with the negotiations and discussions in standing committees of WTO is essential. The TRTC of WTO is an example but so is the capacity building during the transition period for agreements on rules to which I referred in my comments to Bernard Hoekman's report (point 1). A major case will be the negotiations on trade facilitation where the need to build up customs and transport facilitating institutions will be the main enabling element for many developing countries to meet principles and standards to be negotiated.

### ***C. Tensions between Capacity Building and Negotiations?***

The importance, for part of TRTC, of a strong interaction with the Doha negotiations does not mean that Gregory Shaffer is not right in suspecting that sometimes negotiating interests are at odds with effective capacity building. I don't think many cases can be found where donor agencies would refrain from funding the right TRTC because there is a conflict with their own country's negotiating position. An example which comes to mind is the technical support of several European agencies (through funding to a private technical agency) to the demand of West African countries to abolish cotton subsidies in the Doha negotiations. The cotton initiative definitely puts pressure on US and (in a more limited way) EU negotiators. Discussions took place (also with representatives from the US Government) to find out whether this technical support would weaken their negotiating position and might lead to further demands made on lowering subsidies for other products. But like in many other cases where TRTC directly or indirectly strengthens the negotiating position of developing countries, the assistance went ahead. Such other cases are e.g. the funding of private export bodies that give advice to poorer developing countries in dispute settlement cases or in assessing negotiating priorities.

One might also suspect that TRTC becomes occasionally a substitute for trade reform ('aid instead of trade') and that it would be better to give priority to the specific reform instead of providing training to be able to keep the old rules. This might be the case with technical or process standards that are not reachable for small low-income countries. The search for basic or intermediate standards



should in those cases have priority over technical assistance. So the message should be that linking assistance to negotiations is a good thing because it improves the relevance and effectiveness of the assistance, provided ways can be found to manage properly conflicts of interest.

# *Traditional Knowledge and Geographical Indications:*

## **Foundations, Interests and Negotiating Positions**

*Marion Panizzon*

University of Zurich

*Thomas Cottier*

University of Berne

### **I. A Brief Summary**

The Doha Development Agenda (DDA) introduced the idea of protecting Traditional Knowledge (TK) into multilateral trade negotiations. In parallel, it discusses enhanced protection of Geographical Indications (GIs) for agricultural products, beyond the current levels of protection based upon unfair competition. Both TK and GIs bear the potential to enhance diversification of products based upon sustainable agriculture. Both concepts are specifically addressed in the Doha Ministerial Declaration (DMD) of 14 November 2001 in paragraphs 18 and 19, respectively, relating to the TRIPs Agreement.<sup>1</sup> The DMD provides that WTO members extend protection of GIs to wines and spirits and addresses the inclusion of other products. It mandates the TRIPs Council to address Traditional Knowledge in reviewing the agreement under Article 71.1 of the TRIPs Agreement. Under the DDA, any reform must take into account the development dimension.<sup>2</sup>

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1 See Doha Ministerial Declaration, adopted 14 November 2001, WTO Document WT/MIN(01)/DEC/1 of 20 November 2001, [hereinafter Doha Declaration].

2 See *id.*, paragraph 2.

The purpose of this paper<sup>3</sup> is to describe:

1. The legal, economic, ecological and societal precepts shaping TK and GIs;
2. The legal framework for TK and GIs in the context of international trade regulation;
3. The work undertaken in international organisations;
4. Positive norms of the WTO Agreements treating of TK and GIs; and
5. The diverging negotiating positions WTO Members towards complementing the system of legal protection for TK and GIs.<sup>4</sup>

It takes stock. It provides a survey of the state of play in different fora and the difficulty of bringing about coherence in this new and complex field located at the intersections of agriculture, intellectual property and development.

*Traditional Knowledge* (TK) is a concept of cultural ecology which, for reasons of equity and sustainability, increasingly calls for legal protection as an emerging concept in international law. It expresses the exploitation by individuals or communities of genetic material, which the holders have discovered and identified as resourceful for the livelihood of contemporary and future generations.<sup>5</sup> TK encompasses the processes of extracting relevant genetic resources from nature. The effort of identifying genetic resources is complemented by skill and practices of preserving such knowledge for future

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3 The paper is part of a research project entitled 'Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives' for the Swiss Agency for Development and Cooperation (SDC) of the Federal Department of Foreign Affairs.

4 See generally Cottier, T. & Panizzon, M., 'Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection', 7(2) *JIEL*, 2004, pp. 371-400; Cottier, T., 'The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations in World Trade Law', 5 (4) *JIEL*, 1998, pp. 561, 569-573; see also Bellman, C., Dutfield, G., Melendez-Ortiz, R., (eds.) *Trading in Knowledge: Development Perspectives on TRIPs, Trade and Sustainability*, London: Earthscan Publications, 2003; Dutfield, G., 'Sharing the Benefits of Biodiversity - Is there a Role for the Patent System?' 5 (6) *JWIP*, 2002, pp. 899-931; Bragdon, S., 'Major Legal Regimes Affecting Plant Genetic Resources', in: *Intellectual Property: Trade, Competition, and Sustainable Development*, Cottier, T., Mavroidis, P. C., Panizzon, M. & Lacey, S. (eds.), World Trade Forum Vol. III, Ann Arbor, University of Michigan Press, 2003, pp. 446-448; Llewelyn, M., 'Which Rules in World Trade Law-Patents or Plant Variety Protection?', *ibid.*, pp. 305-308.

5 See e.g., Anaya, S. J., *Indigenous Peoples in International Law*, Oxford: Oxford University Press, 1996, p. 105, who stated that indigenous people share a 'deeply felt spiritual and emotional nexus with the earth and its fruits', and depend on a 'secure land and natural resource base to ensure the economic viability of their communities'.

generations.<sup>6</sup> Traditional Knowledge therefore often propels genetic engineering and drives biotechnological advances. Under the 'product of nature doctrine' in patent law, courts reject patents 'claiming products of newly discovered plants, artificially synthesized compounds that had been earlier derived from natural resources, or on DNA sequences, a cell containing it, or a natural or recombinantly produced protein.'<sup>7</sup> Genetic resources, and, specifically, genetic sequences, thus remain in the public domain, as a common concern of humankind, freely accessible to all and in particular for research. No legal subject can claim any type of property rights to genetic resources. Yet, genetic resources and the related TK are being increasingly tapped, and appropriated, by biotechnological and pharmaceutical companies in search of cures for globally important disease and ways and means to enhance food security.<sup>8</sup> They serve as a basis for novel products that are fully subject to patent or plant variety protection.

International legal efforts, so far, have failed to efficiently and successfully protect TK which leads researchers to the genetic resource. The knowledge holder, who first discovered the promising propensities of a genetic resource for humankind, more often than not has remained without reward for his/her discovery which industry turned into a widely distributed, convincing cure against disease. The legal protection for TK relating to genetic resources has not yet remedied the imbalance created by industrial exploitation of traditional information.<sup>9</sup> The United Nations Convention on Biological Diversity (CBD) is the pioneer treaty addressing the issue. It designed, some 12 years ago, the first legal instrument seeking to distribute fairly and equally the benefits of genetic

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6 See e.g., WIPO, Traditional Knowledge - Operational Terms and Definitions, Report of the Third Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO Document, WIPO/GTRKF/IC/3/9 of 20 March 2002.

7 Burchfiel, Kenneth, J., *Biotechnology and the Federal Circuit*, Washington, DC: The Bureau of National Affairs, Inc., 1995, p. 61 referring to *American Wood Paper Co. v. Fiber Disintegrating Co.*, 90 US (23 Wall.) 566 (1874) and *Cochrane v. Badische Anilin & SodaFabrik*, 111 US 293, (1884) at 297; in the latter case the defendant argued that alizarine was a 'a natural product' and that it has been 'well known in the arts, from time immemorial, for the purpose of dyeing, and has generally been extracted from the 'madder root'. The court agreed with the defendant and invalidated the patent on similar grounds: see *Cochrane v. Badische Anilin & SodaFabrik*, 111 US 293, (1884) at 311.

8 See e.g., Sutton, M. Q. & Anderson, E. N., *Introduction to Cultural Ecology*, Walnut Creek, CA: AltaMira Press, 2004, pp. 96-124.

9 See Cottier, T. & Panizzon, M., 'Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection', in: Maskus, K. & Reichman, J. H. (eds.), *International Public Goods and Transfer of Technology Under A Globalized Intellectual Property Regime*, Cambridge: Cambridge University Press, forthcoming May 2005.

resources.<sup>10</sup> When Art. 8(j) CBD<sup>11</sup> afforded the first-time legal protection for TK, its protection was to require a one-time financial or technological reimbursement from the firm interested in using the knowledge to the government in return for access to the resources.<sup>12</sup> The next potential stepping-stone in the development of legal protection for TK were the negotiations on the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) of 2001.<sup>13</sup> However, Art. 9.2(a) of the instrument leaves the aforementioned CBD regime relating to TK unchanged. Some even maintain that the access and benefit sharing regime relating to TK has been weakened under the ITPGRFA, because Art. 9.2(a) treats TK no longer as an independent value to be protected, but considers TK a corollary to farmers' rights. In result, TK is left entirely to the national context and legislator.

Progress towards a comprehensive and system-wide protection for TK is slow at the WTO. None of the WTO Agreements protect TK as intellectual property, nor do they empower the knowledge holder with the legal means of defending him/herself against misappropriation of the knowledge. Article 10bis Paris Convention for the Protection of Industrial Property, as incorporated into the TRIPs Agreement, obliges Members to provide for protection against unfair competition, defined as competition 'contrary to honest practices'. The specific, indicative provisions do not address the problem of appropriation, but apply to it. Under GATT 1994 covered agreements, the only merit of the two TK-related

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10 See United Nations Convention on Biological Diversity (CBD) adopted at the United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992 (The Earth Summit) and entered into force 23 December 1993.

11 See *id.*, Art. 8(j): 'Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.'

12 See *id.*

13 See ITPGRFA adopted by the FAO Conference, at its Thirty-first Session (November 2001) on 3 November 2001, through Resolution 3/2001, entered into force on 29 June 2004, available at: <http://www.fao.org/Legal/TREATIES/033s-e.htm>, last visited 31 August, 2004 [hereinafter ITPGRFA], Art. 9.2(a): 'The Contracting Parties agree that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including: (a) protection of Traditional Knowledge relevant to plant genetic resources for food and agriculture.'

provisions so far, is to treat, under the Agreement on Technical Barriers to Trade (TBT) and under the Agreement on Textiles and Clothing (ATC), South-South trade in TK-based goods and TK-oriented production and process methods (PPMs), including textiles, differently from non-TK based ones. 12.4 TBT Agreement allows South-South trade to apply lower standards than the minimum standards of international law, if such lower standards serve 'preserving indigenous technology and production methods and processes'. Paragraph 3(a) of the Annex to the ATC prohibits industrialized textile importing WTO members to invoke the textile safeguard of Art. 6 ATC against imports of traditional folklore handicraft textiles from developing countries, under the condition that a bilateral arrangement exists between the Members concerned, which 'properly certifie[s]' the products as such. This amounts to the most specific legal protection of TK under current WTO law. Behind the proposals to add TK as an item on the Doha Development Agenda in the context of reviewing the TRIPs Agreement were the discussions at the WIPO. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the 'IGC'),<sup>14</sup> began in 2000 to elaborate a means of protecting TK with IPRs, in the context of the reform of the Patent Cooperation Treaty (PCT).<sup>15</sup>

*Geographical Indications* (GIs) are well established in intellectual property law, even though largely limited so far to protecting European values and assets. They protect specific qualities of a product, which draw their defining feature from a particular region and TK developed therein.<sup>16</sup> GIs are expressly protected in Section 3 of the TRIPs Agreement in Articles 22 through 24. The current GI

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14 See WIPO, General Assembly, Twenty-Sixth (12<sup>th</sup> Extraordinary) Session, Geneva, September 25 to October 3, 2000, 'Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore', WIPO Document WO/GA/26/6 of 25 August 2000, whereby the WIPO General Assembly in October 2000 established the Intergovernmental Committee (IGC) as an international forum for debate and dialogue concerning the interplay between intellectual property (IP), and traditional knowledge, genetic resources, and traditional cultural expressions (folklore).

15 See WIPO International Patent Cooperation Union (PCT Union), Working Group on Reform of the Patent Cooperation Treaty (PCT), Sixth Session, Geneva, May 3 to 7, 2004, Additional Comments by Switzerland on its Proposals Regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications, WIPO Document, PCT/R/WG/6/11 of 21 April 2004.

16 See e.g., Nascimento, A., 'Potential Benefits of Geographical Indications: The Kava Case', in: *Traditional Knowledge on Plant Genetic Resources for Food and Agriculture, WTI/DEZA Biodiversity Project*, Wallingford, Oxfordshire: CABI Publishing, forthcoming 2005; see also Addor F. & Grazioli, A., 'Geographical Indications beyond Wines and Spirits - A Roadmap for a Better Protection for Geographical Indications in the WTO TRIPs Agreement', 5(6) *JWIP*, 2002, pp. 865 *et seq.*

regime grants a relatively low level of protection based upon standards of unfair competition for all products other than wines and spirits. It offers the prospects of an 'enhanced' protection for wines and spirits in Art. 23.<sup>17</sup> In 2002, the EC proposed to further expand the scope of this 'enhanced' protection under Art. 23 to other agricultural products. Consensus is not expected shortly, as the EC, together with India, Thailand, Turkey and Switzerland, has been in disagreement with both the Cairns Group (USA, Brazil, Canada, Australia) and certain developing countries who fear another form of agricultural protectionism (China, Brazil, Colombia, Uruguay, *et al.*).<sup>18</sup>

Under the 'July 2004 Doha Development Package',<sup>19</sup> of 1 August 2004, GIs remain an 'outstanding implementation issue' of the Doha Round.<sup>20</sup> The 'July 2004 Package', which is officially called the 'Doha Work Programme',<sup>21</sup> has put off the suggested changes to the TRIPs GI regime for the time being, and at least until May 2005.<sup>22</sup> GI extension has been referred to an improvised process of 'facilitators', whereby such 'Friends of the Chair' are entrusted with organizing discussions in identified areas, including GIs.<sup>23</sup> Under the auspices of the Director-General who may liaise with his 'Friends', the Chairpersons in the WTO bodies concerned, may hold 'dedicated consultations' in order to speed up the search for solutions.<sup>24</sup> Not only are developing countries questioning the legality of the *ad hoc* proceeding, but also the procedures and criteria of selection of these key officials.<sup>25</sup> WTO Members are divided over the issue whether the DMD offers

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17 See generally Addor F. & Grazioli A., *supra* note 16, pp. 865 *et seq.*

18 See WTO Trade Negotiations Committee - Geographical Indications: the Significance of 'Extension' in the TRIPs Agreement and its Benefits for WTO Members - Communication from Thailand and Turkey - Addendum, WTO Document TN/C/W/14/Add.2 of 15 July 2003, certain WTO Members' proposition in favour of extending the protection under Art. 23 TRIPs to all products.

19 WTO Doha Work Programme, Decision adopted by the General Council on 1 August 2004, WTO Document WT/L/579 of 2 August 2004 [hereinafter WTO, Doha Work Programme], the Doha Work Programme is also called the 'General Council's post-Cancún decision'.

20 See WTO Ministerial Conference, Fifth Session, Cancún, 10-14 September 2003, Ministerial Statement [concluding Cancún] adopted 14 September 2003, WTO Document WT/MIN(03)/20 of 23 September 2003.

21 WTO, Doha Work Programme, *supra* note 19.

22 See *id.*, p. 2, a progress report on GIs is to be submitted to the Trade Negotiations Committee (TNC) and the General Council no later than May 2005.

23 See Narlikar, A. & Wilkinson, R., 'Collapse at the WTO: A Cancun post-mortem', 25(3) *Third World Quarterly*, 2004, p. 450.

24 WTO, Doha Work Programme, *supra* note 19, p. 2.

25 See Narlikar, A. & Wilkinson, R., *supra* note 23.

a sufficient negotiating mandate for GIs on products other than wines and spirits,<sup>26</sup> as well as for TK.<sup>27</sup>

Considering the uncertainties revolving around the interpretation of the Doha mandate, it currently remains doubtful whether WTO Members are sufficiently committed to negotiate on reforming and rebalancing the TRIPs Agreement in favour of developing countries.<sup>28</sup> However, the problems underlying the topics addressed in this paper will not disappear. Apart from politics, a main reason for deferring at this stage is the fact that sufficiently clear concepts of scope and level of protection for TK and expanded GIs are still lacking. Enhanced efforts to coordinate the work of different organisations as well as combining negotiations on agriculture and intellectual property within the WTO need to be made under the Doha Development Agenda.

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26 Compare Office of the United States Trade Representative (USTR), 'US and Other Trade Partners Present Positions and Proposals to Prevent Unauthorized Use of Geographic Names', USTR Press Release of 20 September 2002, available at: <http://usinfo.state.gov/ei/Archive/2004/Jan/06-428636.html>, last visited 18 November 2004; and Australian Government Department of Foreign Affairs and Trade, 'Current State of WTO Doha Round Negotiations', Press Release of September 2004, available at: [http://www.dfat.gov.au/trade/negotiations/current\\_state\\_report.html](http://www.dfat.gov.au/trade/negotiations/current_state_report.html), last visited 18 November 2004 [hereinafter Australian Government, Press Release 2004, Doha Round], '[t]he July 2004 Framework Package has retained GIs as an issue of interest in the agriculture negotiations, but as of early mid-September 2004 there had been no negotiations on those issues and Australia remains opposed to such negotiations;' with European Commission, External Trade, 'The Doha Development Agenda', available at: [http://europa.eu.int/comm/trade/issues/newround/doha\\_da/index\\_en.htm](http://europa.eu.int/comm/trade/issues/newround/doha_da/index_en.htm), last visited 18 November 2004, '[t]he Ministerial Declaration launching the DDA reflects the "broad agenda" and the focus on development advocated by the EU: it mandates negotiations on agriculture, industrial products, services, intellectual property (geographical indications, TRIPs and Health)...'

27 See Australian Government, Press Release 2004, Doha Round, *supra* note 26, '[t]he Doha Development Agenda requires a detailed review of the relationship between the TRIPs Agreement and the Convention on Biological Diversity. Australia has a major interest in ensuring a fair return from its biological resources and that the IP system, in Australia and internationally, supports innovation and investment in biotechnology.'

28 See Cottier, T. & Panizzon, M., *supra* note 4.



## II. Defining Traditional Knowledge and Geographical Indications

### A. *Local Traditions of Knowledge, Geographical Origins of Products*

Descriptions offered above indicate that Traditional Knowledge (TK) and Geographical Indications (GIs) share a common element insofar as they both protect accumulated knowledge typical to a specific locality. While TK expresses the local traditions of knowledge, GIs stand for specific geographical origin of a typical product or production method. GIs and TK relate, respectively, a product (GIs), a piece of information (TK), to a geographically confined people or a particular region or locality.<sup>29</sup>

### B. *Traditional Knowledge as Information, Skill and Practice Handed down from One Generation to the Next*

*Traditional Knowledge* (TK) mainly expresses the exploitation by individuals or communities of plant genetic material for humans and the processes of extracting from nature the genetic resources, as well as the skill and practices of preserving this knowledge for future generations. In addition, the creation of clothing and tools, the construction and maintenance of shelter, the orientation and navigation on land and sea, the interpretation of climatic and meteorological phenomena, dyes and weaving patterns, design, spiritual beliefs and expressions of culture also constitute TK.

The discoveries, transmitted from one generation to the next, document the skills and practices assembled over time, which are often upgraded by subsequent innovations in the course of history. TK is not static. Rather, it expresses a continuous process of devising strategies for the survival of humankind and, inasmuch, a viable complement to formal science. Local indigenous knowledge completes and complements the rational, expert-led scientific world view, which, until the end of the 20<sup>th</sup> century was unquestionably considered the universal keeper of scientific knowledge and the only truth for development aid.<sup>30</sup> TK and efforts at expanding its scope will pay

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29 See TRIPs Art. 22.1 'Geographical Indications are, for the purpose of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.'

30 See Briggs, J. & Sharp, J., 'Indigenous Knowledges and Development: A Postcolonial Caution', 25(4) *Third World Quarterly*, 2004, pp. 661-664; see generally Escobar, A., *Encountering Development: The Making and Unmaking of the Third World*, Princeton, NJ: Princeton University Press, 1995.

off, as TK becomes a valuable alternative to, or foundation of, formal science for managing ecological relations between society and nature, which includes ‘adaptation to environmental and social change’,<sup>31</sup> not least because TK encompasses the entire spectrum of daily human life.<sup>32</sup>

TK thus is ‘traditional’ not because it is old, but because the knowledge is created, preserved and disseminated in the cultural traditions of particular communities. It is different from formalized, scientific and industrialised R&D efforts.<sup>33</sup> The following areas of main application for TK potentially relevant to international trade regulation may be distinguished.

### 1. Traditional Knowledge on Plant Genetic Resources (PGR)

Traditional knowledge on plant genetic resources embodies information, skills and practices about the healing and nutritional propensities of certain plants passed down from one generation to the next. This first category of TK is representative for all others introduced below, because it relies upon a sustainable use of genetic resources. It subscribes to an equitable but sustainable access of humankind to genetic resources and implies the value and diversity of genetic resources, specifically the need for preservation for future generations.<sup>34</sup>

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31 International Council for Science (ICSU) Study Group on Science and Traditional Knowledge, ‘Science and Traditional Knowledge’, *Report*, March 2002.

32 *C.f.* WIPO, Traditional Knowledge—Operational Terms and Definitions, Report of the Third Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO Document WIPP/GRTKF/IC/3/9, paras. 33, 59, informing that Panama’s *sui generis* system of protection distinguishes TK that has a commercial utility from other TK; even if such a distinction may be criticized as having a disintegrating effect on the holistic nature of TK—i. e. the commercial use and spiritual components of it are intertwined—WIPO suggests that international treaties and domestic laws regulate the protection and use of commercially relevant TK, while leaving it to customary legal traditions to address issues of sacral and spiritual TK.

33 See Agrawal, A., ‘Indigenous and Scientific Knowledge: Some Critical Comments’, 3(3) *Indigenous Knowledge and Development Monitor*, 1995, available at: <http://www.nuffic.nl/ciran/ikdm/3-3/articles/agrawal.html>, last visited 12 December 2004; see also Briggs, J. & Sharp, J., *supra* note 34, pp. 661-674.

34 See Cottier, T., *supra* note 4, pp. 559-560; Burhenne-Guilmin, F., ‘L’accès aux ressources génétiques – les suites de l’Article 15 de la Convention sur la Diversité biologique’, in: *Les Hommes et L’Environnement, Quels droits pour le vingt-et-unième siècle, Études en hommage à Alexandre Kiss*, Prieur, M. & Lambrechts, C. (eds.), Paris, Éditions Frison-Roche, 1998, p. 560; Dutfield, G., ‘Protecting Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formulation’, UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development, Draft (October 2002), available at: <http://www.ictsd.org/unctadictsd/docs>, pp. 3-11; Biber-Klemm, S., ‘Incentives to Bring

It thereby manifests a measure of respect for the diversity of nature and is committed to sustaining the life cycles of growth.

## 2. Agricultural and ecological know-how

TK plays an important role in resource management (pruning of plants and domestication of animals to increase production) and environmental manipulation (irrigation, encouraging growth by burning tracts of land.).<sup>35</sup> While the focus of what has hitherto largely been studied in relation to indigenous peoples and their rights, broadening the scope of inquiry to agriculture, renders TK relevant to a broader interest group, i.e. that of farming communities around the globe. Modern biotechnology in breeding of plant genetic resources may be complemented by deliberate policies to support the use and conservation of traditional plant genetic resources.<sup>36</sup> TK is associated with 'niche' rather than with 'mass' production. It therefore fosters diversity and contributes to the preservation of natural resources. Appropriate policies should serve the purposes of both supporting niche products, and by doing so, also of supporting biological diversity and thus food security. As scientific breeding tends to limit resources and crops available, the protection of TK in the field of agricultural plant genetic resources offers the potential of appropriate flanking policies.<sup>37</sup>

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About Conservation and Sustainable Use of Genetic Resources in the Framework of the World Trade Order', in: *Intellectual Property: Trade, Competition, and Sustainable Development*, Cottier, T., Mavroidis, P. C., Panizzon, M. & Lacey, S. (eds.), supra note 4, pp. 482-504; see also Biber-Klemm, S. & Szymura-Berglas, D., 'Problem and Goals', in: *Traditional Knowledge on Plant Genetic Resources for Food and Agriculture*, supra note 16, for a summary on the basic principles and ethical reflections of the goals of instruments and measures to protect Traditional Knowledge and plant genetic resources and the contribution of TK to the conservation and sustainable use of biological diversity.

35 See, e.g., Sutton, M. Q. & Anderson, E. N., supra note 8, p. 111.

36 C.f. Sutton, M. Q. & Anderson, E. N., supra note 8.

37 See Biber-Klemm, S., Cottier, T., Cullet, P. & Szymura-Berglas, D., 'The Current Law of Plant Genetic Resources and Traditional Knowledge', *Traditional Knowledge on Plant Genetic Resources for Food and Agriculture*, supra note 16, pp. 57-81; c.f. Carneira da Cunha M. & Almeida M., 'Indigenous People, Traditional People and Conservation in the Amazon in Brazil', in: 129(2) *Daedalus* 2000, Journal of the American Academy of Sciences, on the potential tension between international law empowering indigenous TK holders and State sovereignty; it may be that the TK-holders form an indigenous minority in the State and that international law empowering such minorities may be criticized for unduly influencing what is an internal issue of State sovereignty. Nonetheless it is a fact that often TK holders as minority indigenous cultures are discriminated against by the government to the effect that an IPR protection for TK will rarely become a reality in multiethnic states. One example in place are the ethnic minority of the Indios Guaraní in Brazil, Argentina, and Paraguay, who

### 3. Traditional Medicine (TM)

The World Health Organization (WHO) estimates that 25% of ‘modern medicines are descended from plants first used traditionally’.<sup>38</sup> Such traditional medicine (TM) or ethno medicine as it is also called, not only involves ethno pharmacology, but also the knowledge of how to set broken bones or to spiritually heal psychological disorders.<sup>39</sup> The WHO programmes seek to strengthen the role of traditional medicine (TM) in developing countries by integrating TM into national health care systems, increasing access to TM information and ensuring an appropriate, safe and effective use of TM.<sup>40</sup> The WHO, in particular, calls for balancing the price of a drug that is affordable to a developing country and adequate compensation for the R&D efforts of the pharmaceutical industry.<sup>41</sup>

### 4. Traditional Cultural Expressions (TCEs)

Traditional Cultural Expressions (TCEs) demonstrate that information includes cultural expressions and is not limited to plant genetic resources. Such TCEs are: dance, music, weaving and pottery patterns, other traditions of healing, cooking, cleaning and dressing.<sup>42</sup> The WIPO Intergovernmental Conference identifies TCEs as:

- (i) the preservation and safeguarding of tangible and intangible cultural heritage; (ii) the promotion of cultural diversity; (iii) the respect for cultural rights; and (iv) the promotion of creativity and innovation—including that which is tradition-based—as ingredients of sustainable economic development.<sup>43</sup>

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are discriminated against by their own governments, but who also hold most of the TK in the PGRFA of the respective countries’ flora.

38 WHO, ‘Traditional Medicine - Growing Needs and Potential’, *WHO Policy Perspectives on Medicines*, No. 2, May 2002, p. 1; see also Sutton, M. Q. & Anderson, E. N., supra note 8, p. 105, who find data suggesting that 50% of the medicines used today originally were used by other cultures than our Western one.

39 See Sutton, M. Q. & Anderson, E. N., supra note 8 pp. 101, 105.

40 See WHO Information Office, ‘WHO Launches The First Global Strategy on Traditional and Alternative Medicine’, *Press Release WHO/38* of 16 May 2002, available at: <http://www.who.int/inf/en/pr-2002-38.html>, last visited 12 November, 2004.

41 See id.

42 Cottier, T., & Panizzon, M., supra note 4, pp. 371-373.

43 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, Geneva, July 7-15, 2003, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, Document Prepared by the Secretariat, WIPO Document WIPO/GRTKF/IC/5/3, 2 May 2003 [hereinafter WIPO, Consolidated Analysis].

### **C. Geographical Indications as Definition and Protection of Origin**

*Geographical Indications* (GIs) are closely related to functions assigned to trademarks and are well-established in unfair competition law.<sup>44</sup> Even if GIs have no property holder *per se*, they nevertheless count towards an intellectual property right, because their benefit stream is the geographical area in relation to the producer of a product.<sup>45</sup> In addition to IPRs and competition law, GIs are subject to consumer laws, as they embody the preference a consumer may express for locally produced goods. The benefit stream (value) of TK is encapsulated in the intellect of the human mind, while the benefit stream of a GI is a particular product originating in a particular geographical region.<sup>46</sup>

## **III. Towards Protection of Traditional Knowledge**

### **A. Objectives and Scope of TK Protection**

Linking the origin of product with the quality of the product is a well-established objective of intellectual property protection, namely of GIs.<sup>47</sup> The protection of the traditional values as opposed to the novelty of an invention has been a yet unseen objective for an IPR. It is not inconceivable. Like other forms of intellectual property rights, such as trademarks or trade secrets, neither GIs nor

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44 See Cottier, T., *supra* note 4.

45 See Addor, F., Thumm, N. & Grazioli, A., 'Geographical Indications, Important Issues for Industrialized and Developing Countries', in: *Institute of Prospective Technological Studies (IPTS) Report*, May 2003, p. 25, 'Geographical Indications and their protection is a suitable means to protect 'informal innovation', particularly because the right is related to the product itself and it does not depend to a specific right holder'; see also Rangnekar, D., 'Geographical Indications: A Review of Proposals at the TRIPs Council', in: *UNCTAD-ICTSD Project on IPRs and Sustainable Development*, Issue Paper No. 4, 2003; Rangnekar, D., 'Demanding Stronger Protection for Geographical Indications: The Relationship between Local Knowledge, Information and Reputation', in: *United Nations University, Institute for New Technologies*, Discussion Paper 2004/11 of April 2004, available at: <http://www.intech.unu.edu>, last visited 15 December 2004.

46 *C.f.*, Drahos, P., 'The Regulation of Public Goods', in: 7(2) *Journal of International Economic Law*, 2004, p. 328, on the expression 'benefit stream'.

47 See generally Addor, F. & Grazioli, A., *supra* note 16, pp. 865-879; see also Cottier, T., 'The Case for Protecting Traditional Knowledge and Geographical Indications in Agricultural Trade', World Trade Institute, University of Bern, Working Paper, 2003 (on file with the authors).

TK require novelty.<sup>48</sup> Also, TK protection is not limited to intellectual property. The varying scope of TK and its different functions touch upon many fields of law, ranging from unfair competition, unjust enrichment to contractual liability.<sup>49</sup> None of them is clearly prevailing at this stage. At present, most international legal sources of TK protection are non-binding *soft law*, except for the few treaty instruments described below.<sup>50</sup>

### **B. Current Legal Framework**

The overarching international legal framework is Agenda 21 which came out of the 1992 Earth Summit in Rio de Janeiro. Among Agenda 21's objectives of preserving biodiversity for future generations, Principle 22 emerges as recognition that indigenous peoples have a vital role to play in environmental management and development because they dispose of alternative answers and solutions to formal science in the form of TK.<sup>51</sup>

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48 See American Association for the Advancement of Science (AAAS) 'Project on Traditional Ecological Knowledge, Making the Connection: Traditional Knowledge, Science and Human Rights', in: *AAAS Science and Human Rights Program*, available at <http://shr.aaas.org/tek/connection.htm>, last visited 1 September 2004.

49 See, e.g., Cottier, T. & Panizzon, M., *supra* note 4, pp. 389-394; See Reichman, J. H. & Lewis, T., 'Using Liability Rules to Stimulate Local Innovation in Developing Countries', in: Maskus, K. & Reichman, J. H. (eds.), *International Public Goods and Transfer of Technology Under A Globalized Intellectual Property Regime*, Cambridge: Cambridge University Press, forthcoming May 2005; Reichman, J. H. & Hasenzahl, C., 'Non-Voluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework under TRIPs, and an Overview of the Practice in Canada and the United States of America', in: *UNCTAD-ICTSD Capacity Building Project on IPRs*, Issue Paper No. 5, 2003; Reichman, J. H., 'A Compensatory Liability Regime for Applications of Traditional Knowledge', Draft Paper presented to the Cardozo Symposium on the Legal Protection of Traditional Knowledge, New York (23-24 February 2000), pp. 4, 8.

50 See WTO, Secretariat, 'The Protection of Traditional Knowledge and Folklore, Summary of the Issues Raised and Points Made', WTO Document IP/C/W/370, 8 August 2002, [hereinafter WTO Secretariat, *The Protection of Traditional Knowledge, Summary of the Issues*], p. 3.

51 See Agenda 21, United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992 ('The Earth Summit'), available at: <http://www.un.org/geninfo/bp/enviro.html>, last visited 4 September 2004; see also Schäfer, C., & Reinhardt, S., 'Traditional Knowledge Relating to the Conservation and Use of Biodiversity', Issue Papers, 2004, Implementing the Biodiversity Convention Project, Federal Ministry for Economic Cooperation and Development, Germany, for the link between the Rio Declaration, the CBD and traditional knowledge.

### 1. Traditional Knowledge on Plant Genetic Resources (PGR)

Since TK encapsulates information about plant genetic resources, scholars associated the idea with international intellectual property protection (IPRs).<sup>52</sup> Eventually, this approach has made its way into discussions relating to the World Trade Organization's (WTO) Agreement on Trade-related Intellectual Property Rights (TRIPs) and the World Intellectual Property Organization (WIPO). The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) values TK for its contribution to new cures for globally important diseases or for ensuring the food security of a region during a drought. WIPO also acknowledges that TK on plant genetic resources raises questions of distributive justice between the TK holder and the multinational company reaping the benefits from patenting the use of the information about the genetic resource.<sup>53</sup> Yet, under contemporary international law, the state has full jurisdiction over the genetic resource. It can sell the resource to a user by a contractual arrangement, unless the genetic resource qualifies as a public good by being listed in a databank.<sup>54</sup> No international legal protection is yet

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52 See Cottier, T., *supra* note 4, pp. 559-560; *similarly*, Downes, R., 'How Intellectual Property Could be a Tool to Protect Traditional Knowledge', in: 25 *Colum. J. Envtl. L.*, 2000, p. 255; Hansen S. A., & van Fleet J. W., *A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity*, Washington, DC, American Association for the Advancement of Science (AAAS), 2003, available at: <http://shr.aaas.org/tek/handbook/>.p. 4; *c.f.* Roht-Arriaza, N., 'Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities', 17(4) *Mich.J.Int'l L.*, 1996, pp. 921-2; Ramani, R., 'Note and Comment: Market Realities v. Indigenous Equities', 26 *Brooklyn J. Int'l L.*, 2001, pp. 1147-1176, p. 1148, fn. 4.; See also WTO Secretariat, *The Protection of Traditional Knowledge, Summary of the Issues*, *supra* note 50, para. 8; *similarly*, UNCTAD Trade and Development Board Commission on Trade in Goods and Services, and Commodities Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, Geneva, 30 October – 1 November 2000, UNCTAD Document, TD/B/Com.1/EM.13/2, 22 August 2000, pp. 3-4, 9-10.

53 See Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, Geneva, July 7 to 15, 2003, Participation of Indigenous and Local Communities, WIPO Document WIPO/GRTKF/IC/5/11 of 28 March 2003; the 'IGC' is open to Member States of WIPO and relevant IGOs and NGOs accredited as observers; participation of indigenous and local communities is currently being discussed.

54 See Birnie, P. & Boyle, A., *International Law and the Environment*, 2<sup>nd</sup> ed., New York: Oxford University Press, 2002, pp. 137-144, 604-608; see generally, Nanda, V. P. & Pring, G., *International Environmental Law and Policy for the 21<sup>st</sup> Century*, New York: Transnational Publishers, 2003; see also Espiell, H. G., 'The Common Heritage of Mankind and the Human Genome', in: *International Law: Theory and Practice, Essays in Honour of Eric Suy*, Wellens, K. (ed.), 1998, pp. 519-532; Arsanjani, M. H. & Reisman, W. M., 'The Quest for an

in place to effectively empower the TK holders with the legal means to defend his/her know-how against misappropriation and unfair competition.

## 2. Agricultural and ecological know-how

Traditional knowledge plays an important role in cultural ecology, including resource management, such as in agricultural techniques of enhancing production of plants and animals and controlling their lives by domestication and fertilization.<sup>55</sup> International environmental law namely protects the natural resources from extinction but does not relate to the informative value of such practices, processes and techniques. TK is expressed in Art. 8(j) of the aforementioned 1992 Convention on Biological Diversity (CBD),<sup>56</sup> which was adopted in the context of the Earth Summit in Rio de Janeiro on 29 December 1993.<sup>57</sup> It was further developed in the CBD Conference of the Parties (COPs),<sup>58</sup> specifically by COP-6 in the 'Bonn Guidelines',<sup>59</sup> and the International Treaty for

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International Liability Regime for the Protection of the Global Commons', *ibid.*, pp. 485 *et seq.* While TK is not considered common heritage of humankind, the genetic resources, which TK identifies, preserves and disseminates, are discussed as regards their eligibility under common heritage of humankind. The advocates of subsuming genetic sequences under common heritage concepts argue that genetic sequences fulfil the criteria of 'existing for the benefit of all' and 'existence and use affect humans around the world'.

55 See Sutton, M. Q. & Anderson, E. N., *supra* note 8, pp. 110-117.

56 See CBD, *supra* note 10.

57 See, *id.*, together with Agenda 21, the Rio Declaration on Environment and Development, the Statement of Forest Principles, and the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity were also adopted at the 'Earth Summit', whereby Agenda 21 is the only other document containing a reference to TK; See also Dutfield, G., 'The Convention on Biological Diversity and Intellectual Property Rights', in: *Cultural and Spiritual Values of Biodiversity*, Posey, D. (ed.), UNEP, forthcoming, currently available at: <http://www.ubcic.bc.ca>, last visited 1 September 2004.

58 See COP-2 Decision II/12, COP-3 Decision III/14, COP-4 Decision IV/9, COP-5 Decision V/16 and COP-6 Decision VI/25, as well as the meetings of the Working Group on Article 8(j) established by COP-4 Decision IV/9.

59 Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, adopted by COP6 decision VI/24 in April 2002. These guidelines were established pursuant to the mandate in Art. 15 CBD where CBD parties agree to 'take legislative, administrative or policy measures, as appropriate ... with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources.' The Bonn Guidelines encourage the development of national regimes and contractual arrangements for access and benefit-sharing and to the implementation of the objectives of the Convention. They regulate on a voluntary basis the access to genetic resources and the sharing of the benefits arising from their use. Because they underscore national legislative efforts for TK



Plant Genetic Resources, ITPRGFA of 3 November 2001.<sup>60</sup> Protection and valuation is sought on the basis of contractual relations and compensation.<sup>61</sup> Legally, the resources have remained in the public domain, available to all, under the territorial jurisdiction of nation states.

### 3. Traditional Medicine (TM)

The World Health Organization (WHO) has acknowledged that TK, which provides for healing substances and practices and touches upon health policy, is to be recognized as traditional medicine (TM), forming one of the pillars of modern scientific medicine. So far, the WHO neither has advocated an international legal regime protecting TM as a part of TK, nor sought to enhance the perception of the global role of TK in industrialised countries. Rather the WHO has confined TM to a role for development country medical policy only.<sup>62</sup>

### 4. Traditional Cultural Expressions (TCEs)

The concept of Traditional Cultural Expressions (TCEs) was recognised by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). WIPO protects traditional cultural expressions (TCEs) insofar as these are recognized internationally or domestically as cultural rights, but WIPO does not itself establish an international legal protection regime.<sup>63</sup> Neither copyright nor design protection under current international law apply to TCEs.<sup>64</sup> Up to this day, no consensus at the WIPO exists as to the attribution of an IP Right to TCEs which would empower traditional artists and practitioners, the

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protection, they stand somewhat in contrast to the TRIPs, which prefers a top-down approach of international binding legislation for TK protection.

60 See ITPGRFA, *supra* note 13.

61 See, e.g., Burhenne-Guilmin, F., *supra* note 34, pp. 552-554, 560-562, one of the earliest authors to clearly distinguish the issue of protecting genetic resources from the one of protection of Traditional Knowledge, identifying the genetic resource as a useful resource for humankind. Based on distinction, the author finds the current CBD regime insufficiently equipped to conserve TK and to protect the knowledge holder.

62 See WHO, 'Traditional Medicine – Growing Needs and Potential', *WHO Policy Perspectives on Medicines*, No. 2, May 2002, p. 1; see more generally, 'WHO Essential Drugs and Medicines Policy, "WHO Traditional Medicine Strategy 2002-2005"', *WHO Document WHO/EDM/TRM/2002.1*, pp. 29-32, available at: <http://www.who.int/medicines/library/trm/trmmaterial.shtml>, last visited 12 November 2004.

63 See WIPO, Consolidated Analysis, *supra* note 43.

64 *Cf. id.*, paras. 12-14.

indigenous, local and other cultural communities against appropriation of their work by mass cultural industries.<sup>65</sup>

### **C. Emerging Intellectual Property Protection for TK in the WTO**

The TRIPs Agreement in its present form and scope is perceived to respond to the needs of industrialised countries.<sup>66</sup> It does not offer much to farming communities, the main holders of traditional knowledge around the globe. It was acceptable to developing countries mainly because it formed part of an overall package and single undertaking, which included a pledge to liberalise market access in agriculture and textiles. These goals are only materialising slowly. They have not remedied a basic imbalance.<sup>67</sup>

#### **1. TK and developing countries**

The Doha Ministerial Declaration acknowledges that the majority of WTO members are developing countries.<sup>68</sup> If the Doha Ministerial Declaration seeks to 'place their [developing countries'] needs and interests at the heart of the Work Programme adopted in this Declaration',<sup>69</sup> TK is considered one of the interests that the negotiations under the Doha Agenda should pursue because TK 'plays an important role in vital areas such as food security, the development of agriculture and medical treatment for up to 80 percent of Africa's rural economy.'<sup>70</sup>

Yet, many developing countries were for a long time indifferent towards the value of TK. In the low-income sectors of agriculture it often has led to stagnation and, invariably, to the loss of TK as structures changed.<sup>71</sup> Today, there is an increasing awareness that rendering the knowledge bearer attentive to the value of

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65 See id.

66 See among others, Downes, R., supra note 52, p. 255.

67 See Cottier, T., & Panizzon, M., supra note 4, pp. 381-384.

68 See Doha Declaration, supra note 1, paragraph 2.

69 Id.

70 Nwokeabia, H., 'Why Industrial Revolution Missed Africa: A "Traditional Knowledge Perspective"', Economic Commission for Africa (UNECA), Document ECA/ESPD/WPS/01/02, 2001, p. 4, (on file with the authors).

71 Id., 'The Economics of African Indigenous Knowledge', World Bank Indigenous Knowledge Programme, *IK Notes on Indigenous Knowledge and Practices*, No. 53, 2003, pp. 1, 4, available at: <http://www.worldbank.org/afr/ik/iknt53.pdf>, last visited 16 November 2004; TK is characterized as 'continuous, but non-additive innovation'.

his/her knowledge will encourage the holders to appreciate TK as ‘continuous and additive innovation’.<sup>72</sup>

In the context of the Doha Development Agenda, many, but not all developing countries propose to seek an agreement on improved market access for agricultural products.<sup>73</sup> If agricultural exports from a developing country reflect traditional natural resources of that region, such as specific grains or products which are processed and produced through traditional skills and techniques, it is argued that a step toward validation of TK at the WTO would be achieved if market access barriers for TK-based products were to be lowered by tariff cuts, either through Special and Differential Treatment (S&D), a ‘development box’, or through overall tariff cuts applicable to all WTO Members.<sup>74</sup> But there are also those developing countries, namely India and Nigeria, which consider the protection of TK to be an issue within the broader debate on food security. They also maintain that if TK-based agriculture is shielded off from global trading rules, developing countries retain their ‘food production capacity’, (either through the special safeguard mechanism or via countervailing duties) and food security of developing countries would be enhanced.<sup>75</sup>

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72 *Id.*; see also Cottier, T. & Panizzon, M., *supra* note 4, pp. 383-386.

73 WTO, Agriculture Negotiations, Backgrounder, Developing Countries, [http://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgrnd14\\_devopcount\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd14_devopcount_e.htm), last visited 18 November 2004, ‘[m]any developing countries complain that their exports still face high tariffs and other barriers in developed countries’ markets and that their attempts to develop processing industries are hampered by tariff escalation (higher import duties on processed products compared to raw materials). They want to see substantial cuts in these barriers.’

74 See WTO, Committee on Agriculture, Special Session, Agreement on Agriculture: Special and Differential Treatment and a Development Box, Proposal to the June 2000 Special Session of the Committee on Agriculture by Cuba, Dominican Republic, Honduras, Pakistan, Haiti, Nicaragua, Kenya, Uganda, Zimbabwe, Sri Lanka and El Salvador, WTO Document G/AG/NG/W/13 of 23 June 2000.

75 WTO, Committee on Agriculture, Special Session, Agreement on Agriculture: WTO Negotiation on Agriculture, Proposal by Nigeria, WTO Document G/AG/NG/W/130 of 14 February 2001; see also, WTO, Agriculture Negotiations, Backgrounder, Developing Countries, *supra* note 73: ‘Some countries say WTO arrangements should be more flexible so that developing countries can support and protect their agricultural and rural development and ensure the livelihoods of their large agrarian populations whose farming is quite different from the scale and methods in developing countries. They argue, for example, that that subsidies and protection are needed to ensure food security, to support small scale farming, to make up for a lack of capital, or to prevent the rural poor from migrating into already over-congested cities.’

## 2. Doha Declaration on Traditional Knowledge (2001)

While the TRIPs Agreement of 1994 is silent on TK,<sup>76</sup> the Doha Declaration of 2001 introduces TK as an item for work on intellectual property. The declaration notes that while the TRIPs Council ‘must examine the relationship between the TRIPs Agreement, and Traditional Knowledge and folklore, and other relevant new developments’, it must do so by ‘fully tak[ing] into account the development dimension’.<sup>77</sup> Implicitly perhaps, the WTO developing country Members intend to ensure that developed countries will, by being called upon to recognise TK, give more consideration to developing countries’ needs in installing an effective IPR protection consistent with the TRIPs.<sup>78</sup> Also, they seek to increase the demand in both developing and industrialized countries for traditional crops.<sup>79</sup> But also certain industrialised countries, feeling pressure from the Cairns Group and certain developing countries to liberalise their agricultural trade, advocate that the special form of protection through GIs should be expanded to all agricultural products.

## 3. The ‘July 2004 Package’

The ‘July 2004 Doha Development Agenda Package’ of 1 August 2004 is a decision adopted by the General Council to reformulate the Doha Round objectives (in the format of a ‘Work Programme’) in order to keep the Doha Development Round on track and to successfully round up the negotiations with an agreement by the end of 2005.<sup>80</sup> Traditional knowledge protection was left out in the July 2004 Package, even if it had been a specific item on the DDA. Also, at the last minute, EU demands for extending GI protection to products other than wines and spirits were discarded too. In the light of existing problems and substantive proposals made and discussed shortly, it is evident that this will not be the last word on the matter. The decision, however, reflects that the topic is not conceptually mature for negotiations.

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76 See Dutfield, G., *supra* note 34, p. 6.

77 Doha Declaration, *supra* note 1, paragraph 19.

78 See Cottier, T. and Panizzon, M., *supra* note 4, pp. 372-373.

79 See Brush, R. S., ‘The Demise of Common Heritage and Protection for Traditional Agricultural Knowledge’, paper prepared for Conference on Biodiversity, Biotechnology and the Protection of Traditional Knowledge, St. Louis MO, April 4-5, 2003, available at: <http://law.wustl.edu/centeris/Confpapers/>, p. 49 (on file with the authors).

80 WTO, Doha Work Programme, *supra* note 19; see also Williams, F., ‘WTO Races to Hit Outline Deal Target’, *Financial Times*, 1 July 2004, p. 6; Genfer Zwischenspur für die Dauha-Runde, *Neue Zürcher Zeitung*, 21 July 2004; *Neue Zürcher Zeitung*, Formale Geplänkel um die Dauha-Runde, 28 July 2004.

## IV. Specific Proposals on Traditional Knowledge

### A. Discussions within the TRIPs Council

In the TRIPs Council, a number of arguments were made in support of TK protection, namely that 'it is only equitable that TK should be given legal recognition.'<sup>81</sup> Given the *raison d'être* of the TRIPs Agreement, which is to provide as broad a scope of IP protection for as broad a range of subject matters as possible, including new ones such as plant varieties, biological materials, lay-out designs and computer software, it is only logical that TK, as a discovery of circumstance, should also be included in the IPR framework of the TRIPs Agreement. As the report of the TRIPs Council puts it: 'nothing in the TRIPs Agreement prevents the WTO from adopting a specific protection regime for TK.'<sup>82</sup> Moreover, this report considers the socio-economic argument in favour of protecting TK with intellectual property rights that 'an egalitarian system of IPRs is one which does not exclude *a priori* any section of society.'<sup>83</sup>

### B. Three Negotiating Positions on Traditional Knowledge Protection

#### 1. CBD-consistent TRIPs interpretation of the 'checklist countries'

In 2002, one of the first proposals relating to TK was lodged by a group of developing countries, i.e. Brazil, China, Cuba, Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia and Zimbabwe. They suggested a solution based upon a mix of IP protection and the access and benefit-sharing regime of the CBD. TK should be validated under the WTO rules by interpreting the TRIPs Agreement as mutually consistent with the CBD rules. They proposed to introduce the principles of informed consent and disclosure of origin prior to the grant of patent rights.<sup>84</sup> In a related submission, Ecuador, India, Peru,

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81 WTO Secretariat, The Protection of Traditional Knowledge, Summary of the Issues, *supra* note 50, p. 3.

82 *Id.*, p. 11.

83 *Id.*

84 See WTO, Council for Trade-Related Aspects of Intellectual Property Rights, The Relationship between the TRIPs Agreement, the Convention on Biological Diversity and the Protection of Traditional Knowledge, WTO Document IP/C/W/356 of 24 June 2002, which is a proposal submitted by Brazil, China, Cuba, Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia and Zimbabwe for circulation to TRIPs Council Members with the proposal that: '[T]he TRIPs Agreement should be amended in order to provide that Members shall require that an applicant for a patent relating to biological materials or to Traditional Knowledge shall provide, as a condition to acquiring patent rights: (i) disclosure of the source and country of origin of the biological resource and of the

Thailand, Venezuela, Pakistan and Bolivia found that, should protection be granted to TK, it should be in compliance with the CBD provisions, pursuant to the TRIPs Council Doha mandate paragraphs 12 and 19 in combination with paragraph 47 of the Doha Ministerial Declaration (DMD).<sup>85</sup>

## 2. Disclosure of origin requirement: The EU and Switzerland

The EU and Switzerland proposed that the sources of origin of TK as well as the genetic resources be laid open by the patent applicant.<sup>86</sup>

Switzerland, which had argued that a disclosure requirement would protect the TK holders, accommodated the potential financial burden on the pharmaceutical industry by referring TK protection to the non-mandatory instruments of WIPO. This position leaves the WTO to 'benefit' from WIPO's work.<sup>87</sup> The Swiss government's way of proceeding reveals the sensitive task of balancing high-profile research interests while committing to equity in the distribution of the worlds' resources. The submission to the TRIPs Council refers in an Annex to a copy of the Swiss submission to the WIPO.<sup>88</sup>

... continued

Traditional Knowledge used in the invention; (ii) evidence of prior informed consent through approval of authorities under the relevant national regimes; and (iii) evidence of fair and equitable benefit sharing under the national regime of the country of origin.'

85 See WTO, Council for Trade-Related Aspects of Intellectual Property Rights, The Relationship between the TRIPs Agreement and the Convention on Biological Diversity (CBD) Checklist of Issues, Submission from Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela, WTO Document IP/C/W/420 of 26 February 2004 and WTO; the Relationship between the TRIPs Agreement and the Convention on Biological Diversity (CBD) Checklist of Issues, Submission from Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela, *Addendum*, WTO Document IP/C/W/420, Add. 1 of 5 March 2004, the latter communicating that Bolivia has been added to the list of sponsors of the above mentioned submission.

86 See WTO, Council for Trade-Related Aspects of Intellectual Property Rights, Additional Comments by Switzerland on its Proposals Submitted to WIPO Regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications, Communication from Switzerland, WTO Document IP/C/W/324 of 14 June 2004, pp. 1-2.

87 WTO Council for Trade-Related Aspects of Intellectual Property Rights - Article 27.3(b), the Relationship between the TRIPs Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge, Communication from Switzerland, WTO Document IP/C/W/400 of 28 May 2003, paras. 25-27.

88 See Sixth Session of the Working Group on Reform of the Patent Cooperation Treaty held on 3-7 May 2004, Submission by Switzerland to the International Bureau of WIPO, WIPO document PCT/R/WG/6/11.

The Swiss submission to the WTO considered intellectual property protection for TK on the agenda for reform of the WIPO Patent Cooperation Treaty (PCT). Arts. 51bis 1g(ii) and (iii) would have to be amended to include an obligation to disclose the origin of TK and of genetic resources as an essential requirement to every patent application. The submission further stated that the Council for TRIPs should 'benefit' and 'draw upon' the 'relevant work being carried out in WIPO'. In consequence, under the Swiss proposed disclosure of origin requirement for TK and genetic resources, disclosure is not scheduled to acquire the universally binding force it would otherwise have had if jurisdiction for TK were concentrated in the WTO and its binding dispute resolution mechanism.<sup>89</sup>

The EC agreed to a disclosure of origin criteria in WTO law, under the condition that it be only declaratory. The EC argued in favour of disclosure of origin of the genetic resource and of related TK, being held apart from patent application criteria. Under the EC proposal, a failure to disclose the origin would trigger criminal sanctions and/or civil liability, but not affect the validity of the patent.<sup>90</sup> Apart from the declaratory versus constitutive effect of the disclosure requirement, another difference from the Swiss proposal is that the EC would subject a TRIPs disclosure of the source requirement *ab initio* to the WTO dispute settlement panels.<sup>91</sup> The EC argued that a 'self-standing disclosure requirement' should be introduced into the TRIPs, which would function in the following way: 'When TK is used as a basis for further innovations, disclosure of the original TK from which inventions are derived would be an important way of ensuring that holders of Traditional Knowledge share in the benefits.'<sup>92</sup> The EC proposal contrasts with the Swiss approach, which requires a disclosure of the source of the genetic resource and of the prior art relating to TK as a constitutive requirement for the grant of a patent, because according to the EC, the 'legal consequences to the non-respect of the requirement should lie outside the ambit of patent law.'<sup>93</sup>

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89 Compare, *id.*, p. 2 with WTO, Council for Trade-Related Aspects of Intellectual Property Rights, Communication from the European Communities and their Member States, Review of Article 27.3(b) of the TRIPs Agreement, and the Relationship between the TRIPs Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge and Folklore, 'A Concept Paper', WTO Document IP/C/W/383 of 17 October 2002, [hereinafter WTO, 'A Concept Paper' from the European Communities] pp. 1-2.

90 See WTO, Committee on Trade and Environment, Report of the Meeting held on 8 October 2002, Note by the Secretariat, WTO Document WT/CTE/M/31 of 2 December 2002, para. 74.

91 See *id.*, pp. 3-13.

92 WTO, 'A Concept Paper' from the European Communities, *supra* note 89, p. 2.

93 *Id.*, p. 2.

While the EC proposal limits the legal consequences to those outside patent law, the Swiss and the African Group propose that a failure to disclose would delay a patent being granted or affect its validity.<sup>94</sup> Two South American WTO members have established a regional protection for TK under the Andean Pact, by requiring prior disclosure in patent applications. These are the Andean decision No. 391 of August 16, 1996 and the Biodiversity Law of Costa Rica. Brazil welcomed the EC's proposal that it would be important to disclose the source of the country of origin of the biological resource and of TK used in an invention.<sup>95</sup>

Other suggestions propose bilateral contracts between the TK holder and the person or company wishing to exploit the patent. These suggestions point out the difficulty of 'negotiations between unequal parties and the problem of prior informed consent'. Others propose a *sui generis* system of protection (protection of proprietary rights that serve to ensure fairness and equity).<sup>96</sup>

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94 See WTO, Council for Trade Related Aspects of Intellectual Property Rights, Communication from the European Communities and their Member States, WTO Document IP/C/W/383 of 17 October 2002. Under the EU proposal, a firm which fails to comply with the declaration of origin of the genetic resource or with the documentation of prior art as regards TK, will not be refused a patent because disclosure under the EC regime, is not a 'substantive requirement of patentability'; instead the firm would only encounter civil or penal law consequences. While the WTO could deal with preventing the misappropriation of TK, the EC nevertheless finds that 'TRIPs Council is not the right place to negotiate a protection regime for a complex new subject matter like TK or folklore'; see WTO, Council for Trade Related Aspects of Intellectual Property Rights - Article 27.3(b), 'The Relationship between the TRIPs Agreement and the Convention on Biological Diversity, and the Protection of Traditional Knowledge', Communication from Switzerland - Revision, WTO Document IP/C/W/400/Rev.1 of 18 June 2003, for Switzerland; see WTO, Council for Trade-Related Aspects of Intellectual Property Rights - Article 27.3(b), 'The Relationship between the TRIPs Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge, Submission by Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, India, Peru, Thailand, Venezuela, WTO Document IP/C/W/403 of 24 June 2003, for the countries listed; See WTO Council for Trade Related Aspects of Intellectual Property Rights - Article 27.3(b), 'Taking Forward the Review of Article 27.3(b) of the TRIPs Agreement', Joint Communication from the African Group, WTO Document IP/C/W/404, of 26 June 2003, [hereinafter WTO, Taking Forward the Review of Article 27.3(b)], for the 41 countries of the African Group: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Congo (Democratic Republic), Côte d'Ivoire, Djibouti, Egypt, Gabon, The Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe.

95 See WTO, Taking Forward the Review of Article 27.3(b), *supra* note 94, para. 75.

96 *Id.*



### 3. The proposal of *sui generis* rights: the 'African Group'

The 41 countries constituting the African Group propose that TK is a 'category of IPR' for which a *sui generis*-type protection should be accorded. The 'misappropriation' of TK shall lead to a cancellation of the IPR. Such misappropriation occurs where industry might have appropriated certain genetic resources to which it was led by TK.<sup>97</sup> The African proposal prefers top-down protection of TK, whereby a multilaterally agreed standard would serve to unify the different national laws, as the African proposal says: 'Any protection of genetic resources and traditional knowledge will not be effective unless and until international mechanisms are found and established within the framework of the TRIPs Agreement.'<sup>98</sup> The African proposal suggests that the international coordination of such protection should be vested in the TRIPs Agreement and that an IPR-type protection is the only effective means for protecting TK, even if the African Group suggests that the TRIPs be mutually supportive with the CBD and the ITPGRFA:

Other means, such as access contracts and data bases for patent examinations, can only be supplementary to such international mechanisms, which must contain an obligation on Members collectively and individually to prohibit, and to take measures to prevent, the misappropriation of genetic resources and traditional knowledge.<sup>99</sup>

### C. Attitudes of Academia and Non-Governmental Organizations

Scholarly proposals to introduce new IP rights to TK (Traditional Intellectual Property Rights, TIP Rights)<sup>100</sup> have generally been met with reluctance in practice and industry, so far. Many fear that protecting TK with private rights introduces the concept of proprietary possession, which contrasts with the communitarian lifestyle in many developing countries, and which, it is feared, will destroy the traditional ways of life. The younger generation in developing countries, it is argued, does not believe that TK can result in economic returns.<sup>101</sup>

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97 See *id.*, pp. 1-9.

98 *Id.*, pp. 2, 4-5.

99 *Id.*, pp. 2, 3.

100 See Cottier, T. & Panizzon, M., *supra* note 4, pp. 371-399; see *also* Cottier, T., *supra* note 4, pp. 555-584.

101 See Balick, M. J., 'Traditional Knowledge: Lessons from the Past, Lessons for the Future', Discussion Draft, Conference on Biodiversity, Biotechnology and the Protection of Traditional Knowledge, St. Louis MO, April 4-5, 2003, available at: <http://law.wustl.edu/centeris/Confpapers/>, pp. 19, 26 (on file with the authors).

Their career choices follow the model of globalisation and they believe that modernising is the only way to render their economies marketable. Most NGOs find that obliging the developing countries to establish an IPR system of protection, regardless of whether or not it might be beneficial to the valuation of TK, only deepens the divide between developed and developing countries.<sup>102</sup>

Some scholars are discussing how to fine-tune the disclosure of genetic origin and TK requirements. De Carvalho finds that a disclosure requirement constitutive to a patent application should only apply when the genetic resource concerned is preserved *in situ*. Where the active components are isolated from those resources or even synthesized, i.e. the genetic resource is preserved *ex situ*, the link between the invention, the know-how, including the TK and the resources may become too weak to be of any significance for patent protection.<sup>103</sup>

#### **D. Discussions in Other Organisations**

##### **1. Food and Agricultural Organization (FAO)**

The 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) of the UN Food and Agricultural Organization is the successor treaty to the FAO International Undertaking (IU). Its so-called 'multilateral system' realises free access to listed crops, but under Art. 12.3 ITPGRFA requires the users of such crops listed under the Annex I to reward the government under whose sovereignty the natural resource is located. The multilateral system of the ITPGRFA is based on a public domain approach. It depends upon public funding and prohibits IPRs on genetic resources, unless the genetic resource has been taken out of the 'common concern of humankind' and is under private property.<sup>104</sup>

The ITPGRFA attributes only a minor role to TK as a tool in the efforts to explore and conserve plant genetic resources. The ITPGRFA addresses TK as one facet of the preservation of genetic resources and as a corollary to farmers' rights

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102 See generally, Downes, R., 'Using Intellectual Property as a Tool to Protect Traditional Knowledge: Recommendations for Next Steps', *The Center for Environmental Law (CIEL) Discussion Paper*, 1997, available at: <http://www.ciel.org/Publications/> (on file with the authors); see also NGOs specialized in the field of agricultural diversity: GRAIN ([www.grain.org](http://www.grain.org)) and RAFI ([www.rafi.org](http://www.rafi.org)), GAIA Foundation, Actionaid ([mail@actionaid.org.uk](mailto:mail@actionaid.org.uk)).

103 See de Carvalho, N. P., 'Patent Law and Policy Symposium. Re-Engineering Patent Law: The Challenge of New Technologies', 2 *Wash.U.J.L. & Pol'y.*, 2000, p. 371.

104 See ITPGRFA, *supra* note 13, Art. 12.3; See also Birnie, P., & Boyle, A., *supra* note 54, pp. 573, 559, 579 on the concept of 'common concern' in international environmental law, particularly, the CBD.

in Art. 9.2(a).<sup>105</sup> Art. 9.2(a) ITPGRFA is unlike the CBD's Art. 8(j). The latter acknowledges the conservation efforts and sustainable use of genetic resources by traditional communities as a subject matter in its own right. Legal protection under the ITPGRFA follows the CBD model of:

[C]onservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits derived from their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.<sup>106</sup>

The ITPGRFA has a rather dismissive attitude towards IPR protection for TK. Traditional knowledge is not referred to in the ITPGRFA. It does little to spur inventions based upon TK, and the treaty 'refuses to establish a hierarchy between itself and other related treaties', such as intellectual property rights treaties' with the result that 'the door is open for conflicting interpretation at the time of implementation.'<sup>107</sup> The ITPGRFA expressly subscribes to 'balanc[ing]' the research interest towards free access with the 'equitable sharing of the benefits arising out of their use'.<sup>108</sup> The legal instruments, however, are shaped in favour of the research community with little to offer on legal protection and adequate compensation for traditional communities that have been the pioneers in exploring and identifying genetic resources.

## 2. WIPO and WHO; UNESCO and UNCTAD

### a) *Traditional Knowledge on Plant Genetic Resources*

WIPO has mainly proposed a bottom-up approach. Developing countries would first be called upon to establish national IPR systems with the possibility to patent TK. Only after assessing the national experience would TK protection be introduced at the international level.<sup>109</sup> The United Nations Conference on Trade and Development (UNCTAD) formulates minimum standards to support an

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105 See ITPGRFA, *supra* note 13.

106 ITPGRFA, *supra* note 13, Art. 1.

107 Cullet, P., 'The International Treaty on Plant Genetic Resources for Food and Agriculture', in: *International Environmental Law Research Center (IELRC), Briefing Paper*, 2003, No. 2, available at: <http://www.ielrc.org/content/f0302.htm>, last visited 16 November 2004.

108 ITPGRFA, *supra* note 13, Art. 1.1.

109 See WIPO, *Elements of a Sui Generis System for the Protection of Traditional Knowledge*, Report of the Third Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO Document WIPO/GRTKF/IC/3/8 of 29 March 2002, paras. 4, 5, 8, 17-57; but see paras. 8, 42-43.

internationally recognized *sui generis* system.<sup>110</sup> WIPO and UNESCO have put together model provisions for national laws on the protection of folklore.<sup>111</sup> WIPO is also building databases for sustaining national legislative efforts to protect TK.<sup>112</sup> The WHO has confined TM to a role for development country medical policy only.<sup>113</sup>

#### **b) Traditional Cultural Expressions**

WIPO identifies Traditional Cultural Expressions (TCEs) in addition to TK on plant genetic resources. WIPO proposes to establish an IPR to protect the 'expressions of folklore' as distinct as Indian cinema ('Kannada', which is regional Indian cinema and 'Bollywood' musicals and movies), Indian software programmes, and Brazilian music, African weaving patterns, folkloric dances, languages, etc.

Copyright protection, also called moral rights, has so far been the domestic legal format for protecting cultural heritage. Such rights of attribution of authorship—the right of the author to be named in connection with their work, the right of integrity of authorship, and to object to, and stop derogatory treatment of a work that demeans the author's reputation, are codified, internationally, under the *Berne Convention for the Protection of Literary and Artistic Works*. Indigenous knowledge-holders would like to see the Copyright Amendment (Moral Rights Bill) of 1999 of the Berne Convention extended to encompass recognition of the communal rights of indigenous custodians.<sup>114</sup>

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110 See UNCTAD, *The Sustainable Use of Biological Resources: Systems and National Experience for the Protection of Traditional Knowledge, Innovations and Practices*, Agreed Recommendations, UNCTAD Document TD/B/COM.1/L.16 of 27 March 2001, stating that "The Commission makes the following recommendations at the international level: ... (d) Exchange information on national systems to protect TK and to explore minimum standards for an internationally recognized *sui generis* system for TK protection."

111 See Dutfield, G., *supra* note 34, pp. 32-34.

112 See Gopalakrishnan, N. S., 'Protection of Traditional Knowledge, The Need for a *Sui Generis* Law in India', 5(5) *JWIP*, 2002, pp. 726-727.

113 See WHO, 'Traditional Medicine - Growing Needs and Potential', *WHO Policy Perspectives on Medicines*, No. 2, May 2002, p. 1; see more generally, 'WHO Essential Drugs and Medicines Policy, "WHO Traditional Medicine Strategy 2002-2005"', *WHO Document WHO/EDM/TRM/2002.1*, pp. 29-32, available at: <http://www.who.int/medicines/library/trm/trmmaterial.shtml>, last visited 12 November 2004.

114 See Cultural Heritage Working Group of the Centre for Studies in Intellectual Property and Technology Law, Arts and Humanities Research Board, 'IP, Cultural Heritage and the Public Domain', Meeting 2 September 2002, available at: <http://www.law.ed.ac.uk/ahrb/events/archive.asp>, last visited 29 August 2002; see also Aboriginal and Torres State Islander Commission (ATSIC), 'Indigenous Rights', available at: [http://www.atsic.gov.au/issues/indigenous\\_rights/intellectual\\_property/Default.asp](http://www.atsic.gov.au/issues/indigenous_rights/intellectual_property/Default.asp), last visited 29 August 2004.

Another approach would be to introduce GIs when exporting and marketing of TK relating to cultural goods and services originates in a specific region, and may be localized as such, namely cultural manifestations, movies, and dances. Yet another approach is to consider TCEs as in the public domain, the use of which international treaty law will, similarly to TK relating to PGR, subject to limitations, such as access and benefit sharing, prior informed consent and transfer of technology. The public domain approach has the advantage that it gives a legal framework to what anthropologists and social scientists identify as the significance of folklore for the formation of ‘public space’.<sup>115</sup> Possibly, a mix between a public domain and IPR protection would constitute the most effective way to preserve folklore: where a knowledge bearer may be identified, protection may be designed as an IPR, whereas where a dialectical relationship exists between the private and the public, a public domain approach may be warranted. In addition to the protection of the folklore as a product, the heritage holder should be protected in the exercise of his/her heritage under the fundamental freedom of indigenous people pursuant to the UNESCO *Draft Declaration on the Rights of Indigenous Peoples and the ILO Convention 169*, as well as relevant provisions of human rights law.<sup>116</sup>

## V. Towards Enhanced Protection of Geographical Indications

### A. Legal Protection of ‘Marks’ of Origin

Insofar as GIs are ‘place names’, which stand for the quality and locality of a product and so generate a responsibility for a place and region, they contrast with anonymous, global, mass production.<sup>117</sup> GIs reflect the current trend away from ‘high volume “day-to-day” foods engineered by multinational enterprises or mass

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115 Public Space and Civil Society, Indira Gandhi National Centre for the Arts, New Delhi (IGNAC), Report, International Seminar on Folklore, available at: <http://www.ignca.nic.in/nl002301.htm>, last visited 30 August, 2004.

116 See United Nations High Commissioner for Human Rights (UNHCR) Cultural and intellectual property of indigenous peoples, Sub-Commission on Human Rights resolution 1993/44; See also Daes, E.-I., *United Nations Study on the Protection of the Heritage of Indigenous People*.

117 WTO, TRIPs: Geographical Indications—Background and the current situation, Geographical Indications in general of 26 February 2004 (last update), available at: [http://www.wto.org/english/tratop\\_e/TRIPs\\_e/gi\\_background\\_e.htm](http://www.wto.org/english/tratop_e/TRIPs_e/gi_background_e.htm), last visited 17 November 2004, for the definition of GIs as ‘place names’.

producing agriculture towards lower volume niche or specialty products.<sup>118</sup> GI protection is close to, but different from trademark protection. The priority principle 'First in Time, First in Right' resolves the conflict between trademarks and GIs. It says that a validly registered prior mark should prevail against a later geographical indication and *vice versa*.<sup>119</sup>

### **B. Status Quo of GIs under Section 3 TRIPs**

An absolute level of GI protection applies to wines and spirits pursuant to Art. 23 TRIPs whereas a relative level of protection exists for all other goods under Art. 22 TRIPs. The relative level of protection establishes a protection of GIs limited to the principles of unfair competition. The relative level of protection prohibits using a geographical name if such a name and use would mislead the public as to the true geographical origin of the product. As long as there is no delusion of the consumer, a geographical name may be used under the condition that where a product is not produced at its geographical origin, the foreign location of production is mentioned in combination with the name of the speciality, e.g. 'Roquefort cheese produced in Norway', 'Feta cheese made in the USA'. Under the absolute and enhanced level of protection, products made elsewhere than in the protected geographical area are barred from using the geographical name even where the true origin of the product is indicated, or even where it is accompanied by qualifications such as 'kind', 'type' or 'style'. The literally correct name or a similar name must not be used under the enhanced protection of Art. 23. The absolute level of protection today only exists for wines and spirits, e.g. the local name of Champagne may not be used for a local Swiss dry white wine.<sup>120</sup>

#### **1. Built-in agenda of Article 23.4 TRIPs Agreement**

Art. 23.4 TRIPs contains a built-in agenda, which calls for negotiating a multilateral registration system of GIs for wines and spirits. The built-in agenda

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118 Barham, E., 'Translating Terroir: The Global Challenge of French AOC Labeling', 19 *Journal of Rural Studies*, 2003, pp. 127, 129.

119 See Hellwig, F., Z., 'Why the Principles of Priority and Exclusivity cannot be Compromised - The Trademark Owner's Perspective on Geographical Indications and First in Time, First in Right', Working Paper, 2004, International Trademark Association, available at: [http://www.inta.org/articles/firstintime\\_firstinright.html](http://www.inta.org/articles/firstintime_firstinright.html), last visited 11 November 2004.

120 See Origin (an NGO), 'The WTO's presentation of the Doha agenda: Rendez-vous in Cancun', GI-Info/On going negotiations, available at: <http://www.origin-gi.com>, last visited 2 September 2004.

of Art. 23.4 TRIPs does not call for negotiating to extend the higher level of protection applicable to wines and spirits under the current law, to other products.<sup>121</sup> Nevertheless, the EC, as mentioned above, refers to this built-in agenda when it argues in favour of expanding the coverage of the higher-level GI protection regime, which currently exists for wines and spirits, to other products. The EC maintains that the TRIPs provides for the mandate to negotiate the multilateral register for high-quality products in order to guarantee their geographical origin.<sup>122</sup> Should the EC be successful, the result would be that cheeses such as 'American Gouda', but also 'Gouda-style' or 'Gouda-type' would be eliminated and producers outside the original geographical scope of protection would be forced to rename and remarket their products.<sup>123</sup>

Those WTO members opposing the extension of the registration (i.e. the absolute level) protection system to products other than wines and spirits, are foremost the agricultural mass-producing countries, such as the US and Australia. These WTO Members argue that the built-in agenda of Art. 23.4 TRIPs does not provide for the mandate to negotiate an expansion of the scope of the GI protection regime.

## 2. Specific item on the Doha development agenda

The only reference to GIs was that the General Council *discuss*, in the context of implementation:

Without prejudice to the positions of Members, all outstanding implementation issues under paragraph 12(b) of the Doha Ministerial Declaration (DMD), including on issues related to the extension of the protection of Geographical Indications provided for in Article 23 of the TRIPs Agreement to products other than wines and spirits, if need be by appointing Chairpersons of concerned WTO bodies as his Friends and/or by holding dedicated consultations.<sup>124</sup>

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121 See Art. 23:4 TRIPs: 'In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPs concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.'

122 See European Commission, External Trade, Intellectual Property, TRIPs and Geographical Indications: 'EU submits Three Communications on Geographical Indications', Brussels, 24 June 2002, available at: [http://europa.eu.int/comm/trade/issues/sectoral/intell\\_property/wto\\_nego/intel4.htm](http://europa.eu.int/comm/trade/issues/sectoral/intell_property/wto_nego/intel4.htm), last visited 17 November 2004.

123 See Cabot, T., 'Naming Rights, is America the Home of the Free but Not of the Brie?', *The Washington Post*, 21 May 2003, p. F01.

124 WTO, Doha Work Programme, *supra* note 19, Section 1(d).

GI protection might be expanded in scope only if the General Council agrees upon the issue in July 2005.<sup>125</sup>

### **C. Increasing Interest at the WTO**

In the light of increasing pressure to do away with costly and trade distorting agricultural domestic support measures, the GI debate has gained momentum in the WTO. It has become a divisive issue between WTO Members in the agricultural negotiations, even if GIs, institutionally, are an instrument of the TRIPs and not of the Agreement on Agriculture (AoA).

#### **1. European interests**

The protection of GIs is at the core of the EC's and Switzerland's positions in reforming their highly subsidized agriculture.<sup>126</sup> The promotion of GIs forms part of the two countries' review proposals to the TRIPs and part of their interest in agricultural negotiations. Rules of unfair competition protect local and regional speciality products and even if not an instrument of market access liberalization itself, the EC and Switzerland seem to vest GIs with a *quid pro quo* function considering GIs a trade-off for dismantling existing barriers to agricultural imports from developing countries. In other quarters, such as the Cairns Group countries, GIs risk to be perceived as new forms of protectionism.

Geographical Indications, so states the EU, are 'the lifeline for 138,000 farms in France'.<sup>127</sup> For example, Neapolitan pizza makers convinced Italian lawmakers (the Ministry of Agriculture) in the summer of 2004, to issue a law protecting the 'true' Pizza from impostors: the label their pizzas would carry under the new law is 'STG', Guaranteed Traditional Specialty.<sup>128</sup> A closer examination reveals that

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125 See *id.*, June 2005 is the date which the July 2004 Package sets for the General Council to review the proposals submitted to it and to take appropriate action.

126 Council Regulation (EC) 692/2003 8 April 2003 amending Regulation (EEC) Nr. 2081/92 on the protection of Geographical Indications and designation of origin for agricultural products and foodstuffs, OJ L 99 (April 17, 2003); EC law was recently revised.

127 European Union, European Commission, External Trade, Sectoral Issues, Intellectual Property, 'Why do Geographical Indications matter to us?', Brussels, 30 July 2003, available at: [http://europa.eu.int/comm/trade/issues/sectoral/intell\\_property/argu\\_en.htm](http://europa.eu.int/comm/trade/issues/sectoral/intell_property/argu_en.htm), last visited 12 November 2004 [hereinafter EU, Why do Geographical Indications matter to us?].

128 Baker, A., 'For the Pizza Makers of Naples, A Tempest in a Pie Dish', *The New York Times*, 9 June 2004, citing Rosa Russo Iervolino, mayor of Naples, '[i]t is a guarantee for Naples pizza, just as there are guarantees for other Italian brands, like Parmesan cheese. It is important to recognize where certain foods come from and protect them from impostors'; see also Cabot, T., *supra* note 124.



the specifications of the pizza-making process are all but protective of the regional produce of Southern Italy, such as Vesuvian-grown tomatoes and buffalo-milk mozzarella from Campagna, resulting from fears about cheaper competition from Polish-grown tomatoes and Slovenian mozzarella, in the enlarged EU.

The production of a specialty cheese from the Jura region between France and Switzerland, Mont d'Or Vacherin, is an example of 'savoir-faire'. The main characteristic of the cheese is its production process involving the cheese-maker fermenting the milk into the cheese and the *affineur*, who is someone improving the quality of the cheese. The cheese-maker, on the one hand, does not necessarily have TK, because the making of the raw cheese loaves does not involve a skill specific only to Mont d'Or cheese. The *affineur*, on the other hand, is the one who produces the typical quality of this creamy cheese, which is eaten by the spoon.<sup>129</sup> It is the *affineur*, and not the cheese-maker who only ferments the milk, who disposes of a specific skill, unique to his practice, which enables him/her to give the raw cheese loaves the particular Mont d'Or flavour and consistency, which involves packing the cheese for storage in pine wood baskets and other skills. GIs may protect the Mont d'Or cheese loaves themselves, because only soft cheese from the French and Swiss Jura mountains produced in the typical conifer wood basket may be commercialized under that name.

'Savoir-faire', the French expression related to TK and GIs, demonstrates how linguistic expressions, which stand for a specific lifestyle, cannot be properly translated into the language of a region or culture foreign to that lifestyle. It illustrates well the 'European' affinity for the culture, lifestyle and consumer choice that GIs stand for.

These examples may be dismissed as an exaggerated application of the concept. Nevertheless, they demonstrate how developed country agriculture, with the exception of the Cairns Group Members, today is faced with competition from developing countries having successfully switched from subsistence farming to cash crops,<sup>130</sup> and is seeking legal protection to keep up farming practices, such as intellectual property rights.<sup>131</sup>

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129 See Vesper, T., 'In der Vallée de Joux fließt der Vacherin wieder, Der König unter den Weichkäsen wandelt sich mit den Zeitläufen', *Neue Zürcher Zeitung*, 2 September 2004.

130 See Rangnekar, D., 'The Socio-Economics of Geographical Indications, A Review of Empirical Evidence from Europe', in: *UNCTAD-ICTSD Capacity Building Project on IPRs*, Issue Paper No. 8, 2004.

131 See Wallis, W., 'African farmers dig deep to comply with EU food rules', *Financial Times*, 7 April 2004.

## 2. Developing countries

37 Members, composed of developed and developing countries alike, have signed proposals advocating GI protection at the WTO to be expanded to agricultural products.<sup>132</sup> Developing countries increasingly value GIs as an instrument contributing to a remunerative marketing of an agricultural production based upon traditional cultivation methods. Persistent resistance to this extension may therefore communicate an unfortunate message to those countries about the *realpolitik* of the international intellectual property regime.<sup>133</sup>

## 3. Cairns Group

Cairns Group countries (such as Argentina, Brazil, United States, Australia) whose economies are built upon immigration from Europe, consider GIs nothing but a protectionist tool to prevent immigrants from using the 'original' recipes and methods of production of their forefathers, thereby denying them comparative advantages in producing and marketing highly competitive like products. Examples besides French viticulture in the Americas, Australia and South Africa, are the production of originally Greek feta cheese in the US (Wisconsin) and the manufacture of Italian Parmesan cheese in Argentina and Australia.<sup>134</sup> Tensions between old world 'niche products' sold at a high price and new world mass agriculture of the same, but cheaper product lead to a reluctance

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132 See WTO Council on Trade-related Intellectual Property Rights, Communication from Bulgaria, Cuba, Cyprus, the Czech Republic, Estonia, the European Communities and their fifteen Member States, Georgia, Hungary, Iceland, India, Jamaica, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey WTO Document IP/C/W/353 of June 24, 2002, [hereinafter WTO Communication from Bulgaria, Cuba, the Czech Republic, Estonia, the European Communities...]; see also Rangnekar, D., 'Geographical Indications: A Review of Proposals at the TRIPs Council, Extending Article 23 to Products other than Wines and Spirits', *UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development*, May 2003, available at: [www.ictsd.org/iponline/unctadictsd](http://www.ictsd.org/iponline/unctadictsd), last visited November 16, 2004.

133 See, e.g., Blakeney, M., 'Proposals for the International Regulation of Geographical Indications', 4 *JWIP*, 2001, pp. 629, 652; See also Addor, F. & Grazioli, A., *supra* note 16, p. 886.

134 See <http://atalanta1.com/products/cheese-arg-parm.htm>; last visited November 18, 2004, for Parmesan in Argentina, usually called 'Reggianito' in analogy to 'Parmigiano Reggiano', the official name for Parmesan in Italy; the Parmesan Council is currently pursuing a court case at the International Court of Justice in The Hague to stop this happening, arguing that the 'parmesan' label should apply only to cheese produced under its scrutiny in the area around Parma and Reggio Emilia in Italy.

to accept intellectual property rights in agriculture, which may also have influenced the relative inexistence of TK for a long time.

## VI. Specific Proposals on Geographical Indications

With a view to completing the work started on the implementation of Article 23.4, the TRIPs Council notes that issues related to the extension of the protection of GIs provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPs pursuant to paragraph 18 in combination with paragraph 12 of the Doha Declaration.<sup>135</sup> The negotiating mandate for GIs is contained in paragraph 12 DMD. It must be read in connection with paragraph 18 DMD.<sup>136</sup> However, paragraph 12 DMD offers no clear statement as to what the scope of the negotiations should be. It provides for a two-track approach:

1. If there is a specific negotiations mandate in the DMD, 'the relevant implementation issues shall be addressed under that mandate.'

If there is no specific negotiations mandate, paragraph 12 says that:

2. 'The other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies by the end of 2002' which, in the case of GIs, would mean the Council for TRIPs.<sup>137</sup>

Because WTO Members have expressed different viewpoints on whether the first or second paragraph 12 DMD applies to the negotiations on GIs, the scope of the absolute level of protection has not been extended yet.<sup>138</sup> It is unclear whether the extension of enhanced protection pursuant to Art. 23 TRIPs to agricultural products has a specific mandate or whether an express one has to be created. The discussion pertains to the linkage of the Agreement on Agriculture negotiations with the TRIPs reforms. Under the narrow view, GIs may not form part of the current Doha Round negotiations, as the mandate is limited to agriculture and there is under the Doha mandate no explicit mention of GIs for agricultural products.<sup>139</sup>

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135 See Doha Declaration, *supra* note 1.

136 See *id.*, paragraph 18.

137 *Id.*, paragraph 12.

138 See 'Origin' (an NGO), *supra* note 121.

139 See WTO website, Trade Topics, TRIPs, Geographical Indications, Background and the Current Situation, 'Extending the 'higher level of protection' beyond wines and spirits', online text, available at: [http://www.wto.org/english/tratop\\_e/trip\\_e/gi\\_background\\_e.htm#protection](http://www.wto.org/english/tratop_e/trip_e/gi_background_e.htm#protection), last visited 5 September 2004.

## **A. Conflicting Objectives in Negotiations**

### **1. Extending enhanced level of GI protection: EU proposal**

The EU proposal for a multilateral register for GIs and the extension of the additional GI protection under the TRIPs, ensures that not only wines and spirits but also cheeses, rice and teas will not be copied by producers from other countries by simply indicating 'made in USA' or 'style of Roquefort'.<sup>140</sup> Its most far-reaching proposal is to ensure 'market access for EU GI products, by asking WTO members to remove prior trademarks and, if necessary, grant protection for EU GIs that were previously used or have become generic so that our GI products can gain market access.'<sup>141</sup>

The EU wishes to use GIs as a bargaining chip conditioning its own opening of agricultural markets to cheaper imports (i.e. the removal of direct support measures) to a wider recognition for GIs. However, a procedural problem poses itself because GI protection figures only on the agenda of the TRIPs review and is not up for negotiation in the context of the agricultural liberalization. Since agriculture negotiations on GIs are so-called 'second phase' negotiations where meetings are largely 'informal', papers presented so far have not been official WTO documents.<sup>142</sup>

However, the Doha Declaration seems to prohibit discussing GIs as a negotiation chip for market access of agricultural products in the context of the Agreement on Agriculture. Whether or not expanding the scope of GIs to agricultural products should be exclusively dealt with in the TRIPs Council, it is uncontested that GIs will be informally used as a bargaining tool in agriculture negotiations, at least as long as the Doha Round negotiations are still aiming at concluding the round with a single package undertaking.

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140 See WTO, Council for Trade-Related Aspects of Intellectual Property Rights - Implementation of Article 23.4 of the TRIPs Agreement Relating to the Establishment of a Multilateral System of Notification and Registration of Geographical Indications, Communication from the European Communities and its member States- Revision, WTO Document IP/C/W/107/Rev. 1 of 22 June 2000.

141 EU, Why do Geographical Indications matter to us?, supra note 128; see also WTO, Communication from Bulgaria, Cuba, the Czech Republic, Estonia, the European Communities..., supra note 133.

142 The availability of such WTO 'documents' thus depends on the respective Members' disclosure policy.

## **2. Registration system of the EU, India, Nigeria, Kenya, Thailand, Bulgaria, Switzerland and others**

The registration system, as proposed by the EU together with India, Pakistan, Sri Lanka, Mauritius, Nigeria, Kenya, Cuba, Thailand, Bulgaria, Romania, Switzerland, Slovakia, Slovenia, and Moldova, suggests that all registered products will benefit from a legal presumption of validity of GI protection.<sup>143</sup> In support of its proposal, the EC also points to India as an example of a country in favour of GI protection, because unlike others, its economy is based upon its distinct culture, which it also exports in the form of saris, speciality teas (Darjeeling, Assam), similarly to Thailand (Jasmine rice), which also supports GIs.<sup>144</sup>

## **3. 'Joint Paper' counterproposal of the Cairns Group**

The counterproposals by the US, Brazil, Canada, Chile and Japan (Members of the Cairns Group) agree to a registry, but not to the legal effect the EU proposes.<sup>145</sup> This 'joint paper' of the Cairns Group Members and others, represents mass agriculture (agro-business, and large-scale farming) as opposed to niche production and subsistence farming. In order to keep the market for mass products free of product-specific protection, the Cairns Group would like to see the registration of GIs as a notification process without legal effect.<sup>146</sup>

The Cairns Group is also opposed to granting the higher level of GI protection which today exists for wines and spirits to products other than these. As US Trade Representative Zoellick has said, the Doha Ministerial Declaration does not

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143 See WTO, Council for Trade-Related Intellectual Property Rights, Special Session, Communication from Bulgaria, Cyprus, the Czech Republic, the European Communities and their Member States, Georgia, Hungary, Iceland, Malta, Mauritius, Moldova, Nigeria, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland and Turkey, Negotiations Relating to the Establishment of a Multilateral System of Notification and Registration of Geographical Indications, WTO Document TN/IP/W/3 of 14 June 2002.

144 See European Commission, External Trade, Intellectual Property, TRIPs and Geographical Indications: EU submits Three Communications on Geographical Indications, Brussels, 24 June 2002, available at: [http://europa.eu.int/comm/trade/issues/sectoral/intell\\_property/wto\\_nego/intel4.htm](http://europa.eu.int/comm/trade/issues/sectoral/intell_property/wto_nego/intel4.htm), last visited 17 November 2004.

145 See WTO, Council for Trade-Related Aspects of Intellectual Property Rights - Special Session - Proposal for a Multilateral System for Notification and Registration of Geographical Indications for wines and spirits based on article 23.4 of the TRIPs agreement, Communication from Argentina, Australia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Namibia, New Zealand, Philippines, Chinese Taipei, and the United States, WTO Document TN/IP/W/5 of 23 October 2002 [hereinafter WTO, 'Joint Paper'].

146 'Joint Paper', supra note 146.

provide for the mandate to extend the absolute level of protection beyond wines and spirits:

For GIs other than wines and spirits, the Doha mandate does not call for negotiations. We believe the current system works well, and we share the concerns of many in the developing world that we don't need to burden everyone with a large and costly new framework, as some have suggested.<sup>147</sup>

In contrast to its official negotiating position at the WTO, the US' internal policy has resolved to introduce a country-of-origin labelling (COOL) for fresh produce, red meats, and peanuts and seafood on the domestic market. It started in 2004 for seafood and will apply to all other products starting 2006, under the umbrella of the 2002 US farm bill. However, it is still disputed whether or not the disclosure of origin (COOL) should be voluntary or mandatory.<sup>148</sup>

The Cairns Group argues that the built-in agenda of Art. 23.4 TRIPs has not been an issue on the DDA. Therefore, the Cairns Group members believe that there is no negotiating mandate in the DDA for extending the scope of the absolute level of protection to other products than wines and spirits. *A fortiori* they find it even less likely that the Doha Ministerial Declaration would allow negotiating such an enhanced level of protection under the framework of the Agreement on Agriculture, namely the provisions on multifunctionality. As the Australian Government Department of Foreign Affairs and Trade says:

The July 2004 Framework Package has retained GIs as an issue of interest in the agriculture negotiations, but as of early mid-September 2004 there had been no negotiations on those issues and Australia remains opposed to such negotiations.<sup>149</sup>

The Europeans, joined by India and some other countries, want a mandatory registry of GIs that would prevent other countries from using the names. The US and other countries refuse to negotiate a mandatory list, but will accept a voluntary list with no enforcement power. The EU says it will not accept an agriculture agreement without a geographical registry.<sup>150</sup>

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147 Office of the United States Trade Representative (USTR), 'US and Other Trade Partners Present Positions and Proposals to Prevent Unauthorized Use of Geographic Names', USTR Press Release of 20 September 2002, available at: <http://usinfo.state.gov/ei/Archive/2004/Jan/06-428636.html>, last visited 18 November 2004.

148 See Becker, G. S., 'Country-of-Origin Labelling for Foods', in: *Congressional Research Service (CRS) Report for Congress, 97-508 ENR*, last updated 3 August 2004, p. 1.

149 Australian Government, Press Release 2004, Doha Round, *supra* note 26.

150 See Sek, L., 'World Trade Organization Negotiations: The Doha Development Agenda', in: *Congressional Research Service (CRS) Report for Congress*, updated 6 August 2004, p. 6.

### **B. Diverging Interests of Developing Countries**

It is important to note that GI protection is not a North-South issue. Interests in the developing world vary, according to the economic structures and objectives. Many developing countries aspire to become the world's major exporters of cash crops, as the way to growing out of poverty, specifically, food aid dependency. To them, GI's are considered hostile in achieving these goals. They are traditionally perceived as non-tariff barriers to agricultural imports. According to them, GIs function similarly to import quotas imposed by industrialized countries as a substitute for abolishing agricultural subsidies. Another developing country criticism is that GIs lead to over-head costs incompatible with the development perspective of small-scale production of export crops, and inasmuch are similar to food safety regulation. As labelling and food safety regulation are found to be detrimental to poverty reduction, so GIs are found to fail the test of cost effectiveness.

At the same time, GIs form an important bargaining tool for these developing countries to exert pressure on developed countries to open their agriculture market. A possible negotiation package could look like this: if the EC is granted the extension of the GI coverage it has been asking for, it should in return quit subsidising its ineffective cash crop market and open instead its common agricultural market to cheaper cash crops from developing countries, retaining an agricultural market of its own for niche and specialty products only.

Developing countries might have, as indicated above, a genuine interest in protecting endogenous products akin to their climate, region and culture. Since the terms Basmati rice, Darjeeling tea and Blue Mountain coffee are not protected under GIs, they do not require the product to stem from a specific region. Hence, developing countries without a GI protection risk that multinationals sell 'their' rice, tea or coffee under the traditional names, but without the product stemming from that region or having been cultivated according to local tradition.<sup>151</sup> The

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151 See WTO, Council for Trade-Related Aspects of Intellectual Property Rights - Communication from Bulgaria, Cuba, the Czech Republic, Georgia, Hungary, Iceland, India, Sri Lanka, Kenya, the Kyrgyz Republic, Liechtenstein, Moldova, Nigeria, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey, Work on Issues Relevant to the Protection of Geographical Indications, Extension of the Protection of Geographical Indications for other Products, WTO Document, IP/C/W/308 of 17 September 2001; see also WTO Council for Trade-related Intellectual Property Rights, Geographical Indications: the Significance of 'Extension' in the TRIPs Agreement and its Benefits for WTO Members, Communication from Bulgaria, Cyprus, Czech Republic, Estonia, European Commission, Georgia, Hungary, India, Kenya, Kyrgyz Republic, Latvia, Liechtenstein, Malta, Macedonia, Poland, Romania, Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand, Turkey, WTO Document TN/C/W/14 of 9 July 2003 [hereinafter WTO, Communication from Bulgaria, Cyprus...].

large coffee, tea and rice producers, namely Jamaica, Kenya, Mauritius, Morocco, Nigeria, Pakistan, Sri Lanka, Thailand, as well as Bulgaria, China, the Czech Republic, the EU, Hungary, Liechtenstein, Slovak Republic, Slovenia, Switzerland, Turkey, want to extend the absolute level of protection under Art. 23 TRIPs.<sup>152</sup> Only via such an IPR protection, which is able to exclude third parties from appropriation, will developing country farming communities be empowered against multinationals. But again, the stumbling block will be the registration of such GIs in databases and, for the farming communities involved, getting acquainted to proprietary rights and using the empowerment in practice. Other developing countries, foremost certain New World WTO Members argue against the registration of GI products, because they have fewer products of their own traditional culture and agriculture that would qualify; given that they have been cultivating Europeanized crop varieties and producing Europeanized foodstuffs instead of their own traditional products.

### **C. Complementary Protection for Traditional Knowledge**

GIs may ensure protection for TK, which for some reason does not fulfil the criteria for patent protection, usually because no TK holder can be identified. How do GIs relate to TK?<sup>153</sup> Traditional Knowledge establishes, as mentioned above, a social relationship between the product and a person, while GIs are 'traditional' insofar as they represent food systems, endogenous to a specific region.<sup>154</sup> Geographical Indications may substitute for IP protection of TK. Even a *sui generis* right may not provide sufficient protection, especially when the TK has been public knowledge and can no longer be assigned to a specific right holder, such as in the Kava case.<sup>155</sup> For example, the US Patent Office granted Natrol, Inc., a US-based Company a US patent for 'kavatrol', a dietary supplement that serves as a general relaxant, composed of Kava, chamomile, hops and schizandra.<sup>156</sup> Two German companies, William Schwabe and Krewel-Werke, obtained a patent for Kava as a prescription drug for treating strokes, insomnia and Alzheimer's disease. In France, L'Oréal has patented the use of Kava against hair loss. The Kava patent firstly raises the issue of pharmaceutical companies misappropriating

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152 See WTO, Communication from Bulgaria, Cuba Cyprus..., supra note 152.

153 See Cottier, T. & Panizzon, M., supra note 4.

154 See id., p. 127.

155 See Nascimento, A., supra note 16.

156 See Downes, D. & Laird, S. A., 'Innovative Mechanisms for Sharing Benefits of Biodiversity and Related Knowledge: Case Studies on Geographical Indications and Trademarks', in: *UNCTAD Biotrade Initiative*, Geneva, 1999, p. 5.



the knowledge of traditional communities about the healing propensities of Kava, in addition to engaging in the biopiracy of the Kava plant's genetic resources. Secondly, the existence of patents based on Kava raises concerns about the conservation and protection of TK related to Kava. The commercialization of Kava-based products has had a negative impact on its conservation. The increasing exploitation of the plant has provoked the harvesting of immature Kava, thus not only jeopardizing the quality of the medicinal product but also reducing its resource base.<sup>157</sup> An intellectual property right may not protect Kava because it is in the public domain and there is no specific TK holder for it, who could apply for TK protection.<sup>158</sup> It is agreed that GIs prove to be the second best option for protecting Kava by acting as a substitute to patent protection of the TK related to the plant itself.<sup>159</sup>

## VII. Conclusions

The advent of the TRIPs Agreement created a new discussion on the relationship of public and appropriated information. The advances of biotechnology, protected by intellectual property, call for new instruments for the protection of Traditional Knowledge. Genetic engineering, which developing countries might rely on for food security, in the light of droughts and floods exacerbated by global warming, bears the risk of further devolving knowledge relating to the conservation and use of traditional crops and thus depleting the heritage of traditional biodiversity and conservation through use. Similarly, the protection of Geographical Indications no longer is exclusively seen as an instrument to protect European values. It equally bears the potential to enhance and diversify products from developing countries. Both, TK and GI protection are inherently linked to liberalization of market access in agriculture. They offer the potential to support niche products and to make a contribution, at the same time, to sustainable agriculture.

Negotiations on TK and GIs are difficult for a number of reasons. As TK is a novel concept, lacking long traditions in national law, it is difficult to define

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157 See Puri, K., 'Is Traditional or Cultural Knowledge a Form of Intellectual Property?' *Oxford Electronic Journal of Intellectual Property Rights*, WP 01/00, available at: <http://www.oiprc.ox.ac.uk/EJWP0100.pdf>, pdf file version of the OHP slides and the accompanying Notes which were first presented at the Oxford University Intellectual Property Research Centre Research Seminar, on 18th January 2000 by Prof. Kamal Puri, pp. 7, 27 (on hold with the authors).

158 See *id.*

159 See generally, Nwokeabia, H., *supra* notes 70-71.

suitable answers on the level of international law. For GIs, the problem is different: here, long-standing experience of extensive protection in European law calls for a new deal and balance in international law. An appropriate level and scope of protection needs to be found. The answers in both areas can and should be based upon the precepts of intellectual property protection. The account of the negotiations, however, also confirms that the subject matter cannot and should not be considered as an issue limited to intellectual property protection.

Separating the TRIPs review from agricultural negotiations does not allow capturing the full breadth and potential of the problems involved in relation to negotiations on agriculture. TK and GIs form part of an effort to support diversification in an increasingly competitive agriculture. They cannot be dissociated and isolated from market access negotiations. Moreover, intellectual property is able to capture merely a fraction of the problem, as information and knowledge often is not assignable and not suitable for appropriation in the first place. It is not an accident that the matter was postponed in July 2004. Broader policies are needed. Indeed, protection of TK should be approached comprehensively across all WTO Agreements in a coherent manner. A two-track approach built upon IPR protection for TK itself and improved market access for TK- and GIs based products and, perhaps, production methods could be one envisaged outcome of the single undertaking of multilateral negotiations under the Doha Development Agenda.

The WTO offers the unique opportunity to trade off TK, as in the information protected by an IPR under the TRIPs, with a concession for increased market access for TK embodied in a product or in production methods under the GATT—what Peter Drahos has termed the ‘skill-embodiment’ and the ‘artifact-embodiment’ respectively.<sup>160</sup> The WTO should thus be the ideal forum for seeking ways to regulate within one single negotiation in one single forum both the protection of TK and market access for TK products.

Claus-Dieter Ehlermann’s argument that ‘[a]n agreement on solutions for these problems might also require a larger menu of subjects under negotiation than are offered by the ongoing talks on improvements and clarifications’, is applicable by analogy to the twin issues of TK and GIs.<sup>161</sup> Empowering a local community or individual holder of TK with the possibility to exclude third parties would not only better balance the benefits which certain plant genetic resources are proven to have for humankind, between the developing and the industrialized WTO Members. It

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160 Drahos, P., ‘The Regulation of Public Goods’, 7(2) *JIEL*, 2004, p. 328.

161 Ehlermann, C.-D., ‘Policy Conclusions’, in: *Preparing the Doha Development Round: Improvements and Clarifications of the WTO Dispute Settlement Understanding*, Conference Report, E.-U. Petersmann (ed.), San Domenico di Fiesole: EUI/RSCAS, 2002, p. 144.

also has the potential of being the first convincing argument and foundation for many developing countries of why to implement the TRIPs Agreement. TK protection in the TRIPs could be traded off by developing countries against the interest of industrial countries to enhance patent protection in the field of genetic engineering and to expand the absolute level of protection for GIs beyond wines and spirits. Even if considered as non-trade concerns of validating traditional lifestyles and preserving biological and cultural diversity, both GIs and TK could make contributions to an equilibrated world trading system.

## **Part V**

# **Doha Round Negotiations on Services Trade**



*Developing Country Proposals  
for the Liberalization  
of Movements of  
Natural Service Suppliers*

*L. Alan Winters\**  
World Bank

This paper is about the developing countries' proposals in the GATS negotiations on the liberalisation of the movement of natural persons to provide services—Mode 4. Trade negotiations in the Doha Round are as mercantilist as ever, and so typically 'proposals for liberalisation' are proposals that other countries should liberalise their imports while the proposing country does next to nothing. As well as being bad economics this also makes it difficult to sort out from initial public positions exactly what the parties want, or even expect, to emerge, i.e. what is actually and realistically proposed and what is just rhetoric. At this early stage in the process of the Doha Round (early in terms of substance if not of calendar time), I have not been able to solve this riddle, so I have set myself a slightly more modest objective.

The paper considers the offers that have been made on Mode 4 by developing countries during the round to date—in part to try to gauge the seriousness of their intent on Mode 4—and also the generalised demands that they have made of developed countries. (I have no access to their specific negotiating requests and therefore cannot comment on these.) I observe, as predicted above, that there is a huge difference in the level of ambition of the two parts of the putative equation.

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\* I am grateful to, but do not implicate, Sumanta Chaudhuri, Bernard Hoekman and Aaditya Mattoo for comments and to Audrey Kitson-Walters for logistical help. The findings, interpretations, and conclusions expressed in this paper are entirely those of the author and do not necessarily reflect the views of the Board of Executive Directors of the World Bank or the governments they represent.

Then, having very briefly noted the extreme caution of developed country offers, and concluded that we are not going to see much progress on Mode 4 during this round, I ask why this is. While the pressures for temporary mobility seem likely to grow as developed countries try to balance their ageing populations with their distaste for permanent migration (at least in Europe), neither side of the developed-developing country debate on Mode 4 seems to expect, or perhaps even wish, much from the process this time around.<sup>1</sup> Hence as well as considering the usual frictions to trade liberalisation—entrenched interests, etc.—I also ask whether the GATS is delivering what we need.

There is a lot to discuss about the economics of the temporary movement of natural persons, but I have done that elsewhere.<sup>2</sup> Thus, this paper is more about the negotiations and their architecture than economics *per se*.

## I. Developing Country Offers

Table 1 lists the developing countries that have made offers on services by April 2004. These cover all four modes but we consider only their Mode 4 components here. They are also, of course, preliminary in the sense that serious negotiation of their content (as opposed to their form) has yet to start. Of the twenty-eight, three of these offers are published on the WTO website and a few others are available via national sites or unofficially. Hence a full and formal analysis of the complete set is not feasible at this stage. On the other hand, private conversations with participants suggest to me a good deal of commonality across offers and that the general tendencies I identify below are not seriously misleading.

Table 2 reports the horizontal commitments in the three schedules that are given on the WTO website. They are fairly typical of the others that I have seen

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1 One interesting reflection due to Aaditya Mattoo is that the relative importance of cultural and displacement fears may influence host countries' preferences between temporary and permanent migration. In Europe, intense cultural xenophobia coupled with relatively benign policies for displaced workers favour temporary mobility. In the USA, on the other hand, with a historical disposition towards migration and a relatively harsh labour market, politics favour permanent immigrants who can be unionised and incorporated into 'the system' to potential 'hit-and-run' competition from temporary migrants.

2 E.g., Winters, L. Alan, 'The Economic Implications of Liberalising Mode 4 Trade', Chapter 4 in Mattoo A and Carzaniga A (eds.) *Moving People to Deliver Services* (2003) 59-92; Winters, L. Alan, Terrie L. Walmsley, Zhen Kun Wang and Roman Grynberg, *Liberalising Labour Mobility under the GATS*, Economic Paper, No. 53, Commonwealth Secretariat (2003); Winters, L. Alan, Terrie L. Walmsley, Zhen Kun Wang and Roman Grynberg, 'Negotiating the temporary movement of natural persons: an agenda for the Development Round', *The World Economy* (2003) 26 (8), 1137-1162.

although I am told that yet others—e.g., India's—are more ambitious. The text reported is extracted and occasionally paraphrased from the initial offers deposited by these countries in 2003. Hence while the information is authentic, the wording is not always that of the official document.

The horizontal schedules are not uniform, but they share a number of themes. All three countries provide market access concessions on senior and skilled intra-corporate transferees and on business sellers (although the terminologies vary). In all cases only 'key' workers are permitted under the intra-corporate rubric and business sellers are precluded from selling directly to the public. Among the differences, the conditions applied to mobile workers differ, with varying periods of stay and of qualification for intra-corporate status. Chile appears to apply a sort of economic needs test to intra-corporate specialists, and she certainly restricts foreign workers to a defined share (15%) of the workforce.

Developing country schedules overall share most of these features. Most of the countries that have made offers are said to be conceding intra-corporate transfers and business sellers and in Latin America maximum shares of the workforce or the wage bill are enforced locally and will be scheduled under the GATS. No developing countries are known to have made horizontal offers on lower-skilled professionals or workers (as they wish industrial countries to do) and very few have done so on independent professionals; several impose specific or vague (implicit) economic needs tests. Overall, so far as I can ascertain, developing countries continue to be actually or potentially quite restrictive on the movement of natural persons in general; they have made concessions in the key areas of interest to developed countries, which are also in their own interests in terms of improving service provision in their own economies.

Table 3 summarises the initial sectoral offers from Turkey and Slovenia; Chile has made none, although she promises to strive to improve her offer, while simultaneously reminding her partners that she has requests as well. The sectoral offers are interesting in detail but given their paucity, the horizontal section of the schedule is the key indicator of progress. Although it is not entirely clear, the way to read the schedules appears to be to take the more restrictive of the horizontal or the sectoral schedules, unless the latter explicitly liberalises or over-rules the former. Specifically, 'none' in the horizontal section—where 'none' is the official term for no restrictions—means 'none except the conditions set out in the horizontal section' (WTO 'Guidelines for Scheduling - L/S/92'). Sectors are exempt from the horizontal restrictions only if the exemption is explicitly noted. This rarely happens, and indeed most sectoral entries add further restrictions, often recording 'unbound', which means that even the restricted horizontal concessions do not apply to that sector, or 'unbound except as indicated in the horizontal section', which means that the horizontal concessions are the only ones that apply. Table 3 records text only where it differs from 'unbound', 'none' or, the ubiquitous 'unbound except as in the horizontal schedule'.



In Turkey education has a potentially more liberal regime than other service sectors, although the basis for licensing teachers is not spelt out. Insurance, on the other hand, has a more restrictive regime with licensing, residence, experience and capital restrictions even for key personnel. Hotels and restaurants have quantitative limits on foreign employment as does shipping (with a 0% quota for foreigners!). Slovenia also further restricts the insurance sector, as well as the accountancy professions and travel agencies. In a piece of local liberalism it permits, however, foreign apprentice mountain guides. This presumably reflects the fact that tour companies have greater political clout than do local young seasonal workers and the need for foreign language skills for an international service.

Most of the remaining schedules are, I believe, not greatly different in flavour from these two. They have very few sectoral commitments and those that are recorded tend to further restrict financial services but liberalise teachers and the hotel trade. Less frequent, but still detectable, are constraints on legal workers, more favourable provisions for foreign doctors, a liberal regime for artists and at least one other country relaxing restrictions for tour guides.

In economic and negotiating terms these offers are fine so far as they go although, as has been noted many times elsewhere, it is difficult to know from the schedules alone exactly how far that is. (One needs country-specific detail and implementation information for that.) Moreover, they are, of course, minimal not actual levels of market access. However, they do not indicate an enthusiasm for foreign workers at any level of skill and they certainly make it difficult for local firms in developing countries to recruit specialists and leaders abroad. If they were keen to see progress on less-skilled workers, developing countries could usefully have established a precedent by scheduling some themselves. If they have excesses of such workers, as one would expect, presumably the inflow would be modest. Where local conditions mean that flows may be larger (e.g., South Africa), developing countries' reticence presumably reflects the same nervousness as developed countries feel about disruption to labour markets and social stresses. By failing to confront it they hardly increase their chances of getting their partners to do so. Overall, these schedules suggest that liberalising flows of less-skilled workers is not just a North-South issue.

## **II. Developing Country Aspirations**

Several developing countries have made statements about Mode 4 in general. These naturally say rather little explicitly about what they would offer and they are not the specific requests that will ultimately drive the negotiation process. Rather, they are broad statements of objectives and motivations for negotiating in

the area. Two among these are notable: an early one from India and a later paper by 14 countries.

The most comprehensive developing country proposal on Mode 4 is from India which is closely related to the one by Chanda<sup>3</sup> who provided the analysis. The proposal provides not only concrete suggestions for areas of further liberalisation in Mode 4, but also detailed administrative procedures relating to Mode 4 visas and work permits and the recognition of qualifications. It is motivated by the view that there is a huge imbalance between current commitments on Mode 3, commercial presence, and those on Mode 4, natural persons.

The communication first points out that existing Mode 4 commitments are largely linked to commercial presence which is of very limited use to developing countries which are interested primarily in the movement of independent professionals and other persons. It argues for adding another category 'Individual Professionals' to the existing categories, in line with India's perceived comparative advantage in the competitive end of the professional market where the competition from large trans-national suppliers is least. Relatedly, it calls for further expansion in the scope of occupational categories to include middle and lower level professionals in the existing coverage of 'other persons' and 'specialists'. This is of interest to many developing countries, who see their comparative advantage lying, if anywhere in skills, in the lower levels. It does not, however, do much for the many relatively small and very poor WTO members which are short of skills and abundant in unskilled labour and hence face potential brain-drain problems. These countries really need to press for low-skilled access, but so far have remained silent.

In support of their objective of extending coverage, the Indians call for uniform definitions of these broader service personnel categories, and propose using the ILO's International Standard Classification of Occupations for the WTO services Sectoral Classification. This is potentially important because specially negotiated classifications can be manipulated to provide tailor-made protection for the sectors in developed countries most at risk from foreign competition, i.e., for sectors where developing countries are most competitive.

India identifies the need for clarity in the definition of and multilateral disciplines on the application of Economic Needs Tests. It calls for the establishment of Multilateral Norms to reduce the scope of discriminatory practices in the use of Economic Needs Tests, for fewer occupational categories to be made subject to such tests and for consensus to be achieved on what such

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3 Chanda, Rupa, 'Movement of Natural Persons and the GATS', *World Economy* (2001) 24 (5), 631-654.

categories should be. On the recognition of qualifications—a major barrier to temporary mobility—India proposes the establishment of multilateral norms to facilitate the recognition of academic qualifications, as well as the recognition of work-related qualifications. The Indians also propose exempting temporary workers from social security contributions.

Perhaps most significantly and innovatively, India makes concrete proposals to separate temporary service providers under the GATS from permanent labour flows, so that normal immigration procedures do not hinder the commitments made on temporary mobility. She proposes introducing a special GATS visa for Mode 4 temporaries outside the normal immigration procedures, with the following features:

- Strict timeframes for granting the visa (2-4 weeks maximum);
- Flexibility for visas on shorter notice for select categories of service providers;
- Transparent and streamlined application processes;
- Mechanisms to find out the status of applications, causes of rejection and requirements to be fulfilled;
- Easier renewal and transfer procedures;
- GATS visas for select companies for use by its employees deputed abroad temporarily; and
- Adequate in-built safeguard mechanisms to prevent temporary service providers entering the permanent labour market.

Other developing country submissions—e.g., by Colombia, Pakistan and Brazil—echo many of the points in the Indian paper—e.g., on economic needs tests and qualifications. The Brazilians also urge the negotiation of a framework before specific issues are tackled. This approach seems very likely to founder at the first stage, which may not be wholly unintentional.

Two and a half years after the Indian submission, a joint statement by 14 developing countries—Argentina, Bolivia, Chile, The People's Republic of China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Pakistan, Peru, Philippines and Thailand – TN/S/W/14 made an eloquent and coherent plea for more progress on Mode 4 in many of the same directions as India. It is not an offer, *per se*, because even where it makes commitments, it is nonbinding on the authors, but nonetheless it identifies clearly the problems that developing countries face in this area. It argues that Mode 4 is the principal way in which developing countries might expect to reap market access benefits in services and

cites indicative evidence<sup>4</sup> on the large magnitude of the gains for both developed and developing countries. It comments, as we do above, that offers to date are modest and barely advance beyond existing schedules. In particular most are horizontal, with no specific sectoral 'flesh' to hang on the horizontal 'bones', and most pertain to service providers associated with commercial presence (intra-corporate transferees) or the highly skilled.

The proponents suggest a special session of the Council for Trade in Services to consider several issues, including:

- The adoption of a classification of service providers separating intra-corporate transferees, business visitors, contractual service providers and independent service providers;
- Serious work to develop sectoral commitments to complement horizontal commitments, and, expressed very mildly, to extend the concessions to lower skilled workers;
- To separate temporary from permanent movement, and specifically to establish a GATS visa, or equivalent;
- To codify or abolish economic needs tests;
- To improve the recognition of qualifications and to ensure that additional testing satisfies a necessity test—i.e., is necessary on objective grounds to test or instil necessary skills to operate in the host markets; and
- To devise a model schedule for Mode 4.

In addition to the major papers, I note in passing some recent advances. Colombia has tabled a proposal on Administrative Procedures relating to visas. India has tabled informal proposals relating to implementation of Article VII of GATS (recognition agreements) and on the recognition of qualifications. And the group of developing countries who had sponsored TN/S/W/14 have co-sponsored an informal proposal on Transparency in Mode 4.

### III. Developed Country Responses

It is early days yet, but one cannot help observing that the developing countries' requests have not been handsomely treated. It is true that the UK has instituted a GATS visa for a limited number of sectors and the EU has made some concessions in its initial offer. In the latter, service companies with graduate

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4 Winters, L. Alan, 'The Economic Implications of Liberalising Mode 4 Trade' Chapter 4 in Mattoo, A. and Carzaniga, A. (eds.) *Moving People to Deliver Services* (2003) 59-92.

training programmes will be able to transfer their ‘managers of the future’ for up to one year training with an affiliated company in the EU. Other intra-corporate transfers are possible for managers and specialists for a maximum of three years without an economic needs test. Companies in specified sectors which have contracts to provide services with a client in the EU will be able to send *highly skilled* personnel<sup>5</sup> to the EU to provide these services for up to six months at a time. Finally, self-employed skilled professionals, again only in certain sectors (for example computer services, engineers) and who are based overseas will be able to enter the EU for up to six months to provide services to EU clients. Under the EC offer, Member States will continue to be able to refuse entry to persons that pose a security threat or that are considered to be at risk of abusing the terms of their entry. This is not a handsome offer, despite the EU’s evident pride in its boldness, and there is even some debate as to whether it lies within the competence of the EU to offer even such modest concessions on behalf of its members.

Other developed countries have done no better, at least formally through the GATS, although via unilateral actions we have seen a bit more progress. The UK has liberalised its regime somewhat with GATS visas in certain sectors, increased quotas in others and a general loosening of implementation barriers (and an associated liberalisation in official rhetoric). Similarly the United States has proposed ways of regularising illegal workers and increasing their flow. Overall, however, we are little nearer to liberalising lower-skilled mobility nor to addressing issues such as economic needs tests, qualifications or social security.

#### IV. Why so Modest?

The aggregate gains from increased labour mobility are potentially huge. One does not have to take the various estimates literally<sup>6</sup> to see that the possibilities far outweigh those of further liberalising goods trade. This section explores why we are seeing such slow progress.

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5 The person must possess (1) a university degree or equivalent technical qualification, (2) professional qualifications where this is required to exercise an activity in the sector concerned according to EC law or the law of the Member state where the service is provided and (3) at least three years of professional experience in the sector.

6 E.g. Winters, L. A., ‘Assessing the Efficiency Gain from Further Liberalization: A Comment’ in Sauve, P. and Subramanian, A., (eds.) *Efficiency, Equity and Legitimacy: The Multilateral Trading System and the Millennium* (2001) 106-113; Winters, Walmsley, Wang and Grynberg, *supra*, n. 2; Rodrik, D., *How to make the trade system work for development*, (2004) mimeo, <http://ksghome.harvard.edu/~drodrik.academic.ksg/How%20to%20Make%20Trade%20Work.pdf>.

One argument is that I may have the wrong measure: negotiations have not become serious yet and so one can read little into the initial offers. Clearly there is some truth to this, but in goods we do observe initial offers being used both as challenges to partners to make concessions in specific areas and as ways of signalling intent to press for far-reaching deals. I do not detect these forces in the services schedules, although I do expect offers to become a little more daring over time.

Relatedly, the explicit trade-off in the Uruguay Round, and the expected one in this Round was Mode 3 concessions by developing countries in return for Mode 4 concessions by developed countries. Since developing countries are making less offers in Mode 3, perhaps they feel no need to make them in Mode 4. Again, there is truth in this, but the trade-off did not work very well before and so the bargain is very likely to become 'within Mode 4' this time as well. Hence, making offers in Mode 4 would be likely to facilitate receiving them.

It is also argued that until the developed countries show a willingness to engage in Mode 4, it is unreasonable to ask the developing countries who, outside intra-corporate transferees, are the *demandeurs* to make extensive offers. This is the stalemate that I hope will be broken and the fact that it has not been so far bodes ill for the future and leads me to believe that developing countries are substantially nervous about this area.

This nervousness partly reflects the fact that migration and temporary mobility are more threatening than ordinary trade liberalisation because they raise the spectre of cultural and social strife. A well-run temporary mobility scheme (which ensures, by and large, temporariness) should circumvent long-run fears of this kind because it shows the local population that integration is not intended. On the other hand, by leaving the temporary migrants out of the mainstream one makes them more isolated and more visible, which could exacerbate short-run frictions. My own belief is that the former effect should dominate (especially if the rhetoric shifts from 'sponging aliens' to 'essential service providers'). However, I note that the eminent Copenhagen Consensus<sup>7</sup> castigated guest worker schemes on the grounds that they prevented the integration of the migrants into local society.<sup>8</sup> The issue remains open.

A further related, worry is that temporary mobility is seen as the first step towards permanent or very long-lived migration—as, for example, Germany's *gasterbeiter* system turned out and the USA's H1-B visa scheme is basically

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7 *The Economist*, June 11, 2004.

8 Has anyone else noted the irony of a group of temporary workers—the Consensus Panel travelled to Denmark and worked there—castigating temporary mobility?

intended to be. Thus issues of migration and labour market policies become involved very directly and these typically lie with ministries that are not instinctively outward-looking. Moreover, temporary schemes are complex to legislate and administer, so these ministries have concrete objections as well. Immigration officials dislike sector-specific visa regulations—as GATS calls for—because they increase the administrative burden.<sup>9</sup> These latter issues apply to genuinely temporary as well as pseudo-permanent mobility.

The labour market effects of the temporary mobility of the lower-skilled fall heavily on local less-skilled workers. In high- and middle-income countries these have long been a favoured group in trade-policy terms, ostensibly being the main beneficiaries of protection—e.g., in agriculture, clothing and footwear. Moreover, in arguing for the liberalisation of imports of unskilled labour-intensive goods, protagonists have often implicitly fallen back on the existence of less-skilled jobs in the non-traded sector ('a nation of hamburger-flippers'). Mobility threatens these jobs (or the wages in them) too, and so encounters even more strongly the traditional biases and concerns. Moreover, although I have argued previously that the educated and ageing rich countries are going to run out of unskilled labour soon, the higher levels of unemployment among the less-skilled in those countries suggest that we haven't got there yet.

It is worth reiterating that the resistance of unskilled workers to immigration is not restricted to richer countries. Even in poor developing countries such fears are heard. This—along with social/racial concerns—could well explain why developing countries have not been bolder in their schedules.<sup>10</sup>

Competition from abroad is now visiting itself upon more-skilled, middle-class, jobs as well as the unskilled. The outsourcing debate partly reflects this phenomenon, but so too do the debates over the regulation and qualifications of foreign workers. The traditionally self-regulating professions have long sought to control competition by managing trainee numbers, and are now active in trying to preclude foreign competition via qualification restrictions; for example, the USA, State Bar Associations significantly restrict inter-state commerce in lawyers. Thus, interest groups throughout the economy are resistant to admitting competing labour. Moreover, middle-classes are much more articulate, networked and influential than less-skilled workers, so we must expect the opposition to be fierce, especially in developing countries where the relatively smaller middle-class

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9 Chaudhuri, S., Mattoo, A., and Self, R., (2004) 'Moving people to deliver services: how can the WTO help?' *Policy Research Working Paper*, No 3238, The World Bank (2004).

10 It is possible that the Indian proposals on contractual service providers could extend to less skilled workers, but it does not seem very likely.

reaps all the adverse consequences of competition but only a share of the consumer gains from lower prices and more choice.

As always, export interests are less well organised and motivated than import-competing ones: the identities of the gainers are less clear and the gains may be eroded by future entry anyway. In Mode 4 the Indians have led on independent professionals, however. Several possible rationales exist: to try to cement down the willingness of the EU to grant concessions in this area, because India's strong endowment of such workers makes this a national interest and, very probably, because India has strong professional associations. It is also worth speculating that many senior Indian decision-makers have children entering the professions whose levels of education are sufficient to practice in the United States or Europe and whose incomes would be greatly enhanced by doing so. Thus pushing on 'independent professions' marries public and private policy. Such pushing, however, may not be to the advantage of smaller, poorer, developing countries with scarce professional skills. They may suffer more seriously from a 'brain drain'.<sup>11</sup> This possible division of interests in the developing world could also help to explain why we have not seen strong coalitions growing up. The traditional 'foot-soldiers' of the developing country caucus may recognise that they have different interests from the traditional 'captains'.

An important counteracting force—as in intermediate goods trade—is firms which wish to use foreign labour; these are likely to push for increased mobility. Examples include the IT sectors in the USA, UK and Germany in the early 2000s, the medical profession seeking nurses and doctors, and agriculture seeking pickers and packers. These groups are certainly behind the expansion of mobility schemes but, naturally, mainly for their own specific requirements rather than for labour in general. In goods trade, users lobby for free trade in their inputs and also quite often for liberalisation elsewhere in their economies so that, via reciprocity, other countries will relax restrictions on the users' exports. In labour mobility, the pressure for general liberalisation is lost because, with one exception, none of the users exports labour. The exception, of course, is multinational companies whose desire to both 'export' and 'import' their own employees lies behind the progress on intra-corporate transferees.

Finally, having spent much of the last few years exploring issues of migration—permanent and temporary—I can assert that they are very complicated. Even qualitative results are hard to establish unambiguously and quantitative ones are rarely credible. In the absence of a well-defined calculus of

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11 The brain drain is less of an issue with temporary than with permanent mobility, but problems cannot be ruled out.



net benefits, policy-makers will tend to be cautious—exactly as they were over agriculture until the OECD provided some clear numbers in the mid-1980s.

To ask why there is so little movement on the GATS is not to imply that there is no movement on temporary labour mobility, however. In fact there is, but not via the GATS. Temporary labour schemes currently exist, and, as I noted above, are being extended and improved. But not multilaterally. This may indicate either that there is no demand for a multilateral input on labour mobility or that there is demand but the GATS cannot satisfy it.

One possibility is that the constituencies that would naturally lobby for agreements on Mode 4 can be satisfied without it. On the unskilled labour front the safety valve for the agriculture, hotels and tourism and clothing sectors may well be illegal migration. If, despite the hostile rhetoric towards foreign workers, they get the labour they want, why bring things out into the open? On more skilled labour the situation is probably that direct targeting of specific sources of labour is cheaper and more reliable (because there are fewer qualifications and education systems to understand) than global search, so that that is what users lobby for.

Breining, Chadha and Winters consider this question in a study of temporary mobility in the health sector, specifically, the flow of doctors from India to the UK.<sup>12</sup> They observe that medical mobility already satisfies many of the conditions that informed scholars of Mode 4 such as Mattoo<sup>13</sup> urge on negotiators. For example, to qualify to practice in the UK doctors need to prove their suitability via a test of competence and language (the PLAB); they do not need to undergo duplicative training or meet extensive residence requirements as are found with some other professions. That is, the qualifications test focuses on necessary fiduciary issues rather than irrelevant formalities. Moreover, the WHO accreditation of medical training facilities goes a long way towards achieving mutual recognition of primary medical qualifications, for the UK recognises preliminary medical training given in any WHO accredited institution. Moreover, India and the UK are almost as good a pair of negotiating partners as one is likely to find.<sup>14</sup> India is the UK's principal supplier of non-EEA doctors and the UK one

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12 Breining, C., R. Chadha and L. A. Winters, 'The temporary movement of workers: GATS Mode 4', Chapter 3 in *Bridging the Differences: Analyses of Five Issues of the WTO Agenda*, Consumer Unity Trust Society (2003) 111-146.

13 Mattoo, Aaditya, 'Developing Countries in the New Round of GATS: Towards a Pro-Active role' *World Economy* (2000) 23, 471-90.

14 Even though health and education are national competences in the EU, the formal negotiation would be between the European Union and India, because the Commission has responsibility for all negotiations in the WTO, even where, as here, the issues at stake are national competences.

of India's principal markets.<sup>15</sup> This maximises the internalisation of the negotiation, and in so doing will encourage agreement.<sup>16</sup>

Despite these apparent advantages, doctors never figure explicitly in GATS Mode 4 commitments and medicine is not included in the sectors for which the UK will now issue 'GATS visas' or in the favoured sectors in the EU's GATS offer. Partly this may just be because the mobility of health workers is well established and is seen by government as part of the health and employment portfolios rather than the trade nexus—i.e. no-one thought of using the GATS in this context. It might also be because the current balance between supply and demand means that there is not much value-added to the GATS. Indeed, the GATS could increase the bureaucratic cost of medical mobility, since the UK's current 'permit-free' schemes for doctors are light-handed relative to other international mobility.<sup>17</sup>

A more likely candidate, however, is concern about the inflexibility of the GATS. In the absence of a safeguards clause it would be arduous to reduce inward mobility below bound levels if circumstances changed. And given the very long gestation period for doctors, the authorities will wish almost all short- to medium-term demand fluctuation to be accommodated by 'imports'. A cohort of unemployed domestic doctors would be a very awkward political constituency. Also both sides wish to avoid the MFN clause. European countries appear to want to be able to target specific countries for specific services. This is especially true where language, culture or qualifications are concerned—for example Commonwealth citizens receive favourable treatment in several UK temporary immigration schemes—or where they offer training, in which case 'aid-like' considerations occur. On the Indian side, applying the MFN clause would increase competition in the UK for migrant doctors places, almost certainly reducing the numbers of Indians or their rewards. That is, binding in the GATS would reduce internalisation. These arguments, of course, also apply to preferential trade in goods, and, at least for around 40 years, we largely overcame

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15 The UK is obliged to recognise qualifications from the European Economic Area and to impose no restrictions on the employment of EEA nationals.

16 See on internalisation in GATT negotiations: Finger, J. M., 'Trade liberalization: a public choice perspective' in Amarcher, R. C., Haberler G. and T. D. Willet (eds.) *Challenges to a Liberal Economic Order* (1979) 421-61; Winters, L. Alan 'Reciprocity' in: J. M. Finger and A. Olechowski (eds.), *A Handbook on the Multilateral Trade Negotiations*, The World Bank (1987) 45-51.

17 Once an overseas doctor has a training job in a UK hospital he/she has no need to apply for a work permit. By 'training jobs' I mean jobs for junior doctors who undertake a great deal of clinical work, but who also received advanced training in their specialities. They are typically time-limited and expire when training is completed.

them in the GATT. However, given that integrating people is more demanding than accepting foreign goods, they are possibly stronger for Mode 4.

The MFN obligation in the GATS applies to all services trade whether scheduled or not (unless a measure has been explicitly excepted from MFN, and even that is time-limited). Thus there is some chance that all bilateral labour mobility arrangements, except those forming part of a fully-blown preferential arrangement, could be challenged and possibly ruled WTO-inconsistent. That would not be helpful. Some commentators are starting to say that since the issues are so sensitive and so case-specific that progress will be possible only bilaterally, we should bow to the inevitable and let the GATS recognise bilateral deals. I agree that for many years most temporary mobility deals will be bilateral, but I would rather leave them out of the GATS than dilute the fundamental non-discrimination principle of the GATT and the WTO. Thus while there is clearly a case for ensuring that bilateral deals on Mode 4 cannot be taken to the dispute settlement procedure, I would not recognise them formally under the GATS and would certainly not allow them to be scheduled or enforced via its procedures. Bilateralism is likely to create friction in temporary mobility and there is a case for keeping that friction out of the WTO. Moreover, bilateralism in goods is economically and politically destructive and will become (even) harder to resist if we concede on Mode 4.

## V. Conclusions

Developing country offers in Mode 4 are unambitious; their general demands are reasonable, but these are not supported by their offers or negotiating tactics, partly because interests differ across developing countries. The developed countries, on the other hand, have breathed a sigh of relief and offered almost nothing under Mode 4, despite stealthily liberalising labour mobility via other mechanisms. The forces ranged against Mode 4 are formidable, so it will be a long and uphill struggle to establish it, not least because bilateralism looks more feasible in most cases. Nonetheless, I would oppose dropping demands for the liberalisation of lower-skilled labour mobility under the GATS, and I would have the GATS ignore rather than condone bilateral arrangements. By seeking to keep unskilled labour in and bilateral deals out, I would clearly be reducing the amount of liberalisation that could be attributed to the GATS, but at least, I would be upholding the fundamental principles of equity and non-discrimination.

**Table 1**  
**Developing and Transition Country Services Offers**  
**up to April 2004**

Argentina	Mexico
Bahrain	Panama
Bolivia	Paraguay
Bulgaria	Peru
Chile	Poland
China	St Christopher & Nevis
Colombia	Singapore
Costa Rica	Slovak Republic
Czech Rep	Slovenia
Fiji	Sri Lanka
Guatemala	Suriname
India	Thailand
Macao, China	Turkey
Mauritius	Uruguay

**Table 2**  
**Horizontal Commitments – Turkey, Slovenia, Chile**

<b>Turkey</b>	
<b>Market Access</b>	<p>Unbound except for the entry and temporary stay of natural persons in the following categories:</p> <p>A. Administrative and technical personnel of established foreign service providers: Work permits and residence permits are valid up to 2 years, and subject to renewal. This includes: managers-executives, specialists, and service sellers.</p> <p>B. Service sellers: It is not necessary to obtain work permits and residence permits for service sellers who stay in Turkey for not more than 30 days, for the purpose of participating in business meetings, business contracts including negotiations for the sale of services, entry into contract to sell services and visits of business establishments, or other similar activities.<sup>a</sup> Service sellers may not sell services directly to the general public.</p>
<b>National Treatment</b>	<p>The professional services which are assigned only to Turkish citizens by the specific laws cannot be rendered by foreigners either as service providers or as the personnel of service providers. On the other hand foreign citizens with Turkish origin may work in professions which are assigned only to Turkish citizens with the permission obtained from the Ministry of Interior. Those professions which are assigned only to Turkish citizens are given below:</p> <p>1) Doctors, 2) Pharmacists, 3) Nurses, 4) Veterinarians, 5) Responsible directors of the factories producing medicine, 6) Guides, 7) Responsible directors of private hospitals, 8) Responsible directors of travel agencies, 9) Directors of newspaper, 10) Dentists, 11) Notaries, 12) Those personnel working in Free Trade Zones other than managers and qualified personnel, 13) Those personnel undertaking coastal commerce and related activities, 14) Opticians, 15) Doctors, pharmacists and veterinarians dealing with laboratory services, 16) Lawyers who practice in Turkish Courts, 17) Accountants and Certified Public Accountants.</p> <p align="right"><i>(cont.)</i></p>

a Note: Turkish legislation related to taxation, prudential and professional competency requirements, and immigration policies has not been listed separately in this schedule.

<b>Slovenia</b>	
<b>Market Access</b>	<p>Unbound, except for measures concerning the entry into and temporary stay, without requiring compliance with an economic need test,<sup>b</sup> of a natural person which falls in one of the following categories:</p> <p><u>Business visitors</u> A natural person, who stays in the Republic of Slovenia without acquiring remuneration from or within the Republic of Slovenia and without engaging in making direct sales to the general public or supplying services, for the purpose of participating in business meetings, business contacts, including negotiations for the sale of services, or other similar activities, including those to prepare the establishment of commercial presence in the Republic of Slovenia. The duration of temporary stay is limited with a 90 day visa.</p> <p><u>Intra-Corporate Transferee<sup>c</sup></u> Natural persons of another Member who have been employed by juridical persons of another Member for a period of not less than three years immediately preceding the entry or have been partners in it (other than majority shareholders): (a) Natural persons occupying a senior position. (b) Natural persons working who possess special knowledge and uncommon qualifications essential to the establishment's service, research equipment, techniques or management. The duration of temporary stay for 'intra-corporate transferees' is limited with a residence permit, which may be granted for up to one year with extensions.</p>
<b>National Treatment</b>	<p>Unbound except for measures concerning the categories of natural persons referred to in the Market Access Column.</p> <p>To the extent that any subsidy is made available to natural persons, their availability may be limited to nationals of the Republic of Slovenia. <i>(cont.)</i></p>

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- b All other requirements of laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements.
- c An 'intra-corporate transferee' is defined as a natural person working within a juridical person, other than a non-profit making organisation, established in the territory of a WTO Member, and being temporarily transferred in the context of the provision of a service through commercial presence in the territory of the Republic of Slovenia; the juridical persons concerned must have their principal place of business in the territory of a WTO Member and the transfer must be to an establishment of that juridical person, effectively providing like services in the territory of the Republic of Slovenia.

<b>Chile</b>	
<b>Market Access</b>	<p>Unbound, except for transfers of senior and specialized natural persons within a foreign enterprise established in Chile, who have been in the employ of the organization for a period of at least two years immediately preceding the date of their application for admission. Foreign natural persons may not make up more than 15 per cent of the total staff employed in Chile. For all legal purposes, senior and specialized personnel must establish domicile or residence in Chile. Senior personnel are executives and specialists with indispensable skills.</p> <p>Specialists must have skills not available in Chile.</p> <p>Service providers are admitted into Chile temporarily for a period of two years which can be extended for a further two years. Personnel admitted under these conditions will be subject to the labour and social security legislation in force.</p>
<b>National Treatment</b>	<p>Unbound, except for the categories of natural persons listed under market access.</p>

**Table 3**  
**Sectoral Commitments – Turkey, Slovakia**

<b>Turkey</b>	
<b>Sector</b>	<b>Market Access</b>
<b>Primary, secondary and other educational services</b>	Foreign teachers and experts may work in pre-primary, primary and secondary educational institutions and in non-formal educational institutions (i.e. in language teaching and vocational training centres) after obtaining permission from the Ministry of Education.
<b>Insurance</b>	Engaging of natural persons in a brokerage business or establishment of an insurance and reinsurance broker company or opening of a branch of a foreign insurance and reinsurance broker company in Turkey is subject to prior permission and obtaining an operation licence from Undersecretariat of Treasury. Such a firm must be founded in the form of a joint-stock or a limited liability company, and must possess the required minimum paid-in capital.
<b>Services auxiliary to insurance</b>	Foreign commercial presence or presence of foreign natural persons regarding services auxiliary to insurance is permitted only for consultancy and risk management. Natural person insurance and reinsurance brokers have to reside in Turkey and they must have at least 5 years of experience as brokers in their countries of origin. Unbound except administrative and technical personnel. Foreign natural person insurance and reinsurance brokers must have at least 5 years of experience as a broker abroad.
<b>Collective investment management</b>	4) The majority of the members of the board of directors of an investment corporation must have Turkish nationality.  <i>(cont.)</i>



<b>Hotel and restaurants</b>	4) After receiving the permission of the Ministry of Interior based on the affirmative opinion of the Ministry of Culture and Tourism, the hotels and restaurants with the tourism encouragement certificate, may employ foreign personnel. But the amount of foreign personnel employed in an enterprise should not exceed 10 per cent of the total personnel. This amount could be increased up to 20 per cent by the decision of the related Ministry.
<b>Passenger and freight transportation</b>	Captain and crew of the Turkish flag vessels should be Turkish residents.
<b>Slovenia</b>	
<b>Sector</b>	<b>Market Access</b>
<b>Accounting, auditing and bookkeeping services<sup>d</sup></b>	Unbound except as indicated in Part I and subject to limitations on natural persons employed by juridical persons only.
<b>Services auxiliary to insurance</b>	Unbound except as indicated in Part I and for actuarial and risk assessment for which residence is required in addition to a qualifying examination, membership in the Actuarial Association of the Republic of Slovenia and proficiency in the Slovene language.
<b>Travel agencies and tour operators</b>	Unbound except as indicated in Part I and that a licence of the Slovenian Chamber of Commerce is required (for consumer protection purposes).
<b>Other: mountain guides services</b>	Registration is required (for consumer protection and safety purposes). Unbound, except as indicated in Part I and training, one year of apprenticeship and examination are required for acquiring mountain guide qualifications. Registration in the Register of active mountain guides is required. <sup>e</sup>

d According to Slovene Law, auditing services are a matter of firms, not natural persons.

e Mountain guides from abroad are temporarily allowed to guide groups from their country being subject to membership of the IFMGA and registration in the national Register of active mountain guides is required.

## *Navigating between the Poles:*

### **Unpacking the Debate on the Implications for Development of GATS Obligations Relating to Health and Education Services**

*J. Anthony VanDuzer*

University of Ottawa

#### **I. Introduction**

Differences of opinion are stark regarding the implications of the General Agreement on Trade in Services (GATS) for public services like health and education in developing countries. Some believe that GATS poses no threat at all to these essential services and, in some circumstances, may contribute to their more effective delivery and regulation. Others are vehemently opposed to trade liberalization commitments of any kind in these areas and view GATS as a significant threat to the effectiveness and even the viability of national health and education systems.

GATS proponents emphasize that GATS allows countries to tailor their commitments to calibrate the level of obligation in ways consistent with national policy objectives. They point out that there is no obligation on any WTO Member to accept the higher tier of GATS obligations, including national treatment and market access, for any particular service and the basic obligations applicable to all services, like most-favoured-nation (MFN) treatment, do not represent any meaningful limitation on regulatory flexibility. In any case, GATS does not apply to most publicly delivered health and education services. These are completely excluded from the scope of all GATS obligations. Most GATS proponents readily admit the fundamental importance of equitable access and other non-commercial goals that inform national policies in health and education. They assert, however,

that GATS commitments to trade liberalization not only can be compatible with such goals but can make their achievement more likely.<sup>1</sup>

Many GATS critics start from a philosophical objection to a trade regime in which health and education services are treated like commodities. Trade liberalization commitments are viewed as serious constraints on the ability of developing country governments to achieve equitable access to basic health and education services and other objectives sought to be fulfilled by government schemes governing the regulation and delivery of these services. In particular, liberalization commitments are seen as contributing to the development of two tier markets in health and education under which public services will be undermined and developing country citizens who are the poorest or in rural areas will see a diminution of badly needed health and education services so that already better off and better served urban segments of the population will benefit.<sup>2</sup>

GATS critics assert that GATS' vaunted flexibility is constrained in practice for developing countries by the power dynamics of trade negotiations and capacity limitations that systematically disfavour developing countries. GATS' obligation to engage in successive rounds of negotiations with a view to progressively liberalizing trade in services ensures that there is ongoing pressure to improve liberalization commitments. The critics argue that any flexibility that may be accorded in the architecture of the agreement is lost when commitments are undertaken. In their view, GATS commitments lock-in liberalization programmes such that subsequent policy reform to return to local private or public delivery is precluded. The dynamic nature of regulation and services delivery in health and education combined with the uncertain scope of GATS obligations make locking in a specific approach to regulation and delivery inappropriate and undesirable.

The reality for developing countries, of course, is much more complex than either of these polar positions suggests. Before deciding on what GATS commitments to undertake in health and education, developing countries must make prior policy choices regarding how much private sector participation to

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1 Examples of commentators who, in general, argue in favour of this view include R. Adlung, 'The GATS Negotiations: Implications for Health and Social Services' (2003) 38 *Intereconomics* 147; and P. Sauvé, *Trade, Education and The GATS: What's In, What's Out, What's All The Fuss About?* (2002).

2 E.g., South Africa's Minister of Education, Kamal Asmal, once warned the South African parliament that 'We must avoid at all costs a GATS in education...', quoted in L. Mabuza, *Who's in and Who's out? Country Responses to Education and GATS, Report of the Fifteenth CCEM Preliminary Meeting on Education and the General Agreement on Trade in Services: What Does the Future Hold?* (May 2003). A similar view was expressed in the 'Porto Alegre Declaration' by a conference of Latin American and Iberian universities in Porto Alegre, Brazil on April 27, 2002.

permit in the delivery of these services. Both health and education are basic government responsibilities and states are extensively involved in regulating, funding and delivering services in these areas. But governments everywhere are considering, or are actually engaged in, reforms to privatize public services or commercialize services delivery in an effort to improve accessibility and control costs. Whether and how to move forward with such reforms are fundamental and often hotly debated domestic issues. Developing country governments must assess the costs and benefits of privatization and commercialization in health and education services measured against the achievement of their development objectives. The desirability and impact of privatization and commercialization on development in each country will depend very much on local conditions including the state's capacity for effective domestic regulation of private sector suppliers.

One question for developing countries in this regard is whether there would be benefits resulting from permitting foreign firms to provide privatized or commercialized services. For example, countries must determine the extent to which opening health and education sectors to foreign investors would lead to more money flowing to improving health and education facilities and better access to desperately needed health and education services than if investment were limited to domestic sources.

A secondary question for developing countries that have decided to liberalize their markets for health and education services is to determine the prospective contribution of GATS commitments in health and education services to obtaining the net benefits of trade liberalization. Many states are successfully liberalizing their regimes relating to health and education services without making GATS commitments to do so. In the current round of GATS negotiations there is little pressure on developing countries to adopt stronger commitments in these areas from WTO Members. At the same time, there is some uncertainty regarding both the scope and nature of GATS obligations and the trade benefits associated with making specific GATS commitments in these sectors. In this context, many developing countries are understandably reluctant to undertake commitments that would limit their future policy options.

This paper sketches the by now familiar outlines of the debate on the liberalization of public services in developing countries focusing on health and education. It then provides a brief overview of the relatively limited existing GATS commitments in these sectors and the low priority attached to improving commitments in the current negotiations. The final sections of the paper look at why there is so little interest in GATS commitments among WTO Members and suggest some possible strategies for making the GATS more relevant to improving the regulation and delivery of health and education services in developing countries.

## **II. An Unscandalized Discussion of Trade Liberalization in Health and Education**

### **A. Introduction – Health and Education Services under the GATS**

GATS applies to all measures affecting trade in health and education services. The only true exclusion from the application of the agreement is for services ‘supplied in the exercise of governmental authority’ which would include, at least, health and education services provided exclusively by the state without charge to its citizens. In terms of obligations, GATS creates both a general framework that applies to all services subject to the agreement and a set of additional obligations for each WTO Member that apply to the treatment of particular services activities that the Member has agreed to list in a national schedule of commitments.

The most important general rule is the obligation to grant MFN treatment to foreign services and service suppliers of other Members. This means that Members must treat services and service suppliers from other Member states no less favourably than those from any other country. For this obligation to apply, services or the service suppliers must be in similar categories. In the language of the WTO agreements, they must be ‘like’.

For every services activity that is listed in its national schedule, a Member commits to a higher level of obligation. A Member must grant foreign services and service suppliers national treatment (meaning treatment no less favourable than the treatment of like domestic businesses) and cannot impose certain restrictions on market access. The national treatment and market access obligations for listed sectors may be circumscribed by express limitations inscribed by each Member in its schedule.

As well, for listed sectors, each Member must ensure that all measures of general application are administered in a reasonable, objective and impartial manner. Measures relating to qualification requirements and procedures, technical standards and licensing requirements in these sectors cannot nullify or impair the Member’s specific commitments in listed sectors by imposing requirements or standards not based on objective and transparent criteria, such as competence and ability to provide the service, or that are more burdensome than necessary to ensure the quality of the service. In the case of licensing procedures, the procedures themselves must not be a restriction on the supply of a service.

GATS contains no definition of health or education services. Most WTO Members scheduled their specific commitments for particular services with reference to the Services Sectoral Classification List developed during the Uruguay round of negotiations which is based on and refers to the categories in

the United Nations Provisional Central Product Classification.<sup>3</sup> In the Classification List, 'Health related and social services' is a distinct category of activity including hospital services and an undefined array of 'other human health services not elsewhere classified' that includes the services of long term residential health care facilities and ambulance services and likely extends to public health and health promotion, laboratory and diagnostic services. The services of health professionals, including physicians, dentists, nurses and others, are listed under Business Services. Health insurance is categorized as a financial service. Education services referred to in the Classification List include not only primary and secondary education and higher education at colleges and universities, but also adult education and 'other education'. This last category likely encompasses a wide variety of commercial training programs and in-house training by businesses. The Classification List provides little guidance on how to define education services beyond these basic categories.<sup>4</sup>

### **B. The National Policy Context for Trade in Health and Education**

One of the distinctive features of national regimes governing health and education services, as compared to most other services, is that they must be responsive to a complex matrix of important policy objectives and involve a high level of state engagement as a funder, regulator and service provider.<sup>5</sup> These characteristics make health and education services particularly challenging to address in a trade agreement, like GATS, that creates disciplines applicable across a broad range of services activities.<sup>6</sup>

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3 GATT, Services Sectoral Classification List: Note by the Secretariat (10 July 1991), GATT Doc. MTN.GNS/W/120. This classification is based on the United Nations *Statistical Paper Series M No. 77, Provisional Central Product Classification* (1991). Most Members identified the services activities with respect to which they were assuming obligations by reference to the Secretariat's classification and the corresponding categories in the Provisional CPC Classification, though, as noted below, many customized their commitments in health and education by adopting additional distinctions.

4 The Provisional CPC, *ibid.*, adds little in the way of elaboration. See Provisional CPC code 92.

5 The WTO Secretariat describes health as operating at the 'borderline between public and private spheres' (WTO, Council on Trade in Services, Health and Social Services: Background Note by the Secretariat, 1998 (S/C/W/50) at 8).

6 That is not to say that other services do not operate in an environment defined by important non-commercial policy considerations and complicated regulatory structures. Financial services and telecommunications are examples. The direct human impact and level of public sector engagement in regulation and direct delivery in every country, however, make education and health distinctive.

Equitable access to a basic level of health and education is widely considered to be a human right and a fundamental responsibility of the state. Public policy in health and education is related not just to quality, the central preoccupation of policy making in most other services areas, but also to a variety of other objectives including equitable access to services and consumer protection as well as the efficient allocation of resources.<sup>7</sup> In health, the greatest challenge for government policy-makers in all countries continues to be how to manage escalating expenses resulting from increased costs of treatment and demographic shifts while ensuring the quality and accessibility of treatment. Education policy must deal with cost pressures, consumer protection and access concerns as well but must also safeguard the role of education as the primary mechanism for the transmission of national values and culture and in preparing a nation's people for citizenship.

For developing countries especially, improvements in health and education are closely linked to economic development. With respect to health, the recent report of the WHO Commission on Macroeconomics and Health has demonstrated the relationship between health and poverty reduction. The Commission found that better health contributes to:

- Higher rates of labour productivity;
- Higher rates of domestic and foreign investment;
- Improved human capital; and
- Higher rates of national savings.<sup>8</sup>

The contribution of education to development is also well established.<sup>9</sup> Indeed improvements in health and education outcomes are related. For example, education is one of the most effective means of combating the transfer of HIV/AIDS.<sup>10</sup> In recognition of the key role of health and education in development, improvements in both areas are implicated in the first six of the eight millennium development goals set by the United Nations.

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7 D. Lipson, Comments, OECD-WB Services Experts Meeting, 4-5 March 2002.

8 World Health Organization, Commission on Macroeconomics and Health: Investing in Health for Economic Development, online at <http://www.cid.harvard.edu/cidcmh/CMHReport.pdf> (date accessed June 10, 2004); see also, World Bank, *Development Report for 2004: Making Services Work for Poor People*, chapter 8 online: <http://econ.worldbank.org/wdr/wdr2004/text-30023/> (date accessed June 10, 2004).

9 UNESCO/OECD, *Financing Education – Investments and Returns, Analysis of the World Education Indicators 2002 Edition* (2003); World Bank *Development Report 2004*, *supra* n. 8., chapter 7.

10 OECD, 'Poverty and Health in Developing Countries: Key Actions' *OECD Observer* (November, 2003).

Another distinctive attribute of the health and education sectors is that both are characterized by market failures. Simply stated, this means that because of a lack of consumer resources, information asymmetries between consumers and providers of health and education services and other market distortions, private sector suppliers on their own would not supply health or education services at minimally necessary levels of quantity and quality.<sup>11</sup>

The combination of these factors has meant that a very large segment of both health and education services are delivered or funded, in whole or in part, by the state in all countries. Approximately fifty percent (50%) of health services in developing countries are publicly funded.<sup>12</sup> Public spending on education varies substantially from one country to the next but represents more than 1/2 of total education expenditure in every country.<sup>13</sup>

In almost all developing countries, the extensive presence of the state is complemented by some level of private funding and delivery of health and education services. In part, this is because of the inability of developing country governments to provide fully adequate services in these areas. Private and public systems may operate in parallel but in most developing countries are closely intertwined. Typically some form of public funding is provided to support the private delivery of basic health and education services. The role of the private sector is expanding in many jurisdictions as governments seek new ways to enhance service delivery and manage escalating costs, such as by privatizing state-run services or introducing competition or other commercial considerations into services delivery. Because of the compelling and varied policy objectives associated with health and education and the state's role as a major funder, private services in these areas are closely regulated.

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11 C. Blouin, 'Economic Dimensions and Impact Assessment of GATS to Promote and Protect Health' in C. Blouin, N. Drager and R. Smith, eds. *Trade in Health Services, Developing Countries and the General Agreement on Trade in Services (GATS): A Handbook* (forthcoming).

12 WTO Secretariat Note on Health and Social Services, *supra* note 5.

13 UNESCO, *Global Education Digest 2004: Comparing Education Statistics Across the World* (2004). Within OECD countries as much as 98% of education spending is public, though the average is around 88%. Percentages in developing countries are typically lower, but remain substantial.



### **C. Growth in Health and Education Services Trade**

Despite the extensive role of the state, both health and education services are increasingly traded. Trade in services means services delivered in any of the four modes of supply contemplated in GATS:

- Mode 1 – cross-border supply – a service is supplied from the territory of one WTO Member into the territory of any other Member such as over the telephone;
- Mode 2 – consumption abroad – a service is supplied in the territory of one Member to a service consumer of any other Member where the service consumer travels to the supplier's country to consume the service;
- Mode 3 – commercial presence – a service is supplied by a service supplier of one Member through a commercial presence in the territory of any other Member; and
- Mode 4 – presence of natural persons – a service is supplied by a service supplier of one Member through the presence of natural persons of that Member in the territory of any other Member.

Health care and education services may be traded in all four of these modes of supply. Though reliable global data on the magnitude of such trade is not available, existing evidence suggests that it is modest but growing strongly. In part, this has been driven by experiments in many countries with increased private sector delivery, including delivery by foreign suppliers. While most exporters are developed countries, a growing number of developing countries, including Cuba, India, Jordan and Thailand, are engaged in exports of health and education services.

The most important mode for international trade in both health and education services is consumption abroad (GATS mode 2). Large numbers of students attend foreign education programmes, especially those offered by universities and other higher education institutions. China is the source of the largest number of students studying abroad. Many students from other developing countries, including India, Indonesia, Malaysia, Mexico, Pakistan and Thailand also study outside their countries of origin.<sup>14</sup> As well, every year more and more patients are visiting other countries to consume health services. An increase in the number and mobility of affluent consumers in developing countries and their rising expectations regarding service quality is driving growth in mode 2 imports into developing countries as these consumers travel abroad for health and education.

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14 In 2002, there were 2.3 million foreign students studying at higher education institutions in the OECD countries, compared to 1.47 million in 1999.

In the area of health services, exports from developing countries through GATS mode 2 are becoming increasingly significant. Interest in non-traditional medicine and competitive pricing of high quality services in some developing countries has encouraged developed country consumers to travel to developing countries for health care. The price of a liver transplant in India, for example, is one-tenth the price of the same procedure in the United States.<sup>15</sup> India also attracts such 'health tourism' from neighbouring developing countries like Bangladesh.

Though statistics on cross-border supply (GATS mode 1) are notoriously difficult to come by, there is no doubt that enhancements in technology are permitting increasing numbers of patients to consume cross-border health services from foreign professionals around the globe through various 'tele-health' applications, such as the remote diagnosis of a patient's condition by a physician outside the country evaluating X-rays and other information provided electronically.<sup>16</sup> As well, information technology is facilitating an explosion in the remote delivery of education and training across national borders.<sup>17</sup>

Also increasing in importance is the delivery of services through a commercial presence (GATS mode 3). Foreign hospitals, clinics and other treatment and long term care facilities are permitted to enter markets in many developing countries like India, Indonesia, Nepal, Sri Lanka and Thailand. Some education institutions have set up a commercial presence abroad to offer programmes either in the form of green field investments or in partnership with local institutions in developing countries. The Massachusetts Institute of Technology, for example, has established a partnership with some Malaysian institutions to offer programs in Malaysia. Such partnerships with prestigious foreign institutions are growing and their services may replace, to some extent, services consumed abroad.<sup>18</sup>

Finally, more and more individual health and education professionals from developing countries provide their services abroad each year (GATS mode 4).

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15 R. Chanda, 'Trade in Health Services' (2002) 80 *Bulletin of the World Health Organization* 158 (Chanda [2002]).

16 G. Wolvaardt, 'Opportunities and Challenges for Developing Countries in the Health Sector' in S. Zarrilli, C. Kinnon, eds. *International Trade in Health Services: A Development Perspective* (1998) at 63.

17 Distance education represents 6% of international student enrolment and has been growing steadily since 1996 (K. Larsen & S. Vincent-Lancrin, 'International Trade in Education Services: Good or Bad?' (2002) 14 *Higher Education and Management Policy*).

18 By 1996, 140,000 students were enrolled in foreign subsidiaries of British institutions of higher education outside the United Kingdom compared to 200,000 foreign students studying in the United Kingdom (Larsen & Vincent-Lancrin, *ibid.*).

This has been modestly facilitated in health services by a trend toward globalization of medical education and information, standards and practice.<sup>19</sup> For both health and education the non-recognition in developed countries of domestic qualifications and experience acquired in developing countries, as well as visa and immigration constraints, continue to represent a significant impediment to the movement of developing country professionals abroad.

#### **D. A Taxonomy of Possible Effects of Trade Liberalization in Health and Education<sup>20</sup>**

In this section, the costs and benefits of service trade liberalization are set out for each of the four modes of supply contemplated in GATS. This taxonomy suggests the nature and direction of trade effects but not their relative magnitude or the corresponding policy implications which are likely to be different for each developing country, depending on local conditions.

##### **1. Mode 1 – cross-border supply**

Cross-border supply typically involves the delivery of a service from a foreign location via the internet or some other kind of communications technology. From the perspective of a developing county considering the import of health and education services through this mode, a wide range of possible benefits, both economic and non-economic, may be identified. With respect to health, technologically mediated supply could mean better access to a wider range of services and treatments and better disease monitoring, especially in remote areas. Similarly in education, all manner of educational programmes could become accessible in this way, enhancing student choices for developing country consumers. In areas in which conventional face to face education is limited or non-existent the potential gains in access may be enormous. Enhanced availability of education and health services and access to expertise in these areas, especially in remote regions, may also contribute to higher rates of local staff retention, as well as reduced internal and foreign migration. Both would have a positive impact on the delivery of local services.

The main barrier to the delivery of services through this mode is the absence of the necessary telecommunications infrastructure and technology in many

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19 D. Warner, 'The Globalization of Medical Care' in S. Zarrilli, C. Kinnon, eds. *International Trade in Health Services: A Development Perspective* (1998) at 71.

20 See Chanda, *supra* note 15, and Blouin, *supra* note 11, for further discussion of the possible effects of trade liberalization in health services. Regarding education services, see Larsen & Vincent-Lancrin, *supra* note 17.

developing countries. Given the magnitude of the need for improved access to health and education services in developing countries, the scarce state resources necessary to put such infrastructure and technology in place may be better spent on the direct provision of basic health and education services. Nevertheless, in terms of cost effectiveness, it is possible that the use of technology may offer certain efficiencies. Technology may increase the productivity of health and education workers, for example. As well, the same technology may be used to support both education and health services delivery.

Apart from the cost of enabling technology, the main concern for governments associated with cross-border supply from abroad is how to ensure that foreign suppliers meet domestic quality standards.<sup>21</sup> Recognition of foreign qualifications in the areas of education and especially health remains limited. Imposing quality standards on health and education services suppliers who never physically enter the country poses additional challenges.

Export opportunities through the cross-border supply of health and education services may be non-existent or limited for many developing countries. Nevertheless, there may be areas in which opportunities exist. It may be cost effective to locate back office functions related to health and education services, like health insurance claims processing and medical record keeping and transcription, in developing countries that offer lower labour costs and the availability of well trained workers with appropriate linguistic and technological skills, such as India and the Philippines.<sup>22</sup> Where concerns of importing states regarding the qualifications of health and education professionals can be overcome, there may be some prospect for the cross-border export of services, particularly to other developing countries. In order to be able to take advantage of any such prospects, public investment in telecommunications infrastructure may be required. Again, the opportunity costs of such an investment, taking into account any offsetting efficiencies and other gains from trade would have to be considered.

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21 For further discussion of the costs and benefits of 'telehealth', see S. Mandill, 'Telehealth: What is it? Will it Propel Cross-Border Trade in Health Services?' in S. Zarrilli, C. Kinnon, eds. *International Trade in Health Services: A Development Perspective* (1998) at 79. Regarding cross-border trade in education see S. Bjarnason, 'Debate on Education and GATS: Where do we stand?' in *Report of the Fifteenth CCEM Preliminary Meeting on Education and the General Agreement on Trade in Services: What Does the Future Hold?* (May 2003).

22 D. Lipson, 'GATS and Trade in Health Insurance Services: Background Note for the WHO Commission on Macroeconomics and Health' *Working Paper for Commission on Macroeconomics and Health* (2001).

## 2. Mode 2 – consumption abroad

The import of health and education services through mode 2 involves the citizens of a country going abroad for medical treatment or to participate in education programmes. For a developing country, imports through mode 2 may be a substitute for foreign services provided to the same domestic population through services suppliers who enter the local market through a commercial presence (mode 3) or individually (mode 4). Mode 2 imports involve certain costs. Most directly, domestic resources will be spent abroad. In education services, any negative effects will be offset to some extent if citizens who complete education abroad return to enhance the human capital of their home country. When high achieving local students go abroad to study but never return, mode 2 imports risk contributing to a loss of human capital or ‘brain drain’ from developing countries.

Since, inevitably, it will be the more affluent among a country’s population that will be aware of and able to engage in consumption abroad, a less direct problem may be the development of a two tier market, where the rich travel abroad for education and medical treatment while the poor must rely on inferior services available at home. Such a two tier market may have some offsetting benefits to the extent that consumption abroad relieves pressures on the limited resources of domestic public health and education systems. At the same time, however, a two tier market may weaken political support for public systems. If an influential segment of the population does not see its direct interests being served by public health and education services, its support for such services may erode.

The export of health and education services by a developing country through mode 2 consists of foreign individuals coming to the country to consume these services. Particularly in health care this form of consumption abroad may be attractive to citizens in developed countries. The burgeoning numbers of retirees in developed countries with increasing health care needs may lead to increased interest in cheaper care in developing countries, especially among those who have ethnic, cultural or other ties. The comparatively low cost of high quality services and access to alternative treatments may draw developed country consumers to developing country services. For a developing country, such ‘health tourism’ would be a source of foreign exchange and domestic employment. The prospect of serving a richer foreign clientele may encourage local investment and foreign investment (trade in services through mode 3) in new health and education facilities and the provision of a wider range of higher quality services. In education, there may be cultural benefits to having foreign students studying domestically. In developing country markets that are geographically close to major developed countries, like Mexico and Morocco, the potential for gains from mode 2 exports would likely be greatest. At the same time, improved local services will tend to discourage locals from engaging in consumption abroad (mode 2 imports), mitigating the costs associated with mode 2 imports described above.

Improved opportunities for local health and education professionals may reduce incentives for them to emigrate.

Exporting health and education services through mode 2 would have little impact on improved provision to the poor, unless some of the returns to local suppliers could be recovered by the state through taxes, and government receipts were used to fund services to poorer segments of the population. This is because investment in health and education facilities to provide services to foreign clients will be most attractive in the most lucrative services. Such 'cream skimming' leaves the expensive remainder of services to be supplied by the state.<sup>23</sup> There may be other disadvantages associated with local investment in private health and education services catering to affluent foreign consumers, such as contributing to the development of a two-tier local market for these services. Well-off local consumers may abandon public services in favour of new private services. While this may relieve pressure on public services, in such a two tier market there may be an internal 'brain drain' as local health and education professionals migrate from public sector to private sector suppliers. Finally, to the extent that the two tier market becomes entrenched, political support for public services may be undermined.

These possible threats to equity and access must be viewed in the appropriate context. Existing public systems of health and education services in developing countries are far from perfect. Some existing public systems already serve the rich disproportionately or, as a result of corruption and inefficiency, are substantially impaired in terms of achieving their social and development objectives.

Also, as discussed in more detail in the following sections, some negative side effects may be managed if not eliminated by appropriate domestic regulation. GATS does not preclude governments from adopting measures to address internal brain drain by discouraging the movement of health and education professionals from the public to the private sector. Equally no provision in GATS restricts measures by governments relating to foreign patients. Even if full commitments were undertaken in hospital services, for example, GATS would permit a Member to tax the fees paid by foreign patients.<sup>24</sup> The feasibility of imposing regulatory solutions such as these in a particular state will depend on an appreciation by the government of the potential problems and the presence of the

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23 In health, for example, private investors may only be interested in providing a limited range of services at high prices to wealthy patients, leaving the state to deliver complex and expensive treatments to indigent patients.

24 R. Adlung & A. Carzaniga, 'Trade in Health Services Under GATS' (2001) 79 *Bulletin of the World Health Organization* 352. The authors have produced an updated version of their paper dated June 2003.

political will to address them, as well as on the state's regulatory capacity to implement these kinds of measures to complement its liberalization initiatives. In many developing countries, a chronic lack of capacity to regulate private suppliers may impair the prospects for effectively ensuring that the public interest is served and progress toward development objectives is achieved where private supply is permitted.

### 3. Mode 3 – commercial presence

As noted above, foreign investment in health and education services would result in the inflow of capital, expansion of employment and, possibly, the provision of new and improved services. The efficiency and quality of services may be enhanced through the introduction by foreign investors of new technologies in developing countries. Local expertise may be enhanced through opportunities to work with these technologies at facilities established or expanded through foreign investment. In the area of health, at least, the available empirical evidence does not consistently show improvements in cost effectiveness and service quality associated with the supply of health services by private suppliers, domestic or foreign.<sup>25</sup> Perhaps a more certain benefit from the augmentation of local services through foreign direct investment is that resources for the public sector would be freed up as a result of reduced demand for public sector services.

The development of high quality private facilities through foreign direct investment may have an effect on trade in other modes. Improved local services through foreign investment may reduce reliance on consumption abroad (reducing mode 2 imports) for the segment of the population for whom that is an alternative and stem the associated loss of foreign exchange. At the same time, such services may enhance opportunities to attract foreign consumers, contributing to mode 2 exports. Opportunities to work in foreign-owned facilities may reduce the pressure for professionals to emigrate, curtailing trade through the presence of natural persons abroad, reducing exports in mode 4.

Possible negative effects may also be identified. Most obviously, foreign investment would lead to an outflow of profits to foreign owners. As well, there may be a significant opportunity cost associated with the public investment that may be required in order to attract private investment in developing countries. Foreign investors may crowd out local suppliers. Given the serious and chronic shortages in health care and many education services in most developing countries, however, crowding may not be a serious problem in many cases. The presence of foreign private services suppliers may also contribute to the

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25 Blouin, *supra* note 11.

development of two tier markets for health and education services. Investment may not flow to where it is most needed from a health and education policy point of view. As noted above, foreign investors are likely to try to 'cream skim' the most lucrative services leaving the remainder of services to the state and local firms. To the extent that new private firms siphon off workers from public sector and local private sector suppliers, foreign investment could contribute to an internal 'brain drain'.<sup>26</sup> Finally, if a two tier market becomes entrenched, there may be a political cost to the extent that some local consumers no longer see their interests as being served by publicly funded services.

Again, the significance of these possible negative effects will depend on the domestic context. For example, the cost of any public investment necessary to attract foreign direct investment will depend on the degree to which factors encouraging such investment are already present, including local market size. As well, one must ask how the results of a liberalized system would compare with the existing public systems of health and education. It may be possible to address some of the negative effects by GATS consistent domestic policies. The development of cream skimming and a two tier market, for example, could be avoided by the imposition of requirements for foreign services suppliers to locate in underserved areas combined with obligations to provide an identified range of services to all citizens at government specified rates. In health care, less intrusive regulation could require a specific number of hospital beds to be set aside for low income patients at prescribed rates. Similarly, places in schools set up with the assistance of foreign investors could be reserved for disadvantaged segments of the population. The internal brain drain problem could be mitigated if requirements to train local staff were imposed on foreign investors or measures were adopted to make moving to the private sector unattractive.

The GATS preamble contains a general recognition of the right of WTO Members to regulate and no provision in GATS precludes these kinds of measures. Where a Member has listed a health or education service in its national schedule of commitments, however, the Member's freedom to impose some of these kinds of policies would require that they be covered by a limitation on the Member's obligations. In order to preserve the Member's freedom to limit the number of suppliers in a particular area, for example, a limitation on the Member's market access obligation to this effect would be required.

While foreign direct investment originating in developing countries may not be substantial, it does occur in the health and education sectors. For example, one Indian hospital group is seeking to build hospitals in Malaysia, Nepal and

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26 Apparently this occurred in connection with reforms to permit foreign investment in hospitals in Thailand (Chanda, *supra* note 15).



Sri Lanka.<sup>27</sup> The main benefit of these kinds of investments is that they may generate financial benefits in terms of profits repatriated.

#### 4. Mode 4 – presence of natural persons

The movement of health and education professionals from developing countries to provide services abroad has a variety of both costs and benefits. Significantly, developing country professionals working abroad generate remittances to their country of origin. Working in another country may allow professionals to acquire new knowledge and skills which may be employed usefully on their return home.

As against these benefits there are also costs. Providing services abroad results in a reduction in the human resources available for delivery of health and education services in developing countries. The significance of this effect will be highly variable. For some professions in some countries movement abroad will cause or exacerbate local shortages, sometimes severely. In other cases, local surpluses may exist. As well, it may be feasible and cost effective for some countries to import professionals to replace locally trained professionals who move abroad. Jamaican nurses, for example, commonly move abroad to provide services in the United States and Canada and are replaced, to some extent, in Jamaica by nurses from Nigeria, Ghana and Myanmar.<sup>28</sup> The net effect, however, has been serious shortage of nurses in Jamaica.

Where stays abroad become permanent the movement of health and education professionals becomes a 'brain drain' with the attendant loss of public investment in the education of departed professionals. There is also the question of the distributive impact of remittances which are received by private rather than public hands. While there will be dispersed economic benefits to the use of remitted funds in the local economy, remittances are not directly available to the state to be applied to ensure the achievement of public policy goals.

Again, there are a variety of GATS consistent regulatory measures that may be adopted to counteract possible negative effects associated with increased export trade in mode 4. Public investment in education and training can be safeguarded by requirements to work locally for a period of time upon completion of education and training programmes. India and South Africa impose such requirements. Alternatively, departing professionals could be required to post a bond recoverable upon their return.

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27 Chanda, *supra* note 15.

28 WTO Secretariat Note on Health and Social Services, *supra* note 5.

The likely effect of migration of health and education professionals to developing countries has been and will continue to be less significant than migration in the other direction. Nevertheless, to the extent that foreign health and education professionals from developed countries may work in developing countries local shortages in particular areas may be overcome. Migration from one developing country to another to address local shortages may be a more common occurrence, as illustrated by the Jamaican nursing example cited above.

### **III. A Profile of Current GATS Obligations – Low Levels of Specific Commitments<sup>29</sup>**

#### **A. Introduction**

In this section the specific commitments undertaken by WTO Members in health and education services under GATS are discussed. By specifically listing a services sector in its national schedule of commitments, each WTO Member commits to complying with a higher level of obligation under GATS including providing national treatment and not imposing certain restrictions on market access. The level of obligation may be reduced by limitations inscribed by the Member in its national schedule. Even in the absence of specific commitments, health and education services are subject to the limited general disciplines of the GATS, including transparency and the MFN obligation, unless they are excluded as services supplied ‘in the exercise of governmental authority’.

#### **B. Health**

Along with education, health services are among the least committed services sectors. Only 42 percent of Members have undertaken any specific commitment in relation to a health service.<sup>30</sup> Overall, commitments tend to be positively related

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29 The commitments of WTO Members in health and related services are described in more detail in Adlung & Carzaniga, *supra* note 24. The commitments of countries in education services are summarized in OECD, *CERI Background Document: Current Commitments under the GATS in Education Services* (2002) prepared for the OECD/US Forum on Trade in Education, held in Washington in June 2002.

30 All statistics in this section were calculated as of January 1, 2004 and so do not include the commitments of Nepal which became a WTO Member in April 2004. Also, the statistics are based on the 12 countries that were members of the European Community prior to 1995 constituting one Member. Health insurance is not discussed, though the availability of private health insurance will have implications for access to health services. See Lipson, *supra* note 22.

to the level of development—only about 1/3 of the 100 developing and least developed country Members<sup>31</sup> have made commitments in health—though there are some significant exceptions. Botswana, Burundi, the Gambia, Lesotho, Malawi, Sierra Leone and Zambia, all least developed countries, undertook commitments in at least one health sector. All but one<sup>32</sup> of the developing countries that have joined the WTO since 1995 have accepted some commitments in health services reflecting the greater negotiating pressure to make commitments experienced by such countries in relation to all services sectors. As well, some developed countries, like Canada, have accepted no obligations in health services. Commitments by the United States and Japan are limited to hospital services.

For WTO Members that have made commitments, most have been in medical and dental services (50 of 146 or 34% of all Members) followed by hospital services (41 of 146 or 28% of all Members), ‘other health services’ (23 of 146 or 16% of all Members) and the services of nurses and other health professionals (21 of 146 or 14% of all Members). Commitments by developing countries follow this same pattern, though the percentage of developing countries making commitments was lower in each category of health services (25% for medical and dental services, 23% for hospital services, 10% for other health services and 7% for the services of nurses and other health professionals). This pattern suggests that more WTO Members were willing to make commitments in capital intensive services like hospitals and highly specialized services like those of physicians and dentists as compared to more labour intensive services, like nursing.<sup>33</sup>

The precise content of Members’ commitments varies to some extent based on the express wording of the commitment. Typically, the open-ended category of ‘other health services’ was left undefined, but a few countries provided their own definitions for the purposes of their commitments. Australia listed only chiropractic and podiatry in this category and Belize accepted commitments for epidemiological services and some diagnostic services. Some Members restricted their commitments to granting market access for private hospitals.

In terms of modes of supply, WTO Members making commitments in health services imposed the fewest limitations on their obligations in mode 2, probably reflecting the view that restrictions on this mode of supply would not be effective, even if they were desirable for some reason. A higher percentage of developing

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31 For the purposes of this paper, statistics referring to developing countries include least developed countries. All transition economies have been removed from the category of developing countries except China and Mongolia.

32 The sole exception is Mongolia.

33 Adlung, *supra* note 1.

countries made full commitments for mode 2 trade in health services (except for other health services) compared to the percentage of all WTO Members. A full commitment means that a Member imposed no limit on either the national treatment or market access obligation. Of those Members listing limitations on their obligations in mode 2 most related to restrictions on the portability of health insurance or horizontal limitations relating to subsidies. These limitations preserve Members' flexibility to refuse to subsidize or reimburse patients for payments made for foreign medical services consumed outside the country.

The relative openness of large developed and developing country markets in mode 2, including the European Communities for all health services, China for medical and dental services and the United States and Japan for hospital services, suggests a market opportunity for services suppliers from developing countries providing cost effective or unique health services to attract foreign consumers from those states. Limitations on the availability of public funding to patients who travel abroad would curtail this opportunity somewhat.

Roughly half the WTO Members accepting commitments in health services sectors made full commitments in mode 1. For all health services, a higher percentage of the developing country Members accepting commitments undertook full commitments. Most Members that did not accept full commitments to provide national treatment and market access for mode 1 simply recorded their commitments as 'unbound', meaning that no commitment at all was accepted by the Member for that mode. Some of the unbound listings were due to the belief that the delivery of these services was technically unfeasible. Others may reflect uncertainty regarding the scope of the commitment given the fast evolving nature of electronic delivery of services or concerns about how to regulate service quality. In one of the few specific limitations that cut back Member's obligations in mode 1, Poland's schedule provides that public insurance need not cover medical care supplied through mode 1.

Aside from the category of other health services, less than half of WTO Members making commitments in health services gave a full commitment for supply of health services through a commercial presence (mode 3), though again the percentage of developing countries giving full commitments was higher, especially in relation to the services of nurses and other health professionals. Few Members, however, recorded the mode 3 commitments as unbound. Many limitations imposed by Members on their obligations in mode 3 consist of horizontal limitations relating to all services sectors that allow Members to restrict the percentage of permissible foreign ownership or the type of legal form that foreign services suppliers may employ for the purposes of their commercial presence or to require approval of foreign investments. In some cases, countries preserved their ability to impose a requirement for the satisfaction of an economic needs test before the establishment of a commercial presence would be permitted. Often no specific criteria for the application of the test were set out, contrary to

the WTO's scheduling guidelines, leaving a wide discretion to governments regarding its application. Such discretion would permit a Member to impose limits on the number of operations in specific locations and other limitations which are measures that could be used to address some of the possible negative effects of liberalization noted in the taxonomy of possible trade effects but which would otherwise be contrary to the market access obligation. In some cases, requirements for economic needs tests were included in sector specific commitments for medical, dental and hospital services. Of developing countries, only Malaysia included such a limitation and only in relation to its commitments in hospital services.

Almost all Members accepting commitments in health services, including most developing country Members imposed significant limitations on their obligations to permit the presence of natural persons supplying health services (mode 4). Some Members set out specific limitations on their obligations, but more than 75% described their obligations as 'unbound' for all health services sectors. Limitations specifically applicable to mode 4 obligations found in Member's schedules consist of quotas and specific training and language requirements. In many cases, Members who listed their obligations as unbound indicated that their obligations were nevertheless subject to their horizontal commitments. Many of these countries undertook to grant mode 4 access to certain intra-corporate transferees. Typically these commitments relate to certain kinds of persons who work for a foreign business that has operations in a Member's country and who are permitted to enter the country on a temporary basis to work at the business's local operations. Such a commitment in mode 4 means that access for individuals is conditional on the establishment of a commercial presence. This kind of access is likely to be of marginal value to developing countries who are not engaged in significant outward foreign direct investment, though as noted above, there are some exceptions in this regard. In some cases, Members listed horizontal obligations to provide access that are restricted to a small range of specialists, though often only if labour market tests are satisfied. The magnitude of restrictions on mode 4 reflect the political sensitivity of access to the local labour market.

### **C. Education**

Approximately 30% of Members have undertaken a specific commitment in some education sector (44 of 146 Members). Twenty-five out of 30 OECD countries have made a commitment in at least one education sub-sector.<sup>34</sup> For the

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34 The five OECD countries that have not made commitments in education services are Canada, Finland, Iceland, Korea and Sweden.

100 developing country Members, the percentage taking on commitments was only 17 percent. As with health services, developing countries that became WTO Members after the Uruguay Round have committed to a higher level of obligation in a wider range of education sectors than the countries that made commitments at the conclusion of the Uruguay Round.

For Members making commitments, all education sectors were the subject of a similar number of commitments: 30 for primary education, 34 for secondary education, 33 for higher education and 32 for adult education. Only 20 Members made commitments for other education, most leaving this category undefined. In general, WTO Members have put more limitations on their obligations relating to trade in primary and secondary education than on those relating to higher and adult education. Adult education is the sector in which countries have made most full commitments in modes 1 through 3.

In defining the scope of their commitments in education many Members deviated from the WTO's Classification List and the more detailed Provisional CPC. In primary education, 12 of 30 Members restricted their commitments to a distinctive category of services. Eight of these Members limited their commitments to private education. In secondary education, 16 of 33 Members adopted distinctions not present in the Classification List or the Provisional CPC. Again, most of these restricted commitments to private education. In higher education, 15 of 33 countries adopted their own categories, 10 limiting their commitments to private education. The only developing country to limit its commitments to privately funded education was Mexico. China, however, may have achieved a similar result by excluding national compulsory education from its commitments in primary and secondary education.

In terms of modes of supply, all WTO Members accepting commitments in an education sector committed to a high degree of freedom with respect to the consumption by their citizens of education services abroad (mode 2). Over 85% of Members accepting a commitment in an education services sector gave a full commitment for trade in services in this mode. Few countries either listed their commitments as unbound or inscribed some specific limitation on their obligations. Specific limitations in some countries schedules relating to mode 2 allow them to restrict the availability of scholarships for education services provided abroad or to non-nationals. The pattern of commitments for developing country Members is essentially the same as for all Members making commitments.

A high percentage of WTO Members that accepted commitments in education sectors gave full commitments for mode 1, though the percentages were lower for primary and secondary education than for other education sectors. The pattern of commitments for developing countries who accepted commitments in mode 1 was the same as for other countries, though a higher percentage recorded their commitments as unbound, perhaps reflecting the relatively greater challenge of

drafting satisfactory limitations for developing countries. A few Members' schedules allow them to restrict the availability of scholarships for education services provided abroad or to non-nationals.

As with health services, less than one half of countries accepting commitments in most sectors of education services gave full commitments with respect to mode 3, commercial presence. The only exception in this regard was adult education which attracted a full commitment from just less than 60% of countries accepting commitments. On the other hand, less than 10% of countries accepted no commitments at all in the education sectors listed in their national schedules for mode 3. All countries recording their commitments as unbound are developing countries.

National schedules thus demonstrate a relatively low commitment to giving full market access and national treatment for education services suppliers operating through a commercial presence, even for those WTO Members undertaking commitments, but a willingness to accept commercial presence with specific or horizontal limitations. The horizontal limitations referred to in relation to health services delivered in mode 3 and discussed above apply as well to education services supplied in this mode. Few of these limitations appear to be targeted directly at the kinds of measures suggested in the taxonomy of possible effects of trade liberalization as being useful to counteract the negative effects of foreign investment in education services, such as limiting the number of suppliers permitted to serve a particular area, though some broad horizontal limitations may preserve this flexibility. There is little difference in this regard between the commitments of developing countries and other WTO Members.

Again, as with health services, mode 4 received the lowest level of commitments in education services. Only one country gave a full commitment in any education sector for this mode. Most of the countries that recorded their obligations as 'unbound' referred to their horizontal commitments. In many of these horizontal commitments, Members have provided a limited undertaking to provide market access for some intra-corporate transferees and some specialist professionals that, as indicated previously, will be of limited value to most developing countries. The pattern of commitments for developing country Members is essentially the same as for all Members.

#### IV. GATS Negotiations to Date – Health and Education on the Back Burner

There is no sector, including health and education, that is *a priori* excluded from the current round of negotiations. As well, strong export interests exist in some countries in these services. With respect to education, Australia, Canada, New Zealand, the United Kingdom and the United States are all significant exporters.<sup>35</sup> In health services, the United States and many other developed countries as well as a few developing countries have export interests.

Despite these interests, health and education have not been significant subjects of discussion in the current round of negotiations. Health was not the subject of any specific negotiating proposal. Four countries, Australia,<sup>36</sup> Japan,<sup>37</sup> New Zealand<sup>38</sup> and the United States<sup>39</sup> have filed negotiating proposals related to education but none could be characterized as suggesting an aggressive approach to liberalizing trade in education services. Each expressly recognizes the important role played by the state in funding, delivering and regulating education as well as the important link between education and social and economic development. As well, each is limited in its scope. The US proposal only relates to higher and adult education and training by private operators. New Zealand's is largely restricted to some suggestions for clarifications regarding the categories of education services used to schedule specific commitments. The main emphasis in Japan's proposal is the need to maintain quality in education, especially education services supplied cross-border. Australia's communication identifies possible benefits associated with more liberal trade in education services as well as some of the barriers currently impeding trade but the proposal itself is restricted to five principles that are relevant to liberalization initiatives, most of which focus on the maintenance of state sovereignty in this area.

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35 Larsen & Vincent-Lancrin, *supra* note 17. For example, in 2000, education exports represented 11.8% of Australia's total services exports and ranked as the third largest category of services exports and the 14<sup>th</sup> largest category of all exports.

36 Communication from Australia: Negotiating Proposal for Education Services, 2001 (S/CSS/W/110).

37 Communication from Japan: Negotiating Proposal on Education Services, 2002 (S/CSS/W/137).

38 Communication from New Zealand: Negotiating Proposal for Education Services, 2001 (S/CSS/W/93).

39 Communication from the United States: Higher (Tertiary) Education, Adult Education, and Training, 2000 (S/CSS/W/23)[United States Proposal: Higher (Tertiary) Education, Adult Education, and Training].



The requests and offers of WTO Members that have been filed with the WTO are confidential. A review of those requests and offers that have been made public to date, however, reveals few that deal with health or education services. With a couple of modest exceptions, the market access offers that have been made public do not contain improved commitments specifically relating to health or education.<sup>40</sup> Similarly, while the fragmentary nature of the available public information precludes anything like a complete picture, it also appears that few requests have been made for improved market access in health and education services.

All of the European Union's requests are publicly available and only two relate to health or education. The European Union has asked the United States for improved access for private suppliers in the higher education sector and asked the Dominican Republic to drop its MFN exemption for medical, dental and nursing services.<sup>41</sup>

India has provided comprehensive information on the requests that it has made and received though it has not identified the recipient of its requests or the countries from which requests have been received.<sup>42</sup> In relation to health services, India currently has a commitment only in hospital services. It has received requests for full market access for medical and dental services, and the services of nurses and other health professionals in modes 1, 2 and 3 as well as some commitments to permit foreign health professionals to operate in India through mode 4. With respect to hospital services, India has received requests for full commitments in modes 2 and 4, as well as the removal of its 51% equity limit on foreign investment in hospitals. For its part, India has made requests for full

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40 Offers from the following have been made public and can be found on the WTO web site in the TN/S/O document series: Australia, Canada, Chile, European Union, Iceland, Japan, Liechtenstein, New Zealand, Norway, Slovenia, Turkey and the United States, European Union (online WTO: [http://www.wto.org/english/tratop\\_e/serv\\_e/s\\_negs\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm) (date accessed June 18, 2004)). Japan has offered some improvements in its commitments regarding mode 2 trade in higher education services and the United States and the European Union have offered slight improvements in their commitments in higher education services.

41 The complete text of the European Union's requests has been posted on the internet by the non-governmental organization GATSwatch (online: GATSwatch: <http://www.gatswatch.org/requests-offers.html> (date accessed July 21, 2004)). The European Union itself has provided a summary of its requests (Summary of the EC's Initial Requests to Third Countries in the GATS Negotiations (July 1, 2002) online [http://europa.eu.int/comm/trade/services/gats\\_sum.htm](http://europa.eu.int/comm/trade/services/gats_sum.htm) (date accessed June 17, 2004)).

42 Government of India, Ministry of Commerce & Industry, Department of Commerce, Trade Policy Division, *Consultation Document on the WTO Negotiations Under the General Agreement on Trade in Services (GATS)*, online [http://commerce.nic.in/wto\\_counsel\\_paper.htm](http://commerce.nic.in/wto_counsel_paper.htm) (date accessed June 17, 2004).

commitments in health professionals in modes 2 and 4, including the removal of residency and nationality commitments and, with respect to mode 4, commitments to permit access for health professionals unrelated to businesses operating in mode 3. As additional commitments, India has requested recognition for the qualifications of Indian medical and dental professionals and nurses.

In education services, India currently has no commitments and has been asked to provide full commitments for higher education, adult education and other education, including educational testing, community education and education agency services in modes 1, 2 and 3. India has requested as additional commitments more transparent mechanisms for the accreditation of courses and programmes provided by education service suppliers, including an appeal process.

Australia has made public its request for improved market access for private hospital and private care for the aged services. Australia has not identified the recipient(s) of its request.<sup>43</sup> Other publicly available information disclosed no other requests relating to health or education.

In summary, while both health and education have been the subject of some requests, there is little to indicate that these services have been accorded a high priority in the negotiations by WTO Members.<sup>44</sup> One possible exception is Australia which has described its interest in improved market access for its suppliers of private hospital and care for the aged services as a negotiating priority. Also, India has expressed a significant interest in greater mobility for its medical and other health professionals.

## **V. Why so Little Interest in GATS Commitments in Health and Education?**

### **A. Introduction**

The taxonomy of possible effects of trade liberalization set out above shows that there may be benefits arising from liberalization of trade in health and education services. There are likely to be costs as well though appropriate policies complementing liberalization initiatives can address at least some of the possible negative consequences in a manner consistent with GATS. Nevertheless so far, relatively few countries have made specific commitments in these services and

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43 'Australia Pushes Export Opportunities for Tourism, Healthcare Businesses', *Media Release* (October 29, 2002) online [http://www.trademinister.gov.au/releases/2002/mvt139\\_02.html](http://www.trademinister.gov.au/releases/2002/mvt139_02.html) (date accessed June 17, 2004).

44 'Director-general of WTO and chairman of WTO services negotiations reject misguided claims that public services are under threat' *WTO Press Release/299* (June 28, 2002).

publicly available evidence does not show a strong interest in additional commitments in the current round of negotiations. Why is this?

A variety of possible explanations may be suggested. The most straightforward reason for the low level of existing commitments may be simply that, in some cases at least, no one asked developing country Members for commitments in these sectors during the Uruguay round. These sectors were not high on negotiators' lists of priorities. As well, in countries in which health and education services are largely supplied through government monopolies, it might have been thought that there was no point in undertaking commitments. It has also been suggested that the commitments in health and education were impeded by a low level of familiarity with GATS among health and education officials and inadequate dialogue between them and trade officials.<sup>45</sup>

The reason most frequently cited for avoiding commitments in health and education services in the current negotiations, however, is uncertainty regarding the nature and effect of GATS commitments. The three main categories of uncertainty may be identified as follows: uncertainty regarding

- The scope and nature of GATS obligations;
- The trade impact of GATS commitments; and
- The likelihood that governments may need or want to adopt future policies in health and education that may be inconsistent with specific commitments in GATS.

## **B. The Three Uncertainties of GATS**

### **1. Uncertainty regarding the scope and nature of GATS obligations**

When GATS came into force on January 1, 1995, it was the first set of comprehensive multilateral rules dealing with trade in services. Many provisions in the agreement are novel, including the application to services of concepts like MFN and national treatment that are well known in trade agreements relating to goods but new in the area of services. The scope and nature of GATS is only beginning to be fleshed out in WTO dispute settlement proceedings.

Many commentators and even the WTO Secretariat have expressed some concerns regarding the precise scope of the services agreement because of uncertainty regarding the carve-out for 'services supplied in the exercise of governmental authority.'<sup>46</sup> This expression is defined to mean 'any service that is

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45 OECD Observer, *supra* note 10.

46 E.g., M. Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework' (2003) *Journal of International Economic Law* 341; WTO, Council for Trade in Services,

supplied neither on a commercial basis nor in competition with one or more service suppliers.’ The application of the criteria in this definition to health and education services is not straightforward because in many countries private and public providers of health and education co-exist and public provision may be implemented through private sector suppliers. As a result, some aspects of national public health and education systems may be subject to the agreement. For example, if universally available publicly funded health services provided free to consumers were supplied by hospitals or physicians that are organized on a for-profit basis, it could be that such services are provided on a commercial basis and are thus outside the exclusion and subject to the GATS. Some have worried that even if services are delivered directly by the state, such as public schools, the mere existence of private schools seeking to serve the same students means that the exclusion has no application because the public and private schools will be found to be in competition and the services of public schools would then be subject to the agreement.<sup>47</sup>

In response, it must be said that some level of uncertainty is the inevitable consequence of applying a short, broadly worded treaty provision, like the exclusion for services supplied in the exercise of governmental authority, to services that are the subject of a range of complex regulations and methods of delivery like health and education. As well, the exclusion is likely to be interpreted more generously than the critics fear. The simple co-existence of public and private services should not lead to the conclusion that public services are in competition.<sup>48</sup> Nevertheless, the inability of governments in WTO Member states to define precisely which aspects of national health and education systems are subject to the agreement and which are not has made it difficult to reassure domestic interests that public services are not threatened in any way by GATS and has impeded the progress of domestic discussions regarding how GATS obligations could be helpful in promoting better outcomes in health and education.

This is unfortunate because the application of this exclusion should not be the key concern of policy makers or those with a stake in health and education because, so long as a government has not taken the additional step of accepting

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Environmental Services: Background Note by the Secretariat, 1998 (S/C/W/46), at 14, 15; WTO, Council for Trade in Services, Education Services: Background Note by the Secretariat, 1998 (S/C/W/49) at 4-6.

47 Among the most prominent critical analyses are S. Sinclair, *GATS: How the World Trade Organization's New 'Services' Negotiations Threaten Democracy* (2000); and J. Grieshaber-Otto & S. Sinclair, *Facing the Facts: A Guide to the GATS Debate* (2002).

48 J. A. VanDuzer, 'Health, Education and Social Services in Canada: The Impact of the GATS' in *Trade Policy Research* (2004).

specific commitments for health or education services, the remaining GATS obligations that do apply are unlikely to impose meaningful constraints on governments.<sup>49</sup> The main substantive obligation is MFN treatment which does not require providing any degree of access for foreigners to domestic markets.

Uncertainty regarding the scope of the substantive obligations in the GATS that become applicable when specific commitments are undertaken has also been raised as a concern. The national treatment obligation only requires that foreign service suppliers and services be treated no less favourably than like domestic service suppliers and services. Because it is necessary to make an assessment of the likeness of service suppliers or services, the precise impact of this obligation will depend on the facts of each case. In determining the likeness of goods, WTO panels have focused on the attributes of the products and whether they are competitive substitutes in the market. It remains to be seen whether services that are substitutes in this sense may nevertheless be found not to be like for the purposes of the national treatment obligation on other grounds. It is not clear, for example, whether foreign services that are treated differently from domestic services in order to achieve legitimate regulatory objectives, such as consumer protection, should not be considered like services and therefore not protected from such discrimination by the national treatment obligation.<sup>50</sup> Where the national treatment obligation applies, it is not yet clear what differences in treatment will result in less favourable treatment contrary to the obligation.<sup>51</sup> In

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49 D. Luff, 'Regulation of Health Services and International Trade Law' in A. Matoo & P. Sauvé, (eds.), *Domestic Regulation and Services Trade Liberalization*, (2003).

50 As an example of the kind of uncertainty that could arise in the services context, imagine an Indian medical lab that does diagnostic work for patients in India and a British lab that performs the same diagnostic work for the same Indian patients over the internet from its location in the United Kingdom. Because of its remote location, it may be harder for Indian regulators to detect and impose sanctions for non-compliance with quality standards on the British lab. The Indian government may want to impose additional regulatory requirements on a foreign-based lab to ensure the protection of Indian consumers and the achievement of other regulatory objectives. These might include more onerous reporting requirements or requiring a cash deposit to ensure that any fine imposed to sanction non-compliance would be paid. Consistent with the national treatment obligation, what scope is there to impose these kinds of different regulatory requirements on the British lab? For there to be a breach of national treatment, these two service suppliers (or their services) must be found to be like and any difference in treatment must be such as to impair the competitive opportunities in the Indian market for the British lab as compared to the Indian lab. The scope of the national treatment obligation and the corresponding freedom to treat foreign suppliers differently in these sorts of situations is not clear.

51 G. Verhoosel, *National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy* (2002), at 14-18. These same issues arise with respect to MFN. Abu-Akeel concludes that these issues in the MFN context are difficult and not capable of being

the few cases dealing with the GATS to date, WTO panels have provided little guidance on these issues. As a result, the effective scope of the national treatment obligation under the GATS is much less certain than the analogous obligation for goods under the GATT, discouraging the making of commitments.<sup>52</sup>

Perhaps the most important area of concern regarding the scope of the substantive obligations in GATS is the application of GATS disciplines on domestic regulation. The preamble of the GATS expressly acknowledges the 'right of Members to regulate' as well as the need to give 'respect to national policy objectives' and the 'particular need for developing countries to exercise this right'. These preambular statements provide an important part of the interpretive context for understanding the substantive standards of the agreement, but are not substantive rules in themselves. With respect to the substantive rules on domestic regulation, the GATS requires that measures relating to qualification requirements and procedures, technical standards and licensing requirements not nullify or impair a Member's specific commitments in listed sectors by imposing requirements or standards not based on objective and transparent criteria, such as competence and ability to provide the service, or that are more burdensome than necessary to ensure the quality of the service. These vague requirements are hard to apply in the context of health and education services, where a variety of goals other than quality of the service, narrowly conceived, are fundamental determinants of public policy. It is not clear to what extent a measure related to, for example, imposing a new universal service obligation as a condition of being permitted to offer hospital services would be considered to relate to the quality of the service. If the measure was found to relate to quality, one may still wonder whether a new universal service obligation would be considered no more burdensome than necessary to ensure the quality of the service.<sup>53</sup> Alternative ways of ensuring the availability of hospital services to the population, such as through the use of some form of incentive, are certainly conceivable. Perhaps one could make arguments regarding the consistency of new universal service obligations

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resolved by WTO dispute settlement panels. He argues that the Council on Trade in Services should issue guidelines to address these issues (A. K. Abu-Akeel, 'The MFN as it applies to Service Trade: New Problems for an Old Concept' 33 *Journal of World Trade* (1999) 103, at 115. Matoo suggests that the MFN obligation should only be breached when differences in treatment cannot be justified as necessary to achieve a legitimate non-discriminatory policy objective (A. Matoo, 'MFN and GATS' in T. Cottier & P. Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2000) at 77-79).

52 Some of the difficulties associated with interpreting the national treatment obligation are discussed in Joel Trachtman's paper for this volume: 'Negotiations on Domestic Regulation and Trade in Services (GATS Art. VI): A Legal Analysis of Selected Issues'.

53 This example is taken from Luff, *supra* note 49, at 204-6.

and other measures common in the health and education sectors with the domestic regulation requirements. Nevertheless, uncertainty regarding the application of these requirements will discourage listing health and education services and becoming subject to GATS domestic regulation obligations as a result.<sup>54</sup>

Members' decisions regarding what to commit under the GATS have been made more difficult by the unrefined and imprecise categories of education and health services in the WTO's Sectoral Services Classification List and the corresponding divisions under the United Nations Provisional Central Product Classification. GATS' distinctive architecture requires each Member to define the category of services activity in which it is willing to accept commitments. In both health and especially education, the Classification List and the Provisional CPC have proven to be inadequate models for countries seeking to make commitments. This is amply demonstrated by the fact that almost half of Members making commitments in education have used different categories of their own invention in their schedules and by the concerns and suggestions regarding education services classifications from two of the countries who have thought most about commitments in education—the United States and New Zealand—both of whom focused on classification problems in their proposals for negotiations on education services. The content of 'other education services' in particular requires some further specification. In health as well, concerns have been expressed by WTO Members about the adequacy of the categories for scheduling services.<sup>55</sup> A simple issue, but one which arises under virtually every national health system, is whether services performed by physicians in a hospital, like most surgery, are hospital services or medical services.<sup>56</sup> While nothing prevents a Member from attempting to resolve these uncertainties by adopting its own classification system and nomenclature, the development and adoption of a single more specific and refined classification system would facilitate scheduling of commitments in a consistent manner and contribute to a common understanding among WTO Members regarding the nature of obligations undertaken.

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54 A much more comprehensive analysis of the challenges associated with interpreting the domestic regulation obligations is provided in Joel Trachtman's paper for this volume (Trachtman, *supra* note 52).

55 Communication from the United States, Health and Social Services, 1998 (S/C/W/56).

56 Luff, *supra* note 49, at 198.

## 2. Uncertainty regarding the trade impact of GATS commitments

GATS proponents advocate commitments in health and education that guarantee improved market access for foreign suppliers on the basis that such commitments will promote trade and investment leading to efficiency gains, increased consumer choice, reduced prices, innovation and technology transfer. The taxonomy of possible effects of trade liberalization set out above describes the process by which such beneficial effects may occur. By creating binding commitments, GATS imposes disciplines on domestic policy makers who may be tempted to retreat from liberalization to engage in renewed protectionism as well as contributing to the transparency and predictability of domestic regulatory regimes. This is true even if GATS specific commitments simply confirm the *status quo*, as is the case in many national schedules. The enhanced predictability of a domestic regime bound by GATS commitments should encourage foreign businesses to participate in the market, especially through foreign direct investment.

But it is not clear how much of an effect GATS actually has in terms of increasing trade and investment, much less on the broader development outcomes critical to shaping health and education policy. To date, there is no empirical evidence demonstrating strong linkages between GATS commitments and increased trade or investment.<sup>57</sup>

This does not necessarily mean that GATS has not had any effect or that it could not have effects in the future. Nevertheless, in the areas of health and education, its impact will be restricted by the existence of significant impediments to trade that operate largely outside existing GATS disciplines. The following are some examples:

- Lack of recognition of foreign credentials impeding the movement of professionals abroad and discouraging students from obtaining foreign credentials;
- Lack of quality assurance standards and procedures for assessment which discourage countries from permitting foreign suppliers to deliver services in all modes;
- Restrictions on the physical and electronic transmission of educational materials;
- Difficulties in obtaining authorization to enter and leave the country for individual services suppliers—including managers, computer specialists, academics and health professionals; and

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57 World Health Organization and World Trade Organization, *WTO Agreements and Public Health – A Joint Study by the WHO and WTO Secretariats* (2002), at 117-118.



- Rules regarding the employment of academics.<sup>58</sup>

The lack of strong evidence of benefits associated with GATS commitments combined with the fact that many barriers to trade in health and education services cannot be readily addressed through existing GATS disciplines discourages countries from negotiating GATS commitments.

### **3. Uncertainty regarding the extent to which specific commitments in GATS may preclude future changes in health and education policies**

One of the particular concerns expressed regarding accepting commitments in health and education is that once a state takes this step, its flexibility subsequently to shift direction is lost. Potentially, this could be an important consideration for governments because experiments with market opening reforms, at least in health care, have often been followed by subsequent rounds of reforms to correct for problems arising with initial reforms.<sup>59</sup> Critics of the GATS worry that if a country decided to commit to national treatment and market access for foreign hospitals operating through a commercial presence, for example, it would be precluded from deciding subsequently to return to a regime requiring the delivery of hospital services through domestic suppliers or under which the state provides the services.

One short answer to this concern is that GATS does not prohibit such a policy change. The agreement expressly contemplates that a Member may withdraw trade concessions made in its national schedule in relation to any service sector at any time on three months' notice to the WTO Council on Trade in Services. Where another WTO Member feels the withdrawal may affect the benefits it receives under the agreement, it may request that the withdrawing Member enter into negotiations with a view to agreeing on a compensating adjustment typically in the form of other trade concessions. Compensatory adjustments must be extended to all WTO Members on an MFN basis. In the event of failed compensation negotiations, the affected Member country may seek arbitration. Where arbitration has been requested, the withdrawing Member cannot make the

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58 These are some of the barriers to trade in education noted in United States: Proposal on Higher (Tertiary) Education, Adult Education, and Training, *supra* note 39, and Australia: Negotiating Proposal for Education Services, *supra* note 36. Adlung describes some of these barriers to trade in health services in Adlung, *supra* note 1.

59 Epps & Flood, discuss experience with several specific types of market reforms in health care which involve increased foreign private participation and the frequent need for a second round of reforms (T. Epps & C. Flood, 'Have We Traded Away the Opportunity for Innovative Health Care Reform? The Implications of the NAFTA for Medicare' (2002) 47 *McGill Law Journal* 747).

modification until it has given trade compensation in accordance with the arbitration award. If the withdrawing Member does not do so, any Member who participated in the arbitration may withdraw substantially equivalent concessions in retaliation. If arbitration is not requested by another Member, the withdrawing Member is free to implement the proposed change to its schedule of commitments.

A state could avoid the risk of such a compensation claim by expressly recording any flexibility it foresees as possibly important in the future in the form of an express limitation on its obligations in its national schedule at the time it undertakes specific commitments for health and education.<sup>60</sup> Taking advantage of this feature of GATS, however, requires a very high level of understanding of the demographic, economic and technological trends affecting such services which few developing country governments may possess. The challenge of inscribing appropriate limitations may be exacerbated by a lack of engagement by health and education ministries in the trade policy development process. To the extent that scheduling limitations is not a straightforward strategy to safeguard policy flexibility that is thought to be required, countries may choose not to list health and education sectors in their schedules, notwithstanding their right subsequently to withdraw their commitments.

### **C. Summary**

The result of these three uncertainties of GATS is that even where developing countries are willing to liberalize trade in health and education services, the case for expressing such willingness in the form of GATS commitments may not be convincing. Many developing countries may see GATS commitments, including commitments simply to maintain the *status quo*, as having few certain benefits while imposing constraints, the precise scope of which is hard to predict. While the architecture of the agreement permits Members to preserve their policy flexibility by inscribing limitations on their obligations in their national schedules, doing so imposes a burden that developing countries may be unwilling to bear. In light of the risks to the achievement of the important social policy objectives of domestic health and education systems that are associated with trade liberalization, developing countries may be reluctant to make commitments that may restrict their policy options in any way.

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60 The possible application of the general exceptions in GATS Art. XIV would also have to be considered.

## **VI. Conclusions – Toward a GATS that Is more Relevant to Health and Education**

GATS is not inherently unfriendly to the regulation and delivery of health and education services in ways that achieve development objectives in developing countries. Trade liberalization in health and education services secured under GATS commitments can have some real benefits and many of the negative effects can be addressed through GATS consistent regulation. GATS does permit Members to decide whether to accept commitments in any area and, if they do, to tailor them in ways consistent with their national policies. It is not surprising, then, that a number of developing and least developed countries have chosen to make commitments in both areas. Still, most developing countries have not undertaken commitments. Among the main impediments to a GATS that operates more effectively as an instrument to facilitate trade in health and education services consistent with development objectives are the three uncertainties described in the preceding section.

The first step to addressing this problem is to improve understanding of the operation of GATS especially among the health and education communities in developing countries. Efforts by the WTO, the OECD and others to date have proved insufficient to dispel the misinformation regarding issues like the impact of the agreement on public services that has played such a significant role in the debate over GATS and its effects on health and education. More work is needed to give practical operational content to GATS obligations in order to assist developing country policy makers to appreciate the impact and the limits of GATS obligations. While this could be undertaken by international organizations and development agencies, some of this work is already being done by developed country governments, such as Canada's, for their internal purposes and could be made available to developing countries.

In terms of other concrete steps that may be taken to address the uncertainties of GATS, one option would be to develop reference papers for health and education as was done in the telecommunications sector. The telecommunications reference paper addressed a range of sector specific issues. It provided some basic, commonly accepted definitions and clarified and established the modalities for the application of key obligations in terms specific to the telecommunications sector. Ultimately, the reference paper was incorporated by reference in the national schedules of many Members. The same approach could be used in relation to health and education services. Developing a common template for specific commitments would economize on scarce negotiating resources in developing countries. As well, in the telecommunications negotiations, the reference paper provided reassurance to domestic regulators regarding the scope and impact of

GATS obligations by acknowledging the importance of relevant policy goals in the telecommunication sector, including the right of Members to impose universal service obligations.<sup>61</sup> Given the highly charged negative response to the application of GATS in the areas of health and education, there is widespread suspicion regarding the application of GATS in these areas. The adoption of instruments specifically tailored to the exigencies of health and education would help to reassure key national stakeholders. Such confidence building will be an essential condition to the development of Members' interest in GATS commitments.

It is not clear that it is possible to address the uncertainties regarding the application of GATS domestic regulation rules through a reference paper. As a part of the specific commitments of those individual WTO Members that incorporate it in their schedules, a reference paper could only express limitations relating to the Member's market access and national treatment obligations or additional commitments. Nothing in a national schedule can affect the domestic regulations obligations. It would be more appropriate to address the uncertainty related to current domestic regulation rules in the context of the negotiations on these rules. Sector specific disciplines, like those adopted for accounting services, could be developed to define what kinds of measures relate to the quality of health and education services and how to apply the rule that qualification requirements and procedures, technical standards and licensing requirements cannot nullify or impair the Member's specific commitments in listed sectors by imposing requirements or standards that are more burdensome than necessary to ensure the quality of the service. To date, such sector specific work in health and education has not been on the agenda of the Working Party on Domestic Regulation.

Alternatively, separate international instruments dealing with these issues could be negotiated in other multilateral fora, such as UNESCO or the World Health Organization. GATS Article VI.5(b) expressly requires that in determining whether a Member is in conformity with its obligations related to domestic regulation, 'account shall be taken of international standards of relevant international organizations applied by that Member.' In this way, the development of international standards to which a Member subscribed would assist in defining the scope of the Member's obligation.

As well, the development and adoption of a more specific and refined classification system for health and education services would facilitate more

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61 Luff, *supra* note 49, and Adlung, *supra* note 1. Lipson has suggested going much farther to adopt some form of special and differential treatment for developing countries (Lipson, *supra* note 22).

consistent scheduling of commitments and contribute to a common understanding among the Members of the WTO regarding the nature of obligations undertaken. Again, especially for developing countries, collective efforts to resolve existing uncertainty are more likely to encourage commitments than leaving it up to individual members to establish their own categories. At the same time, clarity and predictability of GATS obligations would be enhanced by more uniform categories of commitments. This work might be undertaken by the Committee on Specific Commitments, but, so far, has not been. Classification issues could also be addressed in a reference paper.

Support for individual developing countries would also help them to make more effective use of specific GATS commitments in health and education. A significant challenge for many developing countries is the absence of adequate capacity to assess the costs and benefits of GATS commitments in health and education and to conceive and implement an appropriate regulatory regime capable of ensuring that the benefits of trade liberalization are attained in a manner consistent with the achievement of the range of objectives informing government policy related to these areas. At the country level, international development agencies may support local assessment of the costs and benefits of liberalization initiatives, including identifying areas of export potential, such as traditional medicines, and the feasibility of complementary measures in the context of local regulatory capacity and other local conditions. In a recently completed pilot project, the International Trade Centre carried out assessments of trade liberalization with ten developing countries. While this work focussed on business to business services rather than business to consumer services like health and education, it is an example of the kind of support that could be provided.

Whatever improvements are made relating to GATS, inevitably, the agreement will serve only as a complement to other liberalization initiatives. The role of GATS is necessarily limited because many of the impediments to increased trade in health and education lie outside the disciplines of the agreement. International development agencies and international organizations will play a number of key roles in addressing these barriers. Continued research on the effects of liberalization in health and education services not only on trade and investment, but also on accessibility, internal and international migration of health and education professionals and the scope for domestic policy measures to complement and manage the effects of liberalization by organizations like the World Health Organization, UNESCO, the OECD, the World Bank and others will be essential.<sup>62</sup> One of the largest impediments to trade in health and education will continue to be the absence of recognition of foreign credentials and

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62 Chanda, *supra* note 15.

experience of health and education professionals. Quality assurance and accreditation standards are still largely national. UNESCO has played a useful role in coordinating the development of international standards agreements in education.<sup>63</sup> The World Health Organization has developed accreditation guidelines for hospitals and medical laboratories that can be applied by national agencies. These kinds of efforts facilitate international trade in health and education and help to provide a basis for regulating the globalized aspects of these activities so as to ensure that consumer protection and other domestic policy priorities are promoted. International development agencies may also play a role in facilitating adoption of technology forming the backbone of electronic supply of health and education services. This mode of supply promises significant benefits in terms of increasing access while involving few negative effects for developing countries.

All these efforts and others outside the scope of GATS are likely to have a more substantial impact on trade in health and education services than commitments under the GATS. Nevertheless, GATS has the potential to play an important complementary role. Taking the steps identified above could assist in the realization of this potential. Whether WTO Members are willing to take these or other steps to facilitate GATS commitments in health and education, however, is not obvious. To date, health and education have not received significant attention from WTO Members. No doubt, this is because the commercial opportunities in these sectors pale in comparison to those in other areas. As well, there is a fierce debate in many countries regarding the virtues of private commercial participation in health care and education. This has created a difficult domestic political environment in many countries that may discourage them from attaching priority to improving health and education disciplines in the WTO. Nevertheless, widespread concerns about the impact of the GATS on health and education have been the source of impassioned critiques of the agreement that have seriously tainted the public view of GATS. The public rehabilitation of the agreement in addition to the economic benefits that may flow from GATS-secured liberalization in health and education argue in favour of greater attention to the application of GATS to health and education services.

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63 See e.g., *Convention on the Recognition of Qualifications Concerning Higher Education in the European Region*, co-sponsored by the Council of Europe and UNESCO, which was concluded in April 1997 to facilitate international exchanges of students and scholars by establishing standards for the international evaluation of secondary and post-secondary credentials. Signatories include the European Union, many Eastern European countries, Australia, Israel, the United States, and Canada. Appendix II to WTO Secretariat Note on Education Services, *supra* note 46, lists other recognition instruments.



*Negotiations on Domestic  
Regulation and Trade in Services  
(GATS Art. VI):*

**A Legal Analysis of  
Selected Current Issues**

*Joel P. Trachtman*

Tufts University,  
Fletcher School of Law and Diplomacy

## **I. Introduction**

Services negotiations will be an important component of the Doha Development Round. One critical potential limit on liberalization of trade in services is domestic regulation that is intended to achieve purposes other than protection from competition. Here, developing countries, like other countries, have two goals. They wish to open up foreign markets, but they wish to retain as much domestic policy flexibility as possible.

Regulatory criteria have already served as barriers to developing country provision of services in developed countries.<sup>1</sup> And, in general, developed countries maintain more extensive regulation of services than developing countries. So, developing countries may be served by further disciplines on domestic regulation. On the other hand, developing countries require flexibility to maintain, and to extend, their prudential regulation. As economies develop, the need for additional regulation may arise. Therefore, it is important for

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<sup>1</sup> See, e.g., *Final Report of the Panel in the Matter of Cross-Border Trucking Services*, NAFTA Arbitral Panel, Secretariat File No. USA-MEX-98-2008-01 (Feb. 6, 2001) <http://www.ustr.gov/enforcement/trucking.pdf>; *United States - Measures Affecting the Offshore Supply of Gambling and Betting Services*, WT/DS285/4 [update].



developing countries to retain flexibility to apply regulation suited to their developmental goals and stage of development.

There are many ways to negotiate disciplines on domestic regulation.

- First, horizontal disciplines may be applied. These horizontal disciplines are generally rather broad in structure, including rules of non-discrimination, proportionality tests, least trade restrictive alternative tests, requirements for compliance with international standards and requirements for recognition of foreign regulation. These types of horizontal disciplines generally leave some room for interpretation through dispute settlement. Under GATS as originally agreed, only the MFN and national treatment non-discrimination rules applied directly, and the national treatment obligation only applied to the extent that the sector was included in the member state's schedule and only to the extent that the member state did not qualify its adherence to the national treatment requirement. We discuss below the weakness of original GATS proportionality tests.
- Second, these same types of disciplines may be applied instead on a sectoral basis. This is the main project of the Article VI:4 work programme with respect to requirements beyond national treatment and MFN.
- Third, and less explicitly, particular regulatory barriers may be requested specifically to be reduced or otherwise ameliorated. So, instead of relying on the interpretation and application of a general requirement, a member state may specifically request reduction of a particular barrier. This type of approach has the advantage of specificity: member states know what they must give up in terms of their regulatory structure and can make a specific and considered decision to do so or not. Article XVIII of GATS specifically provides for additional types of commitments. However, this approach does not appear to be in common usage.

It may be difficult for developing countries to argue for asymmetric obligations in this area, i.e. greater disciplines on developed countries than on developing countries. Equal general obligations should be evaluated before acceptance to determine their impact on existing and potential developing country regulation. The general disciplines that exist today are somewhat asymmetric in the wrong direction: they seem to discipline new regulation more strongly than existing regulation, and so may be expected to have a greater restrictive effect on developing countries.

While this asymmetry should be revised, developing countries should not broadly reject the possibility of greater disciplines on domestic regulation, especially if GATS commitments may begin otherwise to address service areas of interest to developing countries. For example, immigration controls should be understood as largely motivated by protectionism, and should be understood as a barrier to trade in services. Whether immigration controls are understood as

pure protectionism, like a quota on goods, or as a kind of regulatory protectionism, with a valid collateral purpose, they are intensely relevant to negotiations on trade in services.

## II. State of Play

This section is intended to describe the current GATS treatment of domestic regulation. While our main concern is Art. VI, it is important to examine first the existing disciplines on domestic regulation under the national treatment obligation of GATS. This examination will allow us to evaluate the extent of existing discipline on domestic regulation. Furthermore, there seems to be some level of agreement among negotiators that disciplines under Art. VI:4 should not overlap with those under Arts. XVI (market access) and XVII (national treatment).

### A. National Treatment under Art. XVII

Article XVII:1 of GATS provides that:

In the sectors inscribed in its schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

Thus, national treatment under GATS is not universal, but is subject to the positive listing of the relevant service sector in the relevant state's schedule.<sup>2</sup> In addition, it is subject within each listed sector to the negative listing of any exception to the national treatment obligation in that schedule. Deciding that national treatment should not be a general principle as in GATT, but a concession to be bargained over, is one of the distinctive features of the GATS. The core of a non-discrimination obligation such as national treatment is the comparison between the favoured good, service or service supplier and the disfavoured one. Article XVII sets up the comparison as being one between 'like' services or service suppliers, referring on its face to the 'like products' concept articulated pursuant to Article III of GATT.

What makes two services 'like'? For example, is the underwriting of a bond issue 'like' a bank lending transaction? If so, why are different reserve

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2 See Aaditya Mattoo, 'National Treatment in the GATS: Corner-Stone or Pandora's Box?', *Journal of World Trade*, (1997) 107.

requirements and capital requirements applicable? Does it matter for regulatory purposes that one transaction is effected by a bank that accepts insured deposits? Similarly, is internet telephony 'like' standard telephone service? More fundamentally, is it permissible to make distinctions between services on the basis of the identity and structure of the service supplier as well as the way the service appears to the consumer? While it would be plausible to attempt to apply the 'Border Tax Adjustments' factors to services, it is not clear that these parameters of likeness make sense even in GATT. And of course, the word 'like' has meant different things in different contexts, even within GATT.

The majority of the Appellate Body in *EC - Asbestos* found that 'likeness' under Article III:4 is, 'fundamentally, a determination about the nature and extent of a competitive relationship between and among products.'<sup>3</sup> To perform such an assessment the Appellate Body recalled that the four classic, and basic, criteria, derived from the *Border Tax Adjustment* report<sup>4</sup>—(i) the physical properties of the products in question; (ii) their end-uses; (iii) consumer tastes and habits *vis-à-vis* those products; (iv) tariff classification<sup>5</sup>—are to be used as tools in the determination of this competitive relationship between products. These criteria do not exhaust the inquiry.<sup>6</sup> This approach is intended to approximate the competitive relationship between the relevant goods—it is not as accurate or refined as simply testing cross-elasticity of demand. But the more important point is that this test is relatively ignorant of factors that motivate regulation. The economic theory of regulation suggests that regulation is necessary precisely where consumers cannot adequately distinguish relevant goods—where they are in close competitive relation. Thus, a competitive relationship test for likeness will often result in a finding that goods that differ by the parameter addressed by regulation are indeed like, and should be treated the same.

Under pre-WTO GATT Article III jurisprudence, regulation of production processes has been considered not 'subject to' Article III, and is therefore an illegal quantitative restriction under Article XI, unless an exception applies under Article XX. The product/process distinction serves as a kind of territorially-based allocation of jurisdiction, in which the product, which travels to the importing state, is permitted to be regulated by the importing state. On the other hand, the production process, which is assumed to take place in the exporting state, is not

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3 Appellate Body Report, *EC - Asbestos*, WT/DS135/AB/R, at para. 99. Note the different opinion with regard to the very specific aspects mentioned in para. 154.

4 Working Party Report, *Border Tax Adjustments*, adopted 2 December 1970, BISD 18S/97.

5 *Ibid.*

6 Appellate Body Report, *EC - Asbestos*, WT/DS135/AB/R, at para. 101.

'subject to' Article III, and therefore unprotected from the strict scrutiny of Article XI (and regulation by the host state is only permitted if justified under Article XX).

The situation is quite different in GATS, where regulation of service providers is expressly validated, and subjected to the national treatment criterion.<sup>7</sup> Because of the fact that in many services, the service provider—person or firm—may itself be a part of the continuing nature of the service, a different arrangement seems appropriate. That is, it seems less obvious (if it is at all obvious in the goods sector) that the service importing state should not have equal rights to regulate the service provider itself, even though on the territory of the home country. In other words, the process by which a service is 'produced' (a loan issued, a professional trained) may determine the actual characteristics of the ultimate service 'product' (the loan, the advice, the treatment). This would validate traditional institutional regulation of most types of financial institutions, as well as regulation of the structure of law firms or other types of service providers.

Furthermore, we must distinguish between the two main vehicles for trade in services: cross-border provision (including consumption abroad) and commercial presence. In cases of commercial presence, the foreign service provider would, at least to some extent, be present in the territory of the service 'importing' state, and thus would be more naturally subject to the full territorial jurisdiction of that state. The need for commercial presence indeed reflects the fact that a service is often 'produced' and 'consumed' simultaneously and in the same place. We have a much less 'natural'—and more difficult—problem of allocation of regulatory jurisdiction in connection with cross-border provision of services, whereby production and consumption need not happen in the same place. However, as seems to be recognized in Article XVII, the 'importing' state should not, *prima facie*, be prevented from regulating the service provider in these cases.

Interestingly, the structure of Article XVII seems, on its face, to indicate that a national service regulation imposed on a foreign service provider must meet two tests: it must provide (i) treatment no less favourable than that accorded domestic like services, and (ii) treatment no less favourable than that accorded domestic like service providers. Therefore, even if the service providers are not 'like', and there is thus no possible basis for finding illegal discrimination between them, it is still possible that the services they provide may be 'like', giving rise to a claim of violation of the requirement of national treatment. This might on its face seem an absurd result, and might invalidate, for example, a

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7 Mattoo, *supra* n. 2.

regulation that requires a bank to maintain reserves different from those maintained by an insurance company prior to making a loan, as while the service providers might not be 'like', the services are.

Thus, a better reading would read the two requirements above in the disjunctive, i.e., to separate the evaluation of treatment of services from the evaluation of treatment of service providers.<sup>8</sup> It would simply evaluate regulation of services, as services, by determining whether the regulation treats 'like' services alike, full stop. If this were the case, regulation of service providers would be evaluated to determine only whether like service providers, as service providers, are treated alike. Using this interpretation, there would be no violation of national treatment if like services were treated differently where the reason for the difference in treatment is the regulation of the service provider, as service provider. This is likely to be the interpretation that a WTO panel or the Appellate Body would apply.

In effect, such an approach would replicate a kind of product/process distinction as a service/service provider distinction. But by contrast to the case of products, host state regulation of the 'process' or the service provider—often geographically located in the host state—would be validated (subject only to a strict national treatment constraint). Regulations regulating the service, as such, would only be evaluated to determine whether like services are treated alike, while regulations regulating the service provider, as such, would only be evaluated to determine whether like service providers are treated alike. The WTO Dispute Settlement Body would be required to distinguish between regulation of services and regulation of service providers. In addition, the analogy to products might be taken one step further, suggesting stronger constraints on host state regulation of the service provider than on the service.

Thus far, GATT/WTO dispute resolution has been unable to provide a predictable, consistent approach to determining when products are 'like'. We cannot expect GATS dispute resolution to do better. Thus, for example, we might ask whether two accountants, each with advanced university degrees from universities in different states, are 'like service providers'. Are two banks, each from different states where they are required to establish different levels of reserves, 'like service providers'? Similarly, are the loans provided by these two banks 'like services'? Under GATT jurisprudence, these questions cannot be answered predictably, or in the abstract, but must be determined on a case-by-case basis. While this jurisprudence results in a degree of unpredictability, the Appellate Body has now addressed several cases, providing experience in how

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8 But see, Panel Report, *EC - Bananas*, WT/DS27/R/USA, para. 7.322 (considering that 'like' service suppliers are producers of 'like' services).

these multiple factors are likely to be viewed and applied. The question for us is whether this situation of case-by-case analysis by the dispute settlement mechanism is superior to a more discrete, *ex ante*, specification that could be provided by treaty-making or other quasi-legislative processes?

Once services or service providers are determined to be 'like', it is necessary to determine that the measure imposes 'less favourable treatment' on the foreign service or service provider, compared to the domestic ones. In its *Asbestos* decision, the Appellate Body emphasized that this is a distinct analysis, and that not every national measure that treats foreign goods differently from domestic goods would result in less favourable treatment.

To summarize, the national treatment obligation is theoretically capable of being used to scrutinize and find illegal domestic regulation that (a) treats like products differently, and (b) less favourably. These terms are difficult to define, and are in flux, but where there is a compelling sense of protectionism, as opposed to good faith regulatory differentiation, panels and the Appellate Body are likely to find a violation.

## **B. Article VI**

Article VI (domestic regulation) spells out general obligations for service sectors that have been included by contracting parties in their national schedules, except for measures that are covered by reservations in these schedules under Article XVII (national treatment) and XVI (market access).

In vague terms, Article VI:1 provides that domestic regulations, applied in a sector that a member has agreed to include under specific liberalization commitments, must be administered in a 'reasonable, objective, and impartial manner'. It is possible that this requirement—especially its reasonableness prong—may be employed and developed in WTO dispute settlement to impose substantive obligations of proportionality in connection with domestic regulation. Interestingly, and provocatively, the relevant portions of the dictionary definition of 'reasonable' include 'in accordance with reason; not irrational or absurd', 'proportionate', and 'within the limits of reason; not greatly less or more than might be thought likely or appropriate'.<sup>9</sup> The limitation of this discipline to the 'manner of administration' may be important, although it will be difficult to separate the manner of administration from the substance of rules.

Article VI also includes procedural guidelines requiring that decisions in cases where the supply of a service requires authorization in the host country must be

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9 *The New Shorter Oxford English Dictionary* (1993).

issued 'within a reasonable period of time', and that signatories establish tribunals and procedures to process potential complaints by foreign service suppliers.

Article VI:4 of GATS calls on the Council for Trade in Services (CTS) to develop any necessary disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. We will discuss the Article VI:4 work programme and its fruits below.

Prior to the agreement and entry into force of more specific rules under Article VI:4, disciplines on national measures are available under Article VI:5 in sectors in which the importing Member has undertaken specific commitments. In order for these disciplines to apply, two sets of criteria must be satisfied:

1. The licensing or qualification requirements or technical standards must nullify or impair specific commitments in a manner that could not reasonably have been expected at the time the specific commitments were made; *and*
2. The measure must be (a) not based on objective and transparent criteria, or (b) more burdensome than necessary to ensure the quality of the service, or (c) in the case of licensing procedures, in itself a restriction on the supply of the service.

We examine these two criteria in turn.

### 1. Nullification or impairment

Nullification or impairment (N/I) has served as a central feature in GATT and WTO dispute resolution. Under Article XXIII of GATT, redress pursuant to the dispute resolution system of GATT is only available in the event of N/I. Where a provision of WTO law is violated, nullification or impairment is presumed. On the other hand, it is possible, although infrequent, for N/I to serve as the basis for a successful complaint in the absence of an actual violation of GATT: so-called non-violation nullification or impairment. Article VI:5 of GATS incorporates this concept of non-violation nullification or impairment.

In the leading non-violation nullification or impairment case, *Film*,<sup>10</sup> the panel reviewed in detail the basis for certain US expectations, in order to decide whether the US had 'legitimate expectations' of benefits after successive tariff negotiation rounds. As the complaining party, the US was allocated the burden

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10 Panel Report: *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (98-088VI), adopted by Dispute Settlement Body, 22 April 1998 [hereinafter, *Film Report*].

of proof as to its legitimate expectations. In order for the US to meet this burden, it was required to show that the Japanese measures at issue were not reasonably anticipated at the time the concessions were granted. Where the measure at issue was adopted after the relevant tariff concession, the panel established a presumption, rebuttable by Japan, that the US could not have reasonably anticipated the measure.

The import of this approach in the services context is clear. The complaining party must show that the measures attacked were not reasonably anticipated. Thus, longstanding regulatory practices or circumstances are protected. This provides a certain advantage to developed countries, as compared to developing countries that may be establishing new regulatory regimes. Furthermore, this understanding means that the domestic circumstances as they are form a background for all concessions; as a matter of negotiation strategy, members of GATS must recognize this and bear the burden of negotiating an end to existing measures that reduce the benefits for which they negotiate. It is also clear, as described in more detail below, that Article VI:5 will not impose substantial discipline on existing domestic regulation, placing a greater burden on Article VI:4 as a source of discipline.

It is worthwhile to compare this structure with that applicable to goods under the GATT and under the two WTO agreements applicable to regulatory standards: the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures. Neither GATT nor these agreements include the N/I requirement in the prohibition itself. Therefore, in connection with trade in goods, determination of a violation of a provision of a covered agreement results in *prima facie* N/I under Article 3:8 of the DSU, placing the burden of rebutting the existence of N/I on the respondent. In the context of Article VI:5 of GATS, without N/I, there is no violation. Without a violation, there is no *prima facie* N/I. Consequently, it will be for the complaining party to show nullification or impairment. This will make it more difficult for national services regulation to be addressed under Article VI:5.

We may speculate as to why GATS relies on the N/I concept so heavily in this context. N/I is an extremely vague standard, but one which by itself has been difficult to meet. Thus, in the absence of an ability to negotiate more specific disciplines on national regulation, N/I provides a modicum of more general discipline. It might be viewed as a 'least common denominator', insofar as the parties could agree not to nullify or impair concessions earnestly made, but could not agree on more pervasive, blanket restrictions on their national regulatory sovereignty. Thus, Article VI:5 is first and foremost merely a standstill obligation.



## 2. The necessity test

Under this additional component of the GATS Article VI:5 test, we focus on the requirement (incorporated from Article VI:4(b)) that the national measure not be more burdensome than necessary to ensure the quality of the service. Even if it is possible to show that a national measure nullifies or impairs service commitments, a complainant would still be required to show that the national measure does not comply with the criteria listed in Article VI:4, the most likely of which is the necessity test examined here.

Until the *EC - Asbestos* and *Korea - Various Measures on Beef* decisions of the Appellate Body, 'necessity' was generally interpreted as requiring the domestic regulation to be the least trade restrictive method of achieving the desired goal. In *Korea - Various Measures on Beef*, the Appellate Body interpreted the necessity test of Article XX(d) to imply a requirement for balancing among at least three variables:

In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.<sup>11</sup>

In the context of Article VI:4(b), the reference is to measures 'not more burdensome than necessary to ensure the quality of the service'. The last clause could be very interventionist. It could restrict not just the means to attain a given regulatory goal but even the types of regulatory goals that might be achieved, as when the regulatory goal is not to maintain the quality of the service but to avoid some other externalization or regulatory harm by the service provider. For example, if a bank is required to maintain a particular reserve in relation to a loan, is that necessary to ensure the quality of the service? Many types of service regulation might be subject to similar, inappropriate, attack. This provision should be revised.

Furthermore, in a placement comparable to the inclusion of the N/I criterion in the substantive prohibition, here the necessity criterion is included as a parameter of the substantive prohibition, in addition to being included in the exceptional provisions of Article XIV(c). Therefore, in order to make out a violation of Article VI:5 under this clause, the national measure will be required

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<sup>11</sup> Appellate Body Report, *Korea - Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 164.

to be shown to be unnecessary in the sense described above. Then, in order for the respondent to claim an exception under XIV(c), it will be required to show that it is necessary in the broader sense defined there. One interesting question involves the burden of proof. Under the products jurisprudence of the Appellate Body, it appears that the complainant will be required to show the lack of necessity under Article VI:5, while the responding state would ordinarily be required to prove the affirmative defence of necessity under Article XIV(c). This is at least an odd legal circumstance, where each side is allocated the burden of proof on the same issue at different phases. The complaining state, say for example the EC in an attack on US separation of commercial from investment banking, would be required to show that the US regulatory approach is 'unnecessary' under Article VI:5, while the US would be required to demonstrate its necessity under Article XIV(c).

In 1998, the Committee on Trade in Services adopted the *Disciplines on Domestic Regulation in the Accountancy Sector* (the 'Accountancy Disciplines'),<sup>12</sup> developed by the GATS Working Party on Professional Services (now the Working Party on Domestic Regulation). These disciplines apply to all member states that have made specific commitments in accountancy (positive list) but do not apply to national measures listed as exceptions under Articles XVI and XVII (negative list). They generally articulate further and tighten the principle of necessity: that measures should be the least trade restrictive method to effect a legitimate objective. In fact, these provisions replicate requirements that have been imposed in the EC pursuant to the ECJ's single market jurisprudence. They also replicate the approach of the EC's General System Directives on professions, codifying principles of proportionality, or necessity. They have the following features relevant to this paper.

#### **a) Necessity**

Member states are required to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to, or with the effect of creating unnecessary barriers to trade in accountancy services. Such measures may not be more trade restrictive than necessary to fulfil a legitimate objective, including protection of consumers, the quality of the service, professional competence and the integrity of the profession. As will be

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12 WTO, *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64, 17 December 1998, reprinted in *WTO Focus*, December 1998, 10-11. There is an interesting issue, beyond the scope of this paper, regarding the legal status of this type of WTO 'secondary legislation', both within the WTO and in member states.

clear from the discussion above, this necessity requirement is substantially stronger than that contained in Article VI:5 of GATS.

**b) Qualification requirements**

Member states must take account of qualifications acquired in the territory of another member state, on the basis of equivalency of education, experience and/or examination requirements. Examinations or other qualification requirements must be limited to subjects relevant to the activities for which authorization is sought.

**c) Technical standards**

Technical standards must be prepared, adopted and applied only to fulfil legitimate objectives. In determining conformity, member states must take account of internationally-recognized standards (of international organizations) applied by that Member.

It is worth noting that the EC has stated that the following should be considered in defining necessity under Article VI:4: 'A measure that is not the least trade restrictive to trade will not be considered more burdensome/more trade restrictive than necessary so long as it is not disproportionate to the objective stated and pursued.'<sup>13</sup> This is substantially more lenient in respect of domestic regulation than the definition of 'necessity' developed in GATT/WTO jurisprudence. Furthermore, it is not clear precisely what 'disproportionate' means in this context. Proportionality *stricto sensu*<sup>14</sup> inquires whether the means are 'proportionate' to the ends: whether the costs are excessive in relation to the benefits. It might be viewed as cost-benefit analysis with a margin of appreciation, as it does not require that the costs be less than the benefits. At the same time that it prefers proportionality and necessity to a least trade restrictive alternative test, the EC seems to suggest that 'the validity, or rationale, of the policy objective[s] must not be assessed.'<sup>15</sup>

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13 World Trade Organization, Communication from the European Communities and Their Member States: Domestic Regulation: Necessity and Transparency, S/WPDR/W/14, 1 May 2001, para. 22 (hereinafter, 'EC Communication on Necessity'). Note that the Appellate Body may be understood to have adopted a similar position in *Asbestos* and *Korean Beef*.

14 Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study*, (1996) at 6.

15 EC Communication on Necessity, *supra* n. 13, para. 17.

### **C. Recognition and Necessity**

Necessity has a complex relationship with recognition. That is, a necessity test, interpreted as a requirement that the national measure be the least trade restrictive alternative reasonably available to address the regulatory concern, can either be an absolute requirement or a relative requirement. Thus, a less restrictive option might make sense irrespective of the home regime or conversely might only be justified in reference to the home country regulatory regime, as a *complementary* measure. Judgements based on the former assessment reflect a high degree of judicial activism and are unlikely to be found legitimate.

In the latter case, where the home country regulatory regime satisfies the host country concerns, necessity may require recognition. This would be an extreme interpretation of necessity as least trade restrictive alternative analysis, stating in effect that no regulatory intervention on the part of the importing country is necessary at all. The least restrictive alternative is to do nothing. We have seen this in the ECJ's jurisprudence, and there are also treaty provisions reflecting this concept in Article 4 of the SPS Agreement and Article 2.9 of the TBT Agreement. Under this interpretation, recognition may be mandated by judicial *fiat*.

Note that Article VII of GATS and paragraph 3 of the Annex on Financial Services, in contrast, do not require recognition, but merely authorize it. Although a strong GATS standard of necessity might eventually lead to such judicially required recognition, this is unlikely to be the case under current treaty language for reasons we will come to in the last section. But the necessity test might nevertheless mandate partial recognition of some regulations and not others, whereby partial recognition becomes the operational consequence of the principle of proportionality. It is important to note that the Accountancy Standards require recognition of professional qualifications in accountancy.

As noted above, the Accountancy Disciplines include a greatly enhanced necessity test, applicable within that sector.

### **D. International Standards**

GATS, like GATT, does not specifically require the use of international standards, and provides weaker incentives for the use of international standards than the SPS Agreement or the TBT Agreement. As noted above, Article VI:5(b) requires that account be taken of compliance with international standards where a member state's compliance with Article VI:5(a) is being evaluated. This is a nod toward a safe harbour for states that comply with international standards, although it should provide only very modest incentive effects, because of the weakness of Article VI:5(a). It does not provide a presumption of compliance, as do Article 2.5 of the TBT Agreement and Article 3.2 of the SPS Agreement.

The Accountancy Disciplines require that member states take account of internationally-recognized standards of international organizations in determining conformity with technical standards.<sup>16</sup> This is a different and additional requirement. Under Article VI:5(b), compliance with international standards is taken into account in determining the compliance of a Member's regulation with WTO law.<sup>17</sup> Under the Accountancy Disciplines, a member state must take compliance with international standards into account in determining the acceptability of foreign service providers. This is a gentle shove toward recognition based on essential harmonization.

### III. Additional Issues

#### A. The Article VI:4 Work Program

The Article VI:4 Work Program was intended to deal over time with certain regulatory barriers to trade in services, through decisions made by the Committee on Trade in Services under its authority. The WTO Secretariat, with the assistance of member states, has prepared a list of examples of measures to be addressed by disciplines under GATS Article VI:4.<sup>18</sup> These examples included, *inter alia*, residency requirements, failure to recognize foreign qualifications, and national standards that diverge from international standards. By focusing on examples of regulatory barriers that service suppliers actually face, it is possible to target additional disciplines more precisely. Developing countries should participate actively in this process in order to focus attention on the barriers that their service providers face.

#### B. Sectoral versus Horizontal Treatment

So far, the Article VI:4 Work Program has operated sectorally, and only in the single sector of accountancy. However, it may be that other professional service sectors, and even other service sectors, may be amenable to similar types of

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16 Accountancy Disciplines, *supra* n. 12, para. 26.

17 Article VI(5)(b) refers to standards 'of relevant international organizations', which are defined as 'international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.' This definition might exclude, for example, the Basle Committee.

18 Informal Note by the Secretariat, Working Party on Domestic Regulation, Examples of Measures to be Addressed by Disciplines under GATS Article VI:4, JOB(01)/62 (10 May 2001) (latest version is JOB(02)/20/Rev. 5, dated 29 April 2003). See also Note by the Secretariat, Council for Trade in Services, Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services, S/C/W/96 (1 March 1999).

disciplines. Thus, it would be possible to evaluate application of similar necessity, equivalence, and other disciplines on a horizontal basis.

The proposed draft annex on domestic regulation prepared by Japan suggests adoption of the core disciplines contained in the Accountancy Disciplines, with some modifications, on a horizontal basis.<sup>19</sup> This would retain the possibility for separate, additional or alternative disciplines on a sectoral basis.

### ***C. Relationship to Immigration and Mode 4 Interests of Developing Countries***

Immigration and Mode 4 interests of developing countries have received much attention in the Doha Round. These issues should be addressed directly, with specific commitments regarding the relationship between immigration rules and market access. Immigration might be understood as a 'border measure' not unlike a tariff or a quota, while domestic regulation is an 'internal measure'. While this distinction should not be accorded great substantive impact, it may be useful to consider the approach to immigration and Mode 4 commitments as part of general liberalization, while domestic regulation issues are treated separately.

### ***D. Dependence of Domestic Regulation Disciplines on Commitments***

Existing disciplines in Article VI:1 and VI:5 are dependent on whether the member state in question has undertaken specific commitments in the relevant sector. This is not the procedure followed in the TBT and SPS Agreements, but may seem more relevant in the field of services.

### ***E. Mutual Recognition and Economic Integration***

Under GATS Art. VII, member states that develop mutual recognition arrangements are required to 'afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it.' GATS Art. V permits economic integration arrangements. The relationship between these two provisions, and the circumstances under which developing countries will be permitted to participate in recognition arrangements among developed countries, is an

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19 Communication from Japan, Draft Annex on Domestic Regulation, JOB(03)/45/Rev. 1, revised 2 May 2003.

emerging issue. Under the WTO Appellate Body's jurisprudence, it is at least arguable that recognition arrangements within regional integration arrangements are not protected by Art. V, and would be required to comply with Art. VII.

#### ***F. Prudential Carveout and Regulation of Regulatory Goals***

At some point, it will be worthwhile to reconsider the utility of the prudential carveout in financial services, and to consider whether any discipline on the determination of regulatory goals is required in services more generally. Such a discipline could parallel disciplines in the TBT and SPS Agreements. At the extreme, services regulation might be required to have a prudential or other independent public policy basis, paralleling the requirement of a 'scientific basis' contained in the SPS Agreement.

## Conference Agenda

Friday 2 July 2004

**Session 1:**

***WTO Decision-making Procedures, 'Member-driven' Rule-making and WTO Consensus-practices: Are They Adequate?***

- 09.00 Welcome  
by Prof. H. Wallace, Director RSCAS, EUI, Florence, and  
Prof. E.-U. Petersmann, RSCAS, EUI, Florence
- 09.15 *WTO Procedures for Ministerial Conferences and  
'Member-driven' WTO Negotiations: Policy Recommendations  
from Political Negotiation Theories*  
Report: Prof. J. S. Odell, University of Southern California  
Comment: WTO Representative of the EU
- 10.00 *Are WTO Decision-making Procedures Adequate for Making, Revising  
and Implementing Worldwide and 'Plurilateral' Rules?*  
Report: Prof. C. D. Ehlermann and L. Ehling, Brussels  
Comment: WTO Representative of Bulgaria

**Session 2:**

***Building-Blocks for Concluding the  
Doha Round Negotiations on Agriculture***

- 11.15 *How to Forge a Compromise in the Agricultural Negotiations?  
Economic and Political Proposals*  
Report: Prof. S. Tangermann, OECD, Paris  
Comment: S. Harbinson, WTO
- 12.15 *The End of the WTO's 'Peace Clause': Strategic Use of WTO Dispute  
Settlement Proceedings for Advancing WTO Negotiations on Farm  
Subsidies 'in the Shadow of the Law'?*  
Report: Prof. E.-U. Petersmann, Florence  
Comment: J. M. Weekes, former WTO Ambassador of Canada



**Session 3:*****Public Transatlantic Programme Annual Lecture***14.30 *The Future of the World Trade Organization*

Report: P. Sutherland, KCMG, Chairman of BP; former Director General of GATT and the WTO; former EU Commissioner

Comment: WTO Representative of Mexico

**Session 4:*****Less-developed WTO Members in the Doha Round Negotiations***16.00 *Developing Countries' Interests and Negotiation Positions on Protection of Geographical Indications and Traditional Knowledge*

Report: Prof. T. Cottier and Dr. M. Panizzon, World Trade Institute Bern

Comment: WTO Representative of South Africa

16.45 *Developing Country Interests and Negotiation Positions on Capacity-building and Transfer of Technology*

Report: Prof. G. Shaffer, University of Wisconsin

Comment: WTO Representative of Kenya

17.30 *Special and Differential Treatment of Developing Countries: the Contribution of the World Bank to Making the Doha Development Round a Success*

Report: Dr. B. Hoekman, World Bank

Comment: WTO Representative of Argentina

**Saturday 3 July 2004****Session 5:*****Doha Round Negotiations on Services Trade***10.00 *Developing Country Proposals for Liberalization of Movements of Natural Service Suppliers (Mode 4) under the GATS*

Report: Prof. A. Winters, Sussex University

Comment: WTO Representative of India

10.45 *GATS Negotiations and Public Health, Education and Social Services*

Report: Prof. J. A. VanDuzer, University of Ottawa

Comment: WTO Representative of the United States

11.45 *Negotiations on Domestic Regulation of Services (Article VI GATS)*

Report: Prof. J. Trachtman, Fletcher School of Law and Diplomacy

Comment: WTO Representative of Chile

12.30 **Concluding Discussion on Sessions 1-5**

## *List of Contributors*

- ***Sumanta Chaudhuri***  
Permanent Mission of India to the WTO, Geneva
- ***Thomas Cottier***  
Managing Director of the World Trade Institute, Bern; Professor of European and International Economics Law at the University of Bern; and Director of the Institute of European and International Economic Law
- ***María del Carmen Domínguez***  
Permanent Mission of Chile to the WTO, Geneva
- ***Claus Dieter Ehlermann***  
Senior Counsel, Wilmer, Cutler & Pickering, Brussels; former Member and Chairman of the Appellate Body of the WTO; former Director-General for Competition as well as for the Legal Services in the EU Commission
- ***Lothar Ehring***  
European Commission, DG Trade, Brussels
- ***Dencho Georgiev***  
Ambassador, Representative of the Republic of Bulgaria to the WTO, Geneva
- ***Stuart Harbinson***  
Head of the WTO Director-General's Office, Geneva; Former Ambassador of Hong Kong China to the WTO and former Chairman of the WTO's Negotiating Group on Agriculture
- ***Bernard Hoekman***  
World Bank, Senior Trade Economist, Development Research Group, Washington
- ***Faizel Ismail***  
Permanent Representative of South Africa to the WTO, Geneva
- ***Yves Mény***  
President, European University Institute, Florence
- ***Matthias Meyer***  
Ambassador, Director Task Force WTO Trade and Development, Bern
- ***Marion Panizzon***  
Lecturer at the University of Zurich, and Senior Researcher, Swiss National Science Foundation

- ***Eduardo Pérez Motta***  
Ambassador, Permanent Representative of Mexico to the WTO, Geneva
- ***John S. Odell***  
Professor, School of International Relations, University of Southern California
- ***Ernst-Ulrich Petersmann***  
Joint chair for Public Law and Policy at the European University Institute and its Robert Schuman Centre for Advanced Studies, Florence
- ***Gregory Shaffer***  
Professor of Law, University of Wisconsin Madison; Co-Director Center on World Affairs and the Global Economy
- ***David Shark***  
Deputy Chief of Mission, US Mission to the WTO, Geneva
- ***Peter D. Sutherland***  
Chairman, BP, London; and former Director-General of GATT and the WTO
- ***Stefan Tangermann***  
Director for Food, Agriculture and Fisheries, OECD, Paris; and former Professor of Economics at the University of Göttingen
- ***Joel P. Trachtman***  
Professor of International Law, Tufts University, Fletcher School of Law and Diplomacy, Medford, Massachusetts
- ***Carlo Trojan***  
Ambassador, Permanent Representative of the EC to the WTO, Geneva
- ***J. Anthony VanDuzer***  
Professor, Faculty of Law, University of Ottawa
- ***Eduardo Varela***  
Permanent Representative of Argentina to the WTO, Geneva
- ***Helen Wallace***  
Director, Robert Schuman Centre for Advanced Studies, European University Institute, Florence
- ***John Weekes***  
Senior Policy Adviser, Sydley Austin Brown & Wood LLP, Geneva; and former Ambassador of Canada to the WTO
- ***L. Alan Winters***  
Director, The World Bank, Development Research Group, Washington; and former Professor of Economics at Sussex University



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